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**THE
COMMERCIAL LAWS OF THE WORLD**

**VOLUME XIII
GREAT BRITAIN AND IRELAND I**

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AMERICAN EDITION

THE COMMERCIAL LAWS OF THE WORLD, EDITED BY
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THE COMMERCIAL LAWS OF THE WORLD

COMPRISING

THE MERCANTILE, BILLS OF EXCHANGE, BANKRUPTCY
AND MARITIME LAWS OF ALL CIVILISED NATIONS

TOGETHER WITH

COMMENTARIES ON CIVIL PROCEDURE,
CONSTITUTION OF THE COURTS, AND
TRADE CUSTOMS

IN THE ORIGINAL LANGUAGES INTERLEAVED
WITH AN ENGLISH TRANSLATION

CONTRIBUTED BY

NUMEROUS EMINENT SPECIALISTS OF ALL NATIONS

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THE COMMERCIAL LAW OF GREAT BRITAIN AND IRELAND

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Table of Contents.

	Page
Introduction	11
Law Reports. Abbreviations	20
Bibliography	27
Procedure	36
I. Historical	36
II. Rules of procedure	40
III. Jurisdiction	41
IV. Commencement of action	43
V. Appearance	52
VI. Preparation of the issues	53
VII. Trial	57
VIII. Evidence	60
IX. Appeals	63
X. Execution	66
XI. Interlocutory applications	70
XII. Interpleader. Third party process. Counterclaim	71
XIII. Miscellaneous provisions. Infants and lunatics	72
XIV. The "Commercial" Court	72
XV. Admiralty Division	75
XVI. County Courts	77
XVII. Irish Courts	77
XVIII. Scottish Courts	78
XIX. Costs. Payment into Court	84
XX. Statutes	87
Commercial Laws of England	96
Title I. Companies	96
I. Introduction	96
II. Companies (Consolidation) Act, 1908	98
III. Memorandum of association	99
IV. Articles of association	102
V. Shareholders	103
VI. Share capital	105
VII. Calls	107
VIII. Registered Office	108
IX. Publication of name	108
X. Meetings	108
XI. Directors	111
XII. Contracts by companies	113
XIII. Prospectus	113
XIV. Allotment of shares	116
XV. Stamps on contracts of sale	117
XVI. Commencement of business	118
XVII. Underwriting	118
XVIII. Dividends	119
XIX. Mortgages and charges	120
XX. Audit of accounts	124
XXI. Winding-up	125
XXII. Special forms of companies other than public companies limited by shares	137
1. Private companies	137
2. Unlimited companies	138
3. Companies limited by guarantee	138
4. Assurance companies	138
5. Banking companies	140
6. Foreign companies	141
7. Defunct companies	142
XXIII. Societies with limited liability not under the Companies Act	142
1. Friendly societies	142
2. Building societies	143
3. Industrial and provident societies	143
Title II. Partnership	144
I. Historical	144
II. Ordinary partnerships	145
1. The contract of partnership	145
2. Rights and obligations of partners <i>inter se</i>	147

	Page
<i>Title II. Partnership—continued.</i>	
3. Rights and obligations of partners as regards third persons	150
4. Dissolution	153
5. Death of a partner	155
6. Bankruptcy	156
7. Actions by and against partners	157
III. Limited partnerships	158
Title III. Agency	160
Introduction	160
I. Creation of the relationship of agency	160
II. Married women as agents of their husbands	164
III. Appointment of agents	166
IV. Ratification	167
V. Authority of agents	170
VI. Delegation of agency	175
VII. Duties of agents	176
VIII. Liabilities of agents to their principals	180
IX. Rights of agents against their principals	182
1. Right of remuneration	182
2. Rights of reimbursement and indemnity	184
3. Right of lien	185
X. Relations between principal and third persons	187
1. What acts of agents bind their principals	187
2. Rights and liabilities on contracts of agent	190
3. Liability of principal for torts of agent	194
4. Admissions by agent	195
5. Notice to agent	195
6. Bribery of agent	196
XI. Relations between agents and third persons	196
1. Liabilities of agents on contracts	196
2. Liabilities of agents in respect of moneys received	199
3. Rights of agents against third persons	200
7. Liabilities of agents for wrongs	201
XII. Determination of agency	201
Title IV. Contracts	205
I. Introductory	205
II. Contracts by agreement	205
III. Agreement. Offer and acceptance	207
IV. Contracts in writing	209
V. Consideration	209
VI. Simple contracts for which writing is necessary	211
VII. Implied contracts	213
VIII. Capacity of parties	215
IX. Mistake	218
X. Fraud and misrepresentation	219
XI. Duress and undue influence	221
XII. Contracts which are unenforceable unless fair and reasonable	221
XIII. Agreements of imperfect obligation	223
XIV. Unlawful agreements	224
XV. Assignability of contracts	228
XVI. Joint and several contracts	230
XVII. Discharge of contract before breach or performance	231
XVIII. Discharge by breach	232
XIX. Discharge by failure of condition	233
XX. Suing on a quantum meruit	236
XXI. Performance	237
XXII. Remedies for breach of contract	240
XXIII. Discharge after breach	244
XXIV. Proof of contracts	246
XXV. Actions on foreign contracts	247
XXVI. Actions on foreign judgments	249
Title V. Bills of Exchange, Promissory Notes, Cheques and other Negotiable Instruments	251
I. Historical review	251
II. Character of negotiability	254
III. Bills of exchange	257
1. Form	257
2. Presentment for acceptance	260
3. Acceptance	261
4. Presentment for payment	262

Title V. Bills of Exchange, etc.—continued.

5. Payment and discharge	263
6. Protest	267
7. Notice of dishonour	269
IV. Promissory notes	273
V. Cheques	274
VI. General provisions	282
1. Negotiation and transfer	282
2. Consideration	283
3. Capacity and authority of parties	285
4. Stamps	287
5. Alteration or forgery of a bill or note	290
6. Conflict of laws	292
7. Lost instruments	293
8. Limitation of actions	295
Title VI. Banks and Banking	297
I. Introduction	297
II. Usual documents of credit	301
III. Banker and customer	303
IV. Special operations	307
V. Banker's lien	310
Title VII. The Stock Exchange	312
I. Introduction	312
II. Transactions on the Exchange	313
III. Broker and client	317
IV. The jobber's position	324
V. The contract and its breach	324
VI. Members' defaults	325
Title VIII. Guaranties	329
I. Nature of the contract	329
II. The Statute of Frauds	331
III. Interpretation of the contract	332
IV. Extent of surety's liability	334
V. Determination of the contract	334
VI. Discharge of the surety	335
VII. Action against the surety	338
VIII. Rights of the surety	338
Title IX. Sale of Goods	341
I. Introduction	341
II. Nature of a contract of sale of goods	342
III. Formation of the contract	342
IV. Conditions and warranties	346
V. Transfer of property	350
VI. Transfer of title	354
VII. Performance of the contract	357
VIII. Unpaid seller and his rights against the goods	361
IX. Seller's right of action for breach of contract	364
X. Remedies of the buyer	365
XI. Contract induced by misrepresentation	367
XII. Recovery of special damage	367
Title X. Maritime Law	369
I. Introductory	369
II. Legislation affecting shipping and British ships	375
III. Co-ownership and management of ships	379
IV. Mortgages of ships	380
V. The master: his powers and duties	382
VI. The legal position of foreign ships in British waters	383
VII. Affreightment	384
VIII. Performance	395
IX. The voyage	403
X. Lay days, demurrage and damages for detention	407
XI. Freight	410
XII. General average	415
XIII. Liens	417
XIV. Remedies for breach of contract	422
XV. Carriage of passengers by sea	429
XVI. The Court of Admiralty	432
XVII. Maritime liens	436

	Page
<i>Title X. Maritime Law—continued.</i>	
XVIII. Collision	439
XIX. Damage to goods	452
XX. Damage by personal injury	456
XXI. Division of loss	461
XXII. Limitation of liability	464
XXIII. Salvage	468
XXIV. Towage	483
XXV. Necessaries	487
XXVI. Wages	491
XXVII. Bottomry and respondentia	497
XXVIII. Priorities of claims	501
XXIX. Limitation of actions	504
Title XI. Marine Insurance	507
I. Introduction	507
II. Nature of the contract	509
III. Insurable interest	509
IV. Insurable value	512
V. Disclosure and representations	513
VI. The policy	514
VII. Double insurance	520
VIII. Warranties	520
IX. The voyage	525
X. Assignment of policy	528
XI. The premium	530
XII. Collection of losses	531
XIII. Ratification of unauthorised insurance	532
XIV. Loss and abandonment	532
XV. Partial loss	545
XVI. Measure of indemnity	549
XVII. Rights of underwriter on payment	558
XVIII. Return of premium	560
XIX. Mutual insurance	563
XX. Litigation	564
Addendum I. Institute clauses for 1911	565
Addendum II. Hypothetical adjustment of general average	571
Title XII. Carriage by Land	573
I. Introductory	573
II. The common carrier	574
III. The carriage of valuables	578
IV. Special contracts with railway and canal companies	580
V. Dangerous goods	584
VI. Carriage of animals	584
VII. Rates and charges	586
VIII. Rights and remedies of the carrier	588
IX. Rights and remedies of the owner of the goods	589
X. Facilities to be given by the carrier	591
XI. Preference of customers	592
Title XIII. Trade Marks and Trade Names	594
I. Introduction	594
II. Registrable Trade Marks	595
a) What is a Trade Mark	595
b) What Trade Marks are registrable	597
III. The Register of Trade Marks and registration	601
IV. Restrictions on registration	606
V. Assignment	610
VI. Correction and rectification of the Register	611
VII. The effect of registration	616
VIII. Sheffield Marks	621
IX. Cotton Marks	621
X. International and colonial arrangements	622
XI. Passing off	623
XII. Trade name	625
XIII. Criminal law with reference to Merchandise Marks	628
XIV. Implied warranty on sale of marked goods; miscellaneous offences	631

Introduction.

By the Right Hon. Sir Frederick Pollock, Bart., D. C. L., LL. D. Barrister-at-Law.
Late Corpus Professor of Jurisprudence in the University of Oxford.

In Continental jurisdictions, with the one notable exception of Switzerland, a sharp distinction is drawn to this day between the civil law governing the relations of citizens in general and the mercantile law by which the dealings of traders are judged. There are commercial codes; there have been earlier commercial ordinances; there are special courts for commercial causes; there are rules as to the proper description of trading firms and the books of account which traders must keep. In England we have nothing of this kind except, to a very limited extent, in our recent body of legislation applicable only to incorporated companies. Until the eighteenth century mercantile law remained outside the regular professional cognizance of our superior courts, as maritime and ecclesiastical law did for a still longer time. But when the law merchant was adopted by our Common Law the adoption was complete. For more than a century and a half there has been no distinction in jurisdiction or administration. We have text-books devoted to mercantile law and to special branches of it — as we have text-books devoted to the law of property and its branches. We have lawyers who are specially skilled in mercantile causes — as we have others who are specialists in our archaic and intricate property law. We have special rules of law about bills of exchange, insurance, and so forth — as every head and chapter of the law has and must have its own special rules. But in the main the Law Merchant has become part of the one body of law dispensed in the King's Court, the one Court which has now succeeded the three Superior Courts of Westminster and the Court of Chancery. Yet the Law Merchant has not wholly lost its old character. It has not forgotten its descent from the medieval Law of Nature which claimed to be a rule of universal reason embodied in the various forms of cosmopolitan usage. Conforming to English procedure and legal method, it can still be reinforced by additions drawn from established general custom. This is at first sight a paradoxical result; it was made possible by the great flexibility, in certain directions, concealed under the seemingly rigid technicality of our old judicial forms (a matter which cannot be enlarged on here); it was realized, as perhaps few results in the history of legal institutions have been in any similar degree, by the genius of a very few men.

In its early form the Law Merchant was very like the *Ius Gentium* of the later Roman Republic, which indeed one may well believe to have been largely of mercantile origin; and in its latest period of separate existence it was regularly treated by text-writers as a branch or even as the most important part of the Law of Nature and Nations in the old sense of that term. The usages which prevailed in fact, with more or less local variation in details, from the Baltic to the Mediterranean were justified by speculative learning as founded in universal principles of right; this process appears to have been exactly analogous to that of the classical jurists and their immediate predecessors when they identified the *ius gentium* with *ius naturale*. As matter of history, trade customs were established outside national

and territorial law by the necessity of the case. When trading began, all foreigners were presumed to be enemies. Nevertheless a system of silent barter, then of markets, and then a special peace of markets, and hospitality for foreign merchants, grew up without any sanction other than convenience¹). For us trading with enemies is forbidden; it was by no means so clearly forbidden as late as the eighteenth century; as for primitive trade, it was with enemies because there was no one else to trade with. Much later, traders were still doing justice among themselves in their own fashion. There is no reason to suppose that they first sought the aid of the regular courts and were refused: the formal procedure, repeated summons, and 'essoins' of the county or hundred (or analogous continental jurisdictions) were too plainly unsuited to them. At any rate, when the curtain of the Dark Ages rises on anything that can be called judicial organization in England, we find the law merchant, with rules and a summary procedure of its own, administered in English ports and markets²). Doubtless there were local variations. In the absence of a central seat of authority it would be strange if we found it otherwise. The differences in rules and practice were no greater than existed down to the latter part of the nineteenth century between a number of national and provincial jurisdictions in Germany professing to administer a common Roman law, and exist now between the numerous jurisdictions in North America which alike profess to be bound by a common body of law derived from England. It is needless to tell any one even slightly acquainted with the Middle Ages that the existence of several legal systems in the same territory did not offend or surprise medieval thought. The notion of a supreme law of the land, national law in the proper sense, was in its infancy in the twelfth century and quite young in the thirteenth. Every one knew that the Church had her own laws, courts, and judicial officers, and claimed not merely moral but legal obedience wherever there were Christian men in the world. Again the conception of the law merchant as a personal law binding only on traders was quite natural. The canon law was a personal law of Christians. Jews and Saracens were not bound by it: whether they should be suffered to live in a Christian country, and on what terms, was another question. Thus the problem of relations between the general law and the law merchant was a problem of details and procedure: we now consider it only as it occurred in England. At one time, as late as the early fourteenth century, the king's judges were willing to let merchants bring their law with them as a personal law into the king's court and plead their causes according to law merchant³). There is nothing to show that this was a common or a popular course among traders, and it may be assumed to have been a passing and not very successful experiment. In later books we read of local customs in favour of informal modes of proof, such as tallies, being pleaded in the king's court; and it seems at least a fair guess that the customs were not really local, and were pleaded in that manner because the judges had made up their minds that they could not take notice of the general rules of the law merchant. But in another way the king did take an active part in administering that law, not in the way of ordinary justice, but under his extra-

¹) Grierson, *The Silent Trade*, Edinb. 1903.

²) Carter, *Hist. of Eng. Legal Institutions*, c. XXVI; *Select Pleas in . . . seignorial Courts*, ed. Maitland, Selden Soc. 1889, 132 sqq.; *Sel. Ca. Law Merchant*, ed. Gross, Selden Soc. 1908; Mitchell, *Early History of the Law Merchant*, Cambridge 1904.

³) Y. B. (Rolls series) 21 & 22 Ed. I. 75, 32 & 33 Ed. I. 377.

ordinary power of providing for cases where the regular process of the law was not strong enough, or was not applicable. Foreign merchants were under the king's especial protection and entitled to seek justice from his Council; and so in 1473 we find a stranger complaining in the Star Chamber that a carrier who was taking a bale of his goods to Southampton had broken it open and stolen the contents¹). The Chancellor, Bishop Stillington, laid it down that merchant strangers coming into the kingdom with the king's safe-conduct need not sue by the law of the land and await the trial by twelve men²) and other formalities, but their causes were to be determined by the law of nature in the Chancery; the law of nature meaning, as he explained, the law universally received throughout the world and sometimes called the Law Merchant. In the seventeenth century the Chancellor's practice was to refer such causes to a commission of merchants; but since the commission had to report back to the Chancellor, the expedition which traders so much desired was not secured³). There were some other partial and transitory provisions for special jurisdictions which it would be useless to mention in a summary introduction of this kind.

It is highly probable, however, that the Court of Chancery would, in spite of its cumbrous procedure⁴), have become the court of the law merchant but for the bold practical development on which the rival Courts at Westminster embarked in the eighteenth century.

In and after the Elizabethan age the Courts of common law resumed their mercantile jurisdiction (being, no doubt, unwilling to let so much profitable business go to the Chancellor) and reverted to the thirteenth-century fashion of allowing the custom of merchants — not merely the local custom of London or Bristol — to be brought before them in mercantile suits. But still the judges expected to be satisfied that the merchant suitor really was a merchant: that he belonged, for example, to a merchant gild, English or foreign. After the Revolution⁵), if not before, any such requirement ceased to be taken seriously. The passage from a substantial condition of founding the jurisdiction to a fictitious allegation, which is ultimately dropped as useless, is quite well known in other departments of English procedure to all who have studied its history. Of this kind was, among others, the pretence that a plaintiff in the Exchequer was the king's debtor, which survived in the forms of pleading well into the nineteenth century. The real difficulty with mercantile causes was how to inform the Court what the law merchant was. The Court could not profess to know this of its own knowledge, as it did know or ought

¹) Y. B. 13 Ed. IV, 9, pl. 5. The case being referred to the judges in the Exchequer Chamber, the majority held that the 'breaking bulk' made this larceny by the common law: a decision of great importance, but not to our present purpose.

²) There is nothing to show that trial by jury was popular or much respected before the political trials of the sixteenth century, and much to show that juries in civil causes were constantly corrupted and intimidated by great men, or packed by partial sheriffs.

³) Malynes, *Lex Mercatoria*, 311.

⁴) But, as Dr. Carter, *op. cit.* 276, has well pointed out, the Court of Chancery could always receive and often require the testimony of the parties themselves, which was not admissible in courts of common law till the middle of the nineteenth century.

⁵) During the Restoration period 1660—1688 the Courts were very weak, and it would be difficult to name more than one or two recorded decisions of that time in civil matters of which the memory is still alive for any practical purpose.

to have known the common law of the land. On the other hand, if the question were to be treated as matter of fact, the custom of merchants would have to be proved by witnesses every time, and what was proved at one trial would not be admissible between different parties in another cause; and this apart from the difficulties arising from the fact that English courts have no official record of the oral testimony given by witnesses. At one time it seems to have been supposed that the Court might call in merchants as expert assessors to inform it of the received custom, and then must decide for itself whether the custom was reasonable¹). This would have been an anomalous expedient, and would have offered little security for the correctness of any decisions obtained by it. Lord Mansfield, in the course of his long tenure of judicial office (1756—1788), worked out a happier method of adopting living mercantile usage as the foundation of a stable jurisprudence and with the smallest amount of technical innovation. Juries taken from competent men of business in the city of London were called on to find the custom of merchants as a fact; not that a London jury could be supposed to know of its own knowledge, or to be informed, of universal custom; but it can know what is received in the city of London and practised in England as being such. Then it was laid down that, when the Court had once been informed of the general custom of merchants, as distinct from any merely local usage, the law merchant so established became part of the general law administered by the Court, and not only it need not be proved again, but no attempt to displace it by contrary testimony would be allowed. When once the data were obtained, they were developed by reasoning and authority like any other part of the unwritten law. Some aid of legislation there was at one time and another, but not much. In an earlier generation Chief Justice Holt had insisted on the necessity of an Act of Parliament to make promissory notes negotiable. Much in the same spirit it has been seriously argued in our own time, and maintained by eminent judges, that the body of law merchant adopted into the Common Law by Mansfield and his companions and immediate successors was a closed circle incapable of receiving any further additions from living usage; so that, for example, no new variety of negotiable instrument could be admitted, however general its modern use might be; but the contrary opinion now prevails, namely that evidence of general usage may be admitted to add to the law merchant though not to contradict what is already received²). It should be carefully noted that Lord Mansfield's merit did not consist in the declaration that the law merchant is part of the Common Law, which had been made more than once in the seventeenth century and was repeated by Blackstone in more than one place of his Commentaries, written about the time that Mansfield became Chief Justice³), but in the development of a scientific system which preserved the original vitality of the material derived from custom. That merit is not diminished by the fact, if so it is, that Mansfield's successors have at times been too timid or too formalist to carry on his work in the same spirit. The advances made by mercantile jurisprudence under his guidance have been the subject of

¹) Hobart C. J. as reported in Winch 24, 25, but it is a confused report at best.

²) *Edelstein v. Schuler & Co.* [1902] 2 K. B. 144; for the history of the judicial treatment of negotiable instruments see Sir Francis Palmer, 'The Negotiability of Debentures to Bearer and the Growth of the Law Merchant', L. Q.R. XV. 245, and the considered judgment of a very strong Court in *Goodwin v. Roberts* (1875) L. R. 10 Ex. at p. 346 sqq.

³) Blackstone was in fact lecturing at Oxford earlier.

judicial and other panegyrics of which some are themselves classical for English lawyers¹). Lord Campbell, in his *Lives of the Chief Justices*, recorded a tradition of Lord Mansfield's almost intimate relations with the jurymen habitually serving in the City of London, for which there seems to be no other authority. But it is probable enough, and at this day the co-operation of a good judge with a good mercantile jury is by no means extinct. At its best it is an excellent thing to see; perhaps better seen, as things now are, at Liverpool or Manchester than in London.

It must be noted that the foregoing brief account does not apply to the whole of what is called commercial law by modern Continental lawyers, or included by English text-writers in the description of mercantile law. The heads it really does apply to are negotiable instruments, insurance, and maritime law so far as it came into the jurisdiction of the Common Law courts, and, perhaps we may add, so far as its usages had affected the course of dealing with goods by land as well as by sea. If we take, for example, the ordinary law of the sale of goods, it is quite true that in the middle of the eighteenth century it might be called rudimentary; but, such as it was, there was no trace of a period when it was not part of the common law. Certainly there had been a transformation in the fourteenth or early fifteenth century from the old Germanic contract which required actual delivery — a 'real' contract — to a reciprocal contract²) which not merely created an obligation but transferred property. But this was already forgotten. The existence of the earlier rule was rediscovered in the second quarter of the nineteenth century by that very learned historical lawyer Serjeant Manning, who somewhat rashly conjectured that the modern rule was due only to a misunderstanding, and was criticized by Lord Blackburn, then only a private text-writer. Blackburn had no difficulty in proving that the doctrine as we have it was settled in the fifteenth century³). Nevertheless the Statute of Frauds practically restored the old Germanic rule in 1677, with the alternative of proof by a signed writing, for sales of goods exceeding £10 in value. It is needless to say more here of this enactment, which has caused enormous litigation throughout the English-speaking world (its workmanship being none of the best) and has often been severely criticized: yet it is still in force in most common law jurisdictions, though abrogated in British India forty years ago so far as it had been introduced there. For the rest, our law of sale has been developed in the course of the nineteenth century on strictly scientific lines. Evidence of usage in

¹) The most authoritative of these was delivered by Mr Justice Buller in 1787 in *Lickbarrow v. Mason*, a celebrated case on the law of stoppage in transitu: it is most conveniently referred to in Smith's *Leading Cases* (l. 704, 11th ed.). 'Before that period' — namely within these thirty years, in other words before Lord Mansfield's judgments began — 'we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally [i.e. without separating questions of law from questions of fact] to a jury, and they produced no established principles. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard the principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country.'

²) Not consensual according to medieval theory, see Ames in *Select Essays in Anglo-American Legal History*, III, 313.

³) Blackburn on the *Contract of Sale* (London 1845) 189.

particular kinds of business (not as universal custom, but as a tacit convention between the parties) has been rather freely admitted; this is quite distinct from the reception of law merchant. Stoppage in transitu, no doubt, was recognized by the Court of Chancery before the time when we hear of it in common-law jurisdiction. But there does not seem to have been any trouble about adopting the doctrine as reasonable without resting it formally on actual usage. What has been said of sale may be taken as applicable, in principle, to bailment, agency, and other kindred topics. The one really serious difficulty that the Common Law had to overcome was in the case of negotiable instruments. The attributes of a bill payable to order or bearer were incompatible with the ordinary conditions required for the transfer of property and the novation of obligations both by English law and by the modern Roman law of the Continent. Hence the allowance of those attributes in a regular court of law had to be specially justified, in other words an express adoption of the law merchant was necessary.

Our modern law of partnership begins only in the latter part of the eighteenth century. It was worked out by a series of decisions, mostly in the Court of Chancery or its successor the Chancery Division, in the course of the nineteenth century, with practically no assistance from legislation, and with little reference to custom except so far as general usage was embodied in the agreements which came before the Court to be interpreted and administered. This last word contains the reason why the work has fallen in such large measure to courts of equity. In them alone could appropriate machinery be found for taking partnership accounts, winding up the affairs of a firm after dissolution, distributing property, and giving the specific orders and directions required in the course of the proceedings: courts of common law being able (with exceptions not here material) only to award money damages, and having no personal control over the parties¹). The law thus laid down by a series of eminent equity lawyers from Lord Eldon and Sir William Grant to Sir George Jessel and Lord Macnaghten was so well settled towards the end of the century that in 1890 it was found practicable and not very difficult to codify it by the Partnership Act, 1890. This, like the earlier Bills of Exchange Act and the later Sale of Goods Act, has fulfilled all reasonable expectations by disposing of many doubts on minor points and raising almost none.

The law merchant, in being assimilated to the general law of the land, had to conform itself to the regular procedure of the courts, which could not make room for the summary practice of medieval markets. That was the price it had to pay for its reception, a price on the whole not excessive. Our modern procedure, however, is elastic, and for about fifteen years there has been a so-called commercial court in the King's Bench Division²). Foreign readers must not be misled by the name; the thing is very useful, but (after our English fashion) has been done with no formality at all, and without creating any new tribunal or jurisdiction, by a simple administrative arrangement among the judges. There is a special list of commercial causes assigned to one of the judges; a cause may be put on that list on the appli-

¹) The medieval action of account was practically obsolete before the development of modern partnership law began. In Lord Lindley's experience, which goes back to the middle of the nineteenth century, it had never been found useful between partners: Lindley on Partnership, 591.

²) The King's Bench Division represents the three former distinct Courts of King's (or Queen's) Bench, Common Pleas, and Exchequer.

cation of either party; when it is there, the usual formal steps in procedure (simple as those are now, compared with the practice down to 1875) are freely dispensed with, and the parties are expected to admit all facts not substantially in dispute¹). A like arrangement is now in force at Liverpool, where since 1910 a judge of the High Court has sat continuously. Still less can the law merchant claim exemption from rules of general law as distinct from procedure, rules of proof and the like. Lord Mansfield certainly made one or two attempts to dispense in commercial cases even with requirements of substantive law; but these inroads had, as might be expected, no lasting success. It may or may not be regrettable that the adventure did not occur to some daring judge a century and a half or two centuries earlier, when the law of contract was still plastic: in the latter half of the eighteenth century it was too late. The details are too technical to be relevant here.

For the convenience of readers not familiar with English jurisprudence, it is thought useful to add a short explanation as to the authority of judicial decisions in the common law, and the manner in which the reasons for them are recorded²). Our system was originally peculiar to England, but now prevails throughout the English-speaking world, and even in those parts of the British Empire and the United States which did not derive their substantive law from ours. With us judicial reasons are authoritative, though they may be subject to correction by higher authority of the same kind; extra-judicial opinions, even those of the most learned judges who happen to write books, have not positive authority but at most a persuasive value; but a certain number of classical works from the fifteenth to the eighteenth century are exceptionally received as 'books of authority'. The privileged list stops short of Blackstone's Commentaries. Nevertheless the works of deceased authors may be cited in Court, and some which are not properly 'books of authority' are for practical purposes more frequently mentioned in Court than any of those which are. It is said that works of living authors ought not to be cited at all, but the rule is not observed with much strictness at this day, if it ever was. Probably the historical origin of our custom must be sought in the fact that when advocacy became a definite profession in England there was already a powerful and centralized judicature in the king's courts, where the whole nascent learning of the Common Law was to be found. The only legal treatises in existence were the work of men who had held judicial office, or members of their staff; and of these there were very few. Broadly speaking, there was no safe guide to the doctrine or practice of the king's judges other than the proceedings of the Courts themselves. What the king's judges had done once they might be expected to do again in a like case. It was understood early in the fourteenth century at latest (probably some time before) that in some sense they were bound to follow their own previous judgments.

Now the official records of those judgments were not accessible to every one; nor did they disclose, even had they been accessible, what arguments had been used, what impression they had made on the Court, or what reasons the judges

¹) See Encycl. Laws of England *s. v.* Commercial Court.

²) Only a very condensed sketch can be given here. More detail may be found in the present writer's 'First Book of Jurisprudence' (3d ed. 1911), and see 'Law Reporting' in Encycl. Laws of England. 2d ed. 1907.

had given¹). In the latter part of the thirteenth century young lawyers were already busy taking notes of what was said in court: such notes were copied and recopied, exchanged, and passed from hand to hand — as, even in this age of universal printing, MS. notes of university lectures often are. In the course of the Middle Ages a great mass of these reports was produced, and they came to be known as Year Books.²) A large proportion of them still exists in MS. in various public libraries. Many of them were badly printed in the sixteenth and seventeenth centuries, some of them well in the nineteenth and twentieth; and the work of critical editing and elucidation is proceeding, though slowly. In the sixteenth century the production of printed books containing more or less recent decisions of the Courts began, still as a matter of private enterprise. For nearly two centuries there was a sporadic publication of law reports (many of them only posthumous collections of more or less eminent practising lawyers' notes) having among them the most various degrees of reputation. The transition from French (in its latter age quite barbarous) to English as the language of law reporters was completed only in the eighteenth century. Regular attendance in every superior court of one or more members of the Bar who undertake to record and publish its more material decisions is a practice dating only from the latter half of the eighteenth century. The nineteenth-century practice, down to 1865, was that the reports were produced by the professional publishers of law books, who (sometimes in rivalry, sometimes in syndicates) employed gentlemen of the Bar to compose them. One or two reporters were semi-officially recognized by the Judges in each court, and furnished with copies of the written judgments and other assistance. As there was a distinct set of reports in every court, and no effective competition (the number of law publishers being limited), these publications were expensive and dilatory, though the work was otherwise, with few exceptions, well done. In 1865, as the result of much discussion among the Bar, a consolidated scheme of reporting under the direction of a representative Council was established: no attempt was made to prevent competition or discourage the citation of competing reports. The system of the 'Law Reports' thus founded has been extensively followed in other parts of the British Empire. In America reporting has a more definitely official character, of which there is a trace here in the reporting of cases in the House of Lords; but the general character of the publications is the same. Private and unpublished reports are now very seldom used; there is no rule, however, to prevent any counsel from citing any report of a case, printed or not, which purports to be vouched for by a member of the Bar present at the time. This last condition excludes most though not all newspaper reports of judicial decisions.

The reported decisions of English-speaking courts are enough to fill a library of no contemptible size, and they continue to grow automatically at a rate which the gradual obsolescence of older portions by no means compensates³). Probably

¹) In England the reasons are no part of the formal record: we have nothing like the *considérants* of a French decision.

²) The tradition that they had an official character, which prevailed for about two centuries in our legal literature, is now discredited; on a recent attempt to revive it in a varied form see Dr. Holdsworth in *Law Quart. Rev.* XXVII. 278.

³) Besides, an obscure and all but forgotten authority may at any time assume or recover a quite unexpected importance.

there are now something like fifteen thousand volumes of them. Such a vast and heterogeneous literature needs its own special apparatus of reference, general indexes, digests, and so forth. It would not be practicable or useful to attempt here to give any account of the methods by which an English or American lawyer finds his authorities. The actual references to most books of reports¹⁾ are made by the names of the reporters, which are reduced to initials or otherwise abbreviated except when they are very short, and the number of the volume. At a later page of this volume a list will be found of such of these conventional abbreviations (so familiar that any expansion of them strikes the professional eye almost as a positive mistake) as are thought useful to readers of the present work.

As to the relative weight of different decisions, the authority of a court of first instance must yield, in case of conflict, to that of a court to which an appeal lies from it, and so on till we arrive at the court from which no farther appeal is possible (for England the House of Lords, for the Dominions and possessions beyond seas the Judicial Committee of the Privy Council; these two tribunals consist to a great extent of the same persons). Decisions of courts administering similar law in a foreign jurisdiction have only 'persuasive' authority; an English court listens with respect to the decisions of the Court of Appeal in Ireland, or the Supreme Court of the United States, but is not bound by them, and the decisions of English courts are in the same position in America.

F. P.

¹⁾ Exceptions before 1865 need not be enumerated. Since that date the English 'Law Reports' and others on a like plan have been cited without any personal name; and so are most of the American reports for the last forty years or thereabouts.

Law Reports. Abbreviations.

[1891] A. C.	Law Reports, Appeal Cases (1891 onwards). Current Series.
A. & E.	Adolphus and Ellis's Reports, King's Bench. 1834—1840.
A. & E. N. S.	Adolphus and Ellis's Q.B., New Series. 1841—1852.
A. & H.	Arnold and Hodges' Queen's Bench Reports. 1840—1841.
Aleyn	Aleyn's King's Bench Reports. 1646—1649.
Amb.	Ambler's Reports, Chancery. 1737—1783.
A. M. & O.	Armstrong, Macartney, and Ogle's Irish Nisi Prius Reports. 1840—1842.
A. & N.	Alcock and Napier's K. B. Reports, Ireland. 1831—1833.
And.	Anderson's Reports, Common Pleas. 1534—1605.
Andr.	Andrews' Reports, King's Bench. 1738—1739.
Anon.	Anonymous
Anst.	Anstruther's Reports, Exchequer. 1792—1797.
App. Cas.	Law Reports, Appeal Cases. 1876—1890.
Arn.	Arnold's Reports, Common Pleas. 1838—1839.
Asp.	Aspinall's Maritime Cases. From 1870. Current series.
Atk.	Atkyn's Reports, Chancery. 1736—1755.
B. & A.	Barnewall and Alderson's Reports, King's Bench. 1817—1822.
B. & Ad.	Barnewall and Adolphus's Reports, King's Bench. 1830—1834.
B. & B.	Broderip and Bingham's Reports, Common Pleas. 1819—1822.
B. & C.	Barnewall and Cresswell's Reports, King's Bench. 1822—1830.
B. & S.	Best and Smith's Reports, Queen's Bench. 1861—1869.
B. D. & O.	Blackham, Dundas and Osborne, N. P., Ireland. 1846—1848.
B. & L.	Browning and Lushington's Admiralty Reports. 1864—1865.
B. & P.	Bosanquet and Puller's Reports, Common Pleas. 1796—1804.
B. & P. N. R.	Bosanquet and Puller's New Reports, Common Pleas. 1804—1807.
Ball & B.	Ball and Beatty's Reports, Chancery, Ireland. 1807—1814.
Barn. K. B.	Barnardiston's Reports, King's Bench. 1726—1735.
Barn. C.	Barnardiston's Reports, Chancery. 1740—1741.
Barnes	Barnes's Notes, Common Pleas. 1732—1760.
Batt.	Batty's Reports, K. B., Ireland. 1825—1826.
Beat.	Beatty's Chancery Reports, Ireland. 1813—1830.
Beav.	Beavan's Reports, Rolls Court. 1838—1866.
Beav. & Wal.	Beaven and Walford's Railway Cases. 1846.
Bel.	Bellewe's Reports, King's Bench. 1378—1400.
Bell. App.	Bell's Cases on Appeal from Scotland. 1842—1850.
Bell C.	Bell (R.), Cases, Court of Session. 1790—1792.
Bell folio	Bell's Court of Session Cases, Scotland. 1793—1795.
Benl. or Bendl.	Benloe or Bendloe's Reports, King's Bench. 1531—1628.
Benl. & Dal.	Benloe and Dalison's Reports, Common Pleas. 1486—1580.
Bing.	Bingham's Reports, Common Pleas. 1822—1834.
Bing. N. C.	Bingham's New Cases, Common Pleas. 1834—1840.
Black. W.	Sir Wm. Blackstone's Reports, King's Bench. 1746—1780.
Bli.	Bligh's Reports, House of Lords (1819—1821).
Bli. N. S.	Bligh's Reports, New Series. House of Lords. 1827—1837.
Br.	Alexander Bruce's Reports, Court of Session. 1714—1715.
Br. & Lush.	Browning and Lushington's Admiralty Reports. 1864—1865.
Br. N. C.	Brook's New Cases, King's Bench. 1515—1558.
Bridg. J.	J. Bridgman's Reports, Common Pleas. 1613—1621.
Bridg. O.	Orlando Bridgman's Reports, Common Pleas. 1660—1669.
Bro. C. C.	Browns' Chancery Reports (Elden or Belt). 1778—1794.
Bro. P. C.	Brown's Parliament Cases (1702—1800).
Bro. Supp.	Brown's Suppl. Morrison's Dict. Court of Session. 1622—1794.
Brownl.	Brownlow and Goldesborough's Reports, Common Pleas. 1569—1624.
Bru.	Bruce's Court of Session Cases. 1714—1715.
Buck	Buck's Reports in Bankruptcy. 1816—1820.
Bulst.	Bulstrode's Reports, King's Bench. 1610—1625.
Bunb.	Bunbury's Reports, Exchequer. 1713—1742.
Burr.	Burrow's Reports, King's Bench. 1759—1771.
Burr. Adm.	Burrell's Admiralty Cases. 1648—1840.
C. & A.	Cooke & Alcock's King's Bench Reports, Ireland. 1833—1834.
C. B.	Common Bench Reports, by Manning, Granger and Scott. 1845—1856. Chief Baron.

C. B., N. S.	Common Bench Reports, New Series. 1856—1865.
C. & E.	Cababe and Ellis, Queen's Bench Reports. 1882—1885.
C. & F.	Clark and Finelly's House of Lords Cases. 1831—1846.
C. & J.	Crompton and Jervis's Exchequer Reports. 1830—1832.
C. & K.	Carrington and Kirwan's Reports, Nisi Prius. 1843—1850.
C. L. R.	Common Law Reports. 1853—1855.
C. & L.	Connor and Lawson's Chancery Reports, Ireland. 1841—1843.
C. & M.	Crompton and Meeson's Reports, Exchequer. 1832—1834.
C. M. & R.	Crompton Meeson and Roscoe's Reports, Exchequer. 1834—1836.
C. & P.	Carrington and Payne's Reports, N. P. 1823—1841.
C. P. D. (or Div.)	Law Reports, Common Pleas Division. 1875—1890.
C. S. & P.	Craigie, Stewart and Paton Appeal Cases, Scotland. 1726—1821.
Calth.	Calthrop's Reports, King's Bench. 1609—1618.
Camp. N. P.	Campbell's Reports, Nisi Prius. 1808—1816.
Car. & M.	Carrington and Marshman, Nisi Prius. 1840—1842.
Carp. P. C.	Carpmael's Patent Cases. 1602—1842.
Cart.	Carter's Reports, Common Pleas. 1664—1676.
Carth.	Carthew's Reports, King's Bench. 1686—1701.
Cartm.	Cartmell's Trade Marks Cases. 1876—1892.
Cas. Ch.	Select Cases in Chancery. 1660—1688.
[1891] Ch.	Law Reports, Chancery (1891 onwards). Current Series.
Ch. D. (or Div.)	Law Reports, Chancery Division. 1876—1890.
Clerk Home	Clerk Home. Scottish Session Cases. 1735—1744.
Co. Rep.	Coke's King's Bench Reports. 1572—1616.
Colles	Colles's Cases in Parliament (1697—1714).
Coll.	Collyer's Chancery Cases. 1844—1845.
Comb.	Comberbach's Reports, King's Bench. 1685—1699.
Com.	Comyns' Reports, King's Bench. 1659—1741.
Com. Cas.	Commercial Cases. From 1895. Current Series.
Cooke	Cooke's Reports, Common Pleas. 1706—1747.
Cooper	Cooper's Reports, Chancery. 1837—1839.
Coop. t. Brough.	Cooper's Cases, temp. Brougham. 1833—1834.
Coop. t. Cott.	Cooper's Reports temp. Cottenham. 1846—1848.
Cowp.	Cowper's Reports, King's Bench. 1774—1778.
Cox	Cox's Reports, Chancery. 1783—1796.
Cr. & Ph.	Craig and Phillips' Chancery Reports. 1841.
Cro.	Croke's King's Bench Reports. 1582—1641.
Crockford	Maritime Law Reports, by Crockford. 1860—1871.
Cun.	Cunningham's King's Bench Reports. 1734—1736.
D.	Dunlop, Bell, and Murray's Reports, Scotch Session Cases (second series). 1838—1862.
D. F. & J.	De Gex, Fisher and Jones' Chancery Reports. 1860—1862.
D. F. & J. B.	De Gex, Fisher and Jones' Bankruptcy Reports. 1859—1861.
D. J. & S.	De Gex, Jones and Smith's Chancery Reports. 1862—1866.
D. J. & S. B.	De Gex, Jones and Smith's Bankruptcy Reports. 1862—1865.
D. M. & G.	De Gex, Macnaghten and Gordon's Chancery Reports. 1851—1855.
D. & A.	Deas and Anderson's Court of Session Cases, Scotland. 1829—1833.
D. & E.	Durnford and East's Term Reports, Kings' Bench. 1785—1800.
D. & J.	De Gex and Jones' Chancery Reports. 1857—1860.
D. & J. B.	De Gex and Jones' Bankruptcy Reports. 1857—1859.
D. & L.	Dowling and Lowndes' Bail Court Reports. 1843—1849.
D. & M.	Davison and Merivale's Queen's Bench Reports. 1843—1844.
D. & R.	Dowling and Ryland's King's Bench Reports. 1821—1827.
D. & R. N. P.	Dowling and Ryland's Nisi Prius Cases. 1822—1823.
Dal	Dalrymple's Scotch Session Cases. 1698—1718.
Dan.	Daniell's Exchequer Reports. 1817—1820.
Dan. & Ll.	Danson and Lloyd's Mercantile Cases. 1828—1829.
Das.	Dasent's Bankruptcy and Insolvency Reports. 1853—1855.
Dav.	Davies' Irish King's Bench Reports. 1604—1612.
Dav. Pat. Cas.	Davies' Patent Cases. 1785—1816.
De Gex	De Gex's Bankruptcy Reports. 1845—1850.
De G. & Sm.	De Gex and Smale's Chancery Reports. 1846—1852.
Deac.	Deacon's Bankruptcy Reports. 1836—1839.
Deac. & Chit.	Deacon and Chitty's Bankruptcy Reports. 1832—1835.
Dod.	Dodson's Admiralty Reports. 1811—1822.
Donn.	Donnelly's Chancery Reports. 1836—1839.
Doug.	Douglas' King's Bench Reports. 1778—1785.
Dow	Dow's House of Lords Reports. 1812—1818.
Dow & Cl.	Dow and Clark's House of Lord's Cases. 1827—1832.

Dowl.	Dowling's Bail Court (Practice) Cases. 1830—1842.
Dr. & Sm.	Drewry and Smale's Vice Chancellors' Reports. 1860—1865.
Dr. & Wal.	Drury and Walsh's Irish Chancery Reports. 1837—1840.
Dr. & War.	Drury and Warren's Irish Chancery Reports. 1841—1843.
Drew.	Drewry's Vice Chancellors' Reports. 1852—1859.
Drink.	Drinkwater's Common Pleas Reports. 1840—1841.
Dru. t. Sugden	Drury's Irish Chancery Reports <i>temp.</i> Sugden. 1843—1844.
Dru. t. Nap.	Drury's Irish Chancery Reports <i>temp.</i> Napier. 1858—1859.
Dunc. Mer. Car.	Duncan's Mercantile Cases. 1885—1886.
Dy.	Dyer's King's Bench Reports. 1513—1582.
E. B. & E.	Ellis, Blackburn and Ellis' Queen's Bench Reports. 1858.
E. R.	English Reports. A republication of all the English reports before 1866. Current Series.
E. & B.	Ellis and Blackburn's Queen's Bench Reports. 1851—1858.
E. & E.	Ellis and Ellis' Queen's Bench Reports. 1858—1861.
East.	East's King's Bench Reports. 1801—1812.
Eden	Eden's Chancery Reports. 1757—1767.
Edg.	Edgar's Reports, Court of Session, Scotland. 1724—1725.
Edw. Adm.	Edwards' Admiralty Reports. 1808—1810.
El.	Elchies' Decisions, Scotch Court of Session. 1733—1754.
Eq. Cas. Abr.	Equity Cases Abridged. 1667—1744.
Esp.	Espinasse's Nisi Prius Reports. 1793—1807.
Ex.	Exchequer Reports (Welsby, Hurlstone and Gordon). 1847—1856.
Ex. D.	Law Reports, Exchequer Division. 1875—1890.
F.	Court of Session Reports, Scotland (Fifth Series). 1899—1906.
F. & F.	Foster and Finlason's Nisi Prius Reports. 1858—1867.
F. & S.	Fox and Smith's Irish King's Bench Reports. 1822—1824.
Fac. Dec.	Faculty Collection of Decisions, Court of Sessions. 1752—1841.
Falc.	Falconer's Scotch Court of Session Cases. 1744—1751.
Fin.	Finch's Chancery Reports. 1673—1681.
Fitzg.	Fitzgibbon's King's Bench Reports. 1728—1733.
Fl. & K.	Flanagan and Kelly's Irish Rolls Court Reports. 1840—1842.
Fonbl.	Fonblanque's Cases in Bankruptcy. 1849—1852.
Forb.	Forbes' Decisions in the Scotch Court of Session. 1705—1713.
Forr.	Forrest's Exchequer Reports. 1801.
Fort.	Fortescue's King's Bench Reports. 1695—1738.
Fraz.	Frazer's Admiralty Cases, &c., Scotland. 1814.
Free.	Freeman's Chancery Reports. 1660—1706.
G. & D.	Gale and Davison's Queen's Bench Reports. 1841—1843.
G. & J.	Glyn and Jameson's Bankruptcy Reports. 1821—1828.
Gale	Gale's Exchequer Reports. 1835—1836.
Gaz. Bank.	Gazette of Bankruptcy. 1862—1863.
Gif.	Giffard's Vice-Chancellors' Reports. 1857—1865.
Gilb. Cas.	Gilbert's Cases in Law and Equity. 1713—1715.
Gilb. Ch.	Gilbert's Chancery Reports. 1705—1727.
Glas.	Glasscock's Reports, Ireland. 1831—1832.
Godb.	Godbolt's King's Bench Reports. 1575—1638.
Good. Pat.	Goodeve's Abstract of Patent Cases. 1785—1883.
Gould.	Gouldsborough's King's Bench Reports. 1586—1602.
Gow	Gow's Nisi Prius Cases. 1818—1820.
Grif. Pat. C.	Griffin's Patent Law Cases. 1866—1887.
H. Bl.	H. Blackstone's Common Pleas Reports. 1788—1796.
H. L. Cas.	House of Lords Cases (Clark). 1847—1866.
H. & B.	Hudson and Brooke's Irish King's Bench Reports. 1827—1831.
H. & C.	Hurlstone and Coltman's Exchequer Reports. 1862—1865.
H. & H.	Horn and Hurlstone's Exchequer Reports. 1838—1839.
H. & J.	Hayes and Jones' Exchequer Reports, Ireland. 1832—1834.
H. & M.	Hemming and Miller's Vice-Chancellors' Reports. 1862—1865.
H. & N.	Hurlstone and Norman's Exchequer Reports. 1856—1861.
H. & R.	Harrison and Rutherford's Common Pleas Reports. 1865—1866.
H. & T.	Hall and Twell's Chancery Reports. 1848—1850.
Hag. Adm.	Haggard's Admiralty Reports. 1822—1837.
Hailes	Hailes' Decision, Scotch Court of Session. 1766—1791.
Har. & Woll.	Harrison and Wollaston's King's Bench Reports. 1835—1836.
Hard.	Hardres' Exchequer Reports. 1655—1669.
Hare	Hare's Vice-Chancellors' Reports. 1841—1853.
Hay.	Hayes' Irish Exchequer Reports. 1830—1832.

Hay & M. (or Marr.)	Hay and Marriott's Admiralty Reports. 1776—1779.
Het.	Hetley's Common Pleas Reports. 1627—1632.
Hob.	Hobart's King's Bench Reports. 1603—1625.
Hodg.	Hodges' Common Pleas Reports. 1835—1837.
Hog.	Hogan's Irish Rolls Court Reports. 1816—1834.
Holt K. B.	Holt's King's Bench Reports. 1688—1711.
Holt Adm.	Holt's Admiralty Cases. 1863—1867.
Holt Eq.	Holt's Equity Reports. 1845.
Holt N. P.	Holt's Nisi Prius Reports. 1815—1817.
Hume	Hume's Scotch Session Cases. 1781—1822.
Hurl. & W.	Hurlstone and Walmsley's Exchequer Reports. 1840—1841.
Hut. (or Hutt.)	Hutton's Common Pleas Reports. 1612—1639.
Ind. App.	Law Reports, Indian Appeals. Current Series.
Ir. C. L.	Irish Common Law Reports. 1850—1866.
Ir. Ch.	Irish Chancery Reports. 1850—1866.
Ir. Eq.	Irish Equity Reports. 1838—1850.
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J. & H.	Johnson and Hemming's Vice-Chancellors' Reports. 1860—1862.
J. & L.	Jones and La Touche's Irish Chancery Reports. 1844—1846.
J. & W.	Jacob and Walker's Chancery Reports. 1819—1821.
Jac.	Jacob's Chancery Reports. 1821—1822.
Jebb & B.	Jebb and Bourke's Irish Queen's Bench Reports. 1841—1842.
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Jenk.	Jenkins' Exchequer Reports. 1220—1623.
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Jones T.	Sir Thomas Jones' King's Bench Reports. 1667—1685.
Jones	Jones' Irish Exchequer Reports. 1834—1838.
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Kam. Rem. Dec.	Kames' Remarkable Decisions, Scotch Court of Session. 1716—1752.
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Kay	Kay's Vice-Chancellors' Reports. 1853—1854.
Keb.	Keble's King's Bench Reports. 1661—1679.
Keen	Keen's Rolls Court Reports. 1836—1838.
Keil.	Keilway's King's Bench Reports. 1496—1531.
Keny.	Kenyon's King's Bench Reports. 1753—1759.
Kilk.	Kilkerran's Decisions, Scotch Court of Session. 1738—1752.
Kn.	Knapp's Privy Council Cases. 1829—1836.
L. J.	The Law Journal, New Series Reports in all the Courts. From 1832. Current series.
L. J. Adm.	Law Journal, Admiralty.
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L. J. Ch.	Law Journal, Chancery.
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L. & T.	Longfield and Townsend's Irish Exchequer Reports. 1841—1842.
L. & W.	Lloyd and Welsby's Mercantile Cases. 1829—1830.
Lane	Lane's Exchequer Reports. 1605—1612.
Lat.	Latch's King's Bench Reports. 1625—1628.
Lee t. Hard.	Lee's Cases temp. Hardwicke. 1733—1738.
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Leo.	Leonard's King's Bench Reports. 1540—1615.
Lev.	Levinz's King's Bench Reports. 1660—1697.
Ley	Ley's King's Bench Reports. 1608—1629.
Lit.	Littleton's Common Pleas Reports. 1626—1632.
Lofft	Lofft's King's Bench Reports. 1772—1774.
Lush.	Lushington's Admiralty Reports. 1860—1863.
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M.	Scotch Session Cases, 3rd Series (Macpherson, &c.). 1862—1873.
M. D. & De G.	Montagu, Deacon, and De Gex's Bankruptcy Reports. 1840—1844.
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M. & M.	Moody and Malkin's Nisi Prius Reports. 1826—1830.
M. & M'A.	Montagu and M'Arthur's Bankruptcy Reports. 1828—1829.
M. & P.	Moore and Payne's Common Pleas Reports. 1828—1831.
M. & S.	Maule and Selwyn's King's Bench Reports. 1813—1817.
M. & W.	Meeson and Welsby's Exchequer Reports. 1836—1847.
Mac. & G.	Macnaghten and Gordon's Chancery Reports. 1848—1852.
Mac. & Rob.	Maclean and Robinson's House of Lords Cases. 1839.
Macr. P. Cas.	Macrory's Patent Cases. 1847—1856.
Macr. & H.	Macrae and Hertslet's Insolvency Cases. 1847—1852.
Mad.	Maddock's Chancery Reports. 1815—1822.
Man. & G.	Manning and Granger's Common Pleas Reports. 1840—1844.
Man. & Ry.	Manning and Ryland's King's Bench Reports. 1827—1830.
Mans.	Manson's Bankruptcy Cases. From 1894. Current Series.
Mar.	March's King's Bench Reports. 1639—1642.
Marsh.	Marshall's Common Pleas Reports. 1814—1816.
McCl.	McClelland's Exchequer Reports. 1824.
McCl. & Y.	McClelland & Younge's Exchequer Reports. 1825.
McQ.	McQueen's House of Lords Scotch Appeals. 1851—1865.
Meg.	Megone's Company Cases. 1888—1891.
Mer.	Merivale's Chancery Reports. 1815—1817.
Mod.	Modern Reports. 1669—1732.
Moll	Molloy's Irish Chancery Reports. 1827—1831.
Mont.	Montagu's Bankruptcy Reports. 1830—1832.
Mont. & C.	Montague and Chitty's Bankruptcy Reports. 1838—1840.
Moo.	Moore's Common Pleas Reports. 1817—1827.
Moo. Ind. App.	Moore's Indian Appeals. 1836—1871.
Moo. P. C.	Moore's Privy Council Cases. 1836—1862.
Moo. P. C. N. S.	Moore's Privy Council Cases, New Series. 1862—1873.
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Morr.	Morrell's Bankruptcy Reports, 1884—1893.
Mos.	Mosely's Chancery Reports. 1726—1731.
Mur. & Hurl.	Murphy and Hurlstone's Exchequer Reports. 1836—1837.
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N. & P.	Neville and Perry's King's Bench Reports. 1836—1838.
Nev. & Mac.	Neville and Macnamara's Railway Cases. 1855—1905.
New Pr. Cases	New Practice Cases (Welford, Bittleston and Parnell). 1844—1848.
Noy	Noy's King's Bench Reports. 1559—1649.

O. S.	Old Series.
Ow.	Owen's King's Bench Reports. 1556—1615.
P. D.	Law Reports, Probate Divorce and Admiralty Division. 1876—90.
P. W. (or P. Wms.)	Peere Williams' Chancery Reports. 1695—1736.
P. & D.	Perry and Davison's Queen's Bench Reports. 1838—1841.
Palm.	Palmer's King's Bench Reports. 1619—1629.
Par.	Parker's Exchequer Reports. 1743—1767.
Pat.	Paterson's Scotch Appeal Cases. 1851—1873.
Peake N. P.	Peake's Nisi Prius Cases. 1790—1812.
Phil.	Phillips' Chancery Reports. 1841—1849.
Pollex.	Pollexfen's King's Bench Reports. 1669—1685.
Pop.	Popham's King's Bench Reports. 1592—1627.
Pr. Ch.	Precedents in Chancery, by Finch. 1689—1723.
Pr. Reg. C. P.	Practical Register of the Common Pleas. 1705—1742.
Pri.	Price's Exchequer Reports. 1814—1824.
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R. R.	Revised Reports. A republication of such of the English Common Law and Equity reports from 1785 to 1865 as are still of practical utility. Current Series.
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Raym. Ld.	Lord Raymond's King's Bench Reports. 1694—1732.
Raym. Sir T.	Sir Thomas Raymond's King's Bench Reports. 1660—1684.
Ridg. t. Hard.	Ridgeway's Reports temp. Hardwicke. 1733—1737.
Ridg. Ap.	Ridgeway's Irish Appeal Cases. 1784—1796.
Rob. C.	C. Robinson's Admiralty Reports. 1799—1808.
Rob. App.	Robinson's Scotch Appeal Cases. 1840—1841.
Rob. W.	W. Robinson's Admiralty Reports. 1838—1852.
Rolle	Rolle's King's Bench Reports. 1614—1625.
Rose	Rose's Bankruptcy Reports. 1810—1816.
Russ.	Russell's Chancery Reports. 1823—1829.
Russ. & M.	Russell and Mylne's Chancery Reports. 1829—1831.
Ry. & M.	Ryan and Moody's Nisi Prius Reports. 1823—1826.
S.	Shaw, Dunlop and Bell's Scotch Court of Session Reports (1st Series). 1821—1838.
S. C.	Same Case.
[1907] S. C.	Scotch Session Cases (1907 onwards). Current Series.
S. L. R.	Scottish Law Reporter. 1865 onwards. Current Series.
S. L. T.	Scots Law Times. 1893 onwards. Current Series.
S. & B.	Smith and Batty's Irish King's Bench Reports. 1824—1825.
S. & C.	Saunders and Colt's Bail Court Reports. 1846—1848.
S. & L.	Schoales and Lefroy's Irish Chancery Reports. 1802—1806.
S. & M.	Shaw and Maclean's House of Lords Cases, Scotland. 1835—1838.
Salk.	Salkeld's King's Bench Reports. 1689—1712.
Sau. & Sc.	Sausse and Scully's Irish Rolls Court Reports. 1837—1840.
Saund.	Saunders' King's Bench Reports. 1666—1673.
Sav.	Savile's Common Pleas Reports. 1580—1594.
Say.	Sayer's King's Bench Reports. 1751—1756.
Sco.	Scott's Common Pleas Reports. 1834—1840.
Sco. N. R.	Scott's New Reports, Common Pleas. 1840—1845.
Scot. Jur.	Scottish Jurist. 1829—1873.
Scots R. R.	Scots Revised Reports. 1707—1873.
Sel. Cas. t. King	Select Cases in Chancery temp. King. 1724—1733.
Shaw H. L.	Shaw's Scotch Appeal Cases, House of Lords. 1821—1824.
Show.	Showers' King's Bench Reports. 1678—1695.
Sid.	Siderfin's King's Bench Reports. 1657—1670.
Sim.	Simon's Vice-Chancellors' Reports. 1826—1849.
Sim. N. S.	Simon's Vice-Chancellors' Reports, New Series. 1850—1852.
Sim. & Stu.	Simon and Stuart's Vice-Chancellors' Reports. 1822—1826.
Skin.	Skinner's King's Bench Reports. 1681—1698.
Sm. & G.	Smale and Giffard's English Vice-Chancellors' Reports. 1852—1857.

Smith	J. P. Smith's King's Bench Reports. 1803—1806.
Smy.	Smythe's Irish Common Pleas Reports. 1839—1840.
Sp.	Spinks' Ecclesiastical and Admiralty Reports. 1853—1855.
Star. S. C.	Star Session Cases, Scotland. 1824—1825.
Stark	Starkie's Nisi Prius Reports. 1815—1822.
Str.	Strange's King's Bench Reports. 1716—1749.
Stu. Mil. & Ped.	Stuart, Milne and Peddie's Scotch Court of Session Reports. 1851—1853.
Sty.	Style's King's Bench Reports. 1646—1655.
Swa.	Swabey's Admiralty Reports. 1858—1859.
Swan.	Swanston's Chancery Reports. 1818—1819.
T. L. R.	Times Law Reports. All the Courts. From 1885. Current Series.
T. R.	Term Reports (Durnford and East). 1785—1800.
T. & R.	Turner and Russell's Chancery Reports. 1822—1824.
Tam.	Tamlyn's Rolls Court Reports. 1829—1830.
Taun.	Taunton's Common Pleas Reports. 1808—1819.
Tyr.	Tyrwhitt's Exchequer Reports. 1830—1835.
Tyr. & Gr.	Tyrwhitt and Granger's Exchequer Reports. 1836.
V. & B.	Vesey and Beames' Chancery Reports. 1812—1814.
V. & S.	Vernon and Scriven's Irish King's Bench Reports. 1786—1788.
Vaugh.	Vaughan's Common Pleas Reports. 1665—1694.
Vent.	Ventris' King's Bench Reports. 1668—1681.
Vern.	Vernon's Chancery Reports. 1681—1720.
Ves.	Vesey, Junior's Chancery Reports. 1789—1816.
W. Bl.	Sir William Blackstone's King's Bench Reports. 1746—1780.
W. N.	Weekly Notes. From 1866. Current Series.
W. R.	Weekly Reporter. Reports in all the Courts. 1853—1906.
W. Rob.	W. Robinson's Admiralty Reports. 1838—1852.
W. W. & D.	Willmore, Wollaston and Davison's Queen's Bench Reports. 1837.
W. W. & H.	Willmore, Wollaston and Hodges' Queen's Bench Reports. 1838—1839.
W. & S.	Wilson and Shaw's Scotch Appeal Cases. 1825—1835.
Web. Pat. Cas.	Webster's Patent Cases. 1601—1855.
West	West's Reports, House of Lords. 1839—1841.
Wight.	Wightwick's Exchequer Reports. 1810—1811.
Will.	Willes' Common Pleas Reports. 1737—1760.
Wilm.	Wilmot's Notes and Opinions. 1757—1770.
Wils. Ch.	Wilson's Chancery Reports. 1818—1819.
Wils. Exch.	Wilson's Exchequer Reports. 1805—1817.
Wils. K. B.	Wilson's King's Bench Reports. 1742—1774.
Win.	Winch's Common Pleas Reports. 1621—1625.
Woll.	Wollaston's Bail Court Reports. 1840—1841.
Y. B.	Year Books. 1292—1345. The Year Books are usually referred to by the year of each King's reign, the initial letter of his name, and the page and number of the placita, to which is sometimes prefixed the initial letter of the term, e. g., M. 4 H. vii. 18. 10.
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Y. & J.	Younge and Jervis' Exchequer Reports. 1826—1830.
Yel.	Yelverton's King's Bench Reports. 1603—1613.
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Compiled by **C. E. A. Bedwell**, Librarian to the Honourable Society of the Middle Temple.

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Procedure.

By **Thomas Baty**, D. C. L., LL. D.; Barrister-at-Law.

I. Historical.

The great landmarks in the history of English Court Practice are the Statute of Westminster authorizing writs "*In Consimili Casu*", of 1285, and the Judicature Act of 1873. When we first become acquainted with the forms of procedure, we find them permeated by the inelasticity and strictness so familiar to us in the early history of the Roman Law, when *pluspetitio* was fatal and when an action failed "*de vitibus succis*", since it ought to have been "*de arboribus*". Unless one could bring one's claim under one of certain established formulæ or "counts" it was useless to take it into court. Such, for example, were the formulæ of claim in the actions termed "*debt*", "*detinue*", "*trover*", "*trespass*" and "*covenant*". Of these, *debt* and *covenant* were contractual, *trespass* and *trover* delictual, whilst the nature of *detinue* was long uncertain. Other actions, such as the "assizes", related to the recovery of land. The statute law early provided some escape from this rigour. By the provisions of an act of Edward I (1285) the clerks in the royal chancery were directed to accord to applicants in cases where there was no apt remedy, but yet such as were "*in consimili casu*" with some known form of proceeding, an action which may almost be termed an *actio utilis*. Highly beneficial as this statute was, it was not taken very sweeping advantage of. Its celebrated operation in developing a law of consensual contract, by insisting on the analogy of breach of contract to damage done to property in the course of performance of contract, and so to damage done to property by a mere wrong-doer ("*trespass*") is perhaps an instance of its widest operation: and it also proved extremely useful in developing a system of liability for negligent injuries. But the more subtle wrongs such as breach of faith, neglect to administer a deceased person's goods, insistence on the letter of transactions in disregard of their obvious intention, and the like, were never brought within the scope of the action "*in consimili casu*". At the same time that these new actions were introduced, the germs of a new jurisdiction are observable. This is the system known as Equity or Chancery. The reserve jurisdiction which, to a quite unlimited extent, was at that early time admitted to rest in the king, for the affording of justice where the ordinary law gave no remedy, or no effective remedy, began to be regularly exercised by a committee of the great officers of state, which gradually acquired the name of the Court of Chancery, and of which the most active member was the Chancellor. After the time of Wolsey, the Chancellor regularly sat alone in this court; and for long previously he was virtually its sole judge....how long, it is difficult precisely to say. In the first place, its jurisdiction seems to have been mainly exercised when an ordinary legal remedy was existent but inadequate: as where powerful local magnates or popular city merchants were sued. It appears no longer, since the examination of the "Tower" records, to be thought correct that the first occasion of its interference was the enforcement by the ecclesiastical chancellor of the keeping of faith by persons who had received property "on trust" for those ecclesiastical corporations who could not take it directly themselves. The enforcement of these and similar "trusts", however, did by the XV. century become a most important part of its business. And the apparatus of clerks with which the chancery was furnished eventually attracted to it jurisdiction in many matters of accounts; such as the distribution of deceased person's estates, and partnership matters. In other ways, too, it ameliorated the rules of the common law: conspicuously by refusing to allow creditors to retain or seize property according to the letter of their agreements, merely because some limit of time had expired. It thus secured jurisdiction over the whole law of mortgages of realty; which first appears clearly in the early XVII. century.

Other branches of its activity were of later growth. Its general jurisdiction over minors grew up at the Restoration, when the abolition of feudal tenures had rendered obsolete the old conceptions of guardianship. The free use of "Injunctions", (or interdicts) for the protection of ordinary legal rights, only dates from

the early years of the XIX. century; previously their main employment had been simply to afford a means of restraining a litigant from proceeding at common law where the rules of the court of chancery ("equity") gave him no such right as the common law conceded. Its converse jurisdiction to give "specific performance" of a contract (i. e. to send the promisor to prison until he performs his undertaking) is of very much older date, and might have attracted the whole law of contract into the chancery court, had not the common lawyers developed the action of "assumpsit". For many centuries the chancellor exercised the "praetorian" power of modifying the law: but since Chancellor Hardwicke (*circa* 1740) he ceased to do so, and the distinctive feature of modern "equity" is at the present day the heterogeneous class of cases with which it deals.

We have been thus particular in detailing the fragmentary way in which various classes of cases fell into the sphere of the chancery, because if we place them on one side, together with the cases that fell to the ecclesiastical tribunals set up by William I (which ultimately included, besides church causes, matrimonial causes and cases as to the validity, as distinguished from the effect, of testaments), we shall then be able roughly to say that all other cases were cognizable by the ordinary courts of law. There is one exception, important in a commercial work: — the Court of Admiralty asserted a jurisdiction in mercantile and maritime matters, founded in the fourteenth or fifteenth century, defined and restricted in the sixteenth, violently assailed thenceforward by the common lawyers, with all the aid of fiction and invective, and anew defined in the reign of Victoria. Thus we have (1) the common law courts (2) the chancery (3) the ecclesiastical courts and (4) the admiralty. And all had a different procedure.

The procedure of the common law courts and that of chancery may be respectively defined as "oral" and "scriptural". That of the ecclesiastical courts (which the chancery, in some respects, followed) was essentially that of the Roman law. That of the Admiralty, which was really a court of private international mercantile law (but rather in the sense of *jus gentium* than of modern "Comity"), was substantially Roman also.

It is noteworthy how wide the orbit of the ordinary courts of common law was. Chancery was a court "for great persons and great causes"; for administering masses of property and invoking the personal interference of the second subject in the realm, or else for disentangling a complicated skein of dealings: and chancery lawyers have always been distinguished in modern times for learning and acumen, as opposed to the arts of advocacy. The common law courts had a staff of twelve judges — but the "Chancery was the Chancellor", the few other judges were merely his succubi or representatives — he could re-hear their cases just as he could re-hear his own — he never was trammelled with a jury; and as a rule he did not see the witnesses. Their evidence was taken down by a local commissioner; it was little more than the answers put into their mouths to set questions framed by the agents for the parties. The delays of this process were great — (Cromwell ineffectually tried to remedy them) — and but for the great importance of the Chancery jurisdiction in "mortgages", companies, partnership and the winding up of estates, and in respect of patents and the like, it need hardly have required the attention of commercial lawyers. (Patent matters came to it, because of the extreme convenience of restraining infringement by the remedy of injunction, at one time peculiar to chancery, and always best understood there).

But the ordinary simple commercial case was a matter for the "Superior" common law courts. These were the Court of Common Pleas, and the Courts of the King's Bench and Exchequer; which latter, specialised in their origin, speedily acquired an exactly co-ordinate jurisdiction (except in small particulars). Local courts of "inferior" civil jurisdiction failed to maintain themselves against the King's justice, which the itinerant system rendered readily accessible. The few which survived did so as being courts of counties palatine, where the King's process did not avail. Local courts with limited jurisdiction have been again established since 1834. But to this day, a petty claim will often best be recovered by process in the superior court. The inferior "county court" is principally concerned, in practice, with trivial delicts and cases of redhibitory defects, and other contractual cases where the damages are small and unascertained ("unliquidated").

Taking then the cause in the superior courts of common law as the normal type of action, we find that the modern process has been evolved from the time

when the whole case proceeded orally in court. We have first the royal writ, commanding the defendant to appear and (at any rate by the XIII. century¹) couched in a proper formula disclosing the cause of action — then the plaintiff's "declaration", the defendant's "plea", the "replication", "rejoinder", "rebutter" and "surrebutter", followed by the "verdict" of the jury and the "judgment" of the court. Taken down in writing by the clerk of the court ("registrar"), these formed the "record" or formal archives of the trial. Gradually, time came to be allowed for the preparation of each pleading by the parties, and they began to hand them in to the court officials in writing. This became the fixed practice: and the trial in court was thenceforward restricted to the speeches of counsel and the evidence of witnesses — matter which is all no part of the "record". In early times we should have found no witnesses or jury at all. The proof was by oath (*compurgatio*), ordeal or battle. Witnesses were occasionally summoned, but merely to testify to the truth of the plaintiff's claim *de visu et auditu*. They differ little from compurgators. But battle was never popular in England; ordeal was frowned upon by the Lateran Council, and compurgation in days when the penalties of perjury were ecclesiastical only, had little to recommend it. However introduced, the jury filled one of those vacua which "*natura abhorret*", and rapidly superseded these discredited modes of trial. The prevalent theory in England is that they were first resorted to by the royal justice for the ascertainment of litigated facts, precisely as they were resorted to by the royal administration for the ascertainment of taxable property. However that may be, they were certainly utilized by the crown for the trial of cases under its new possessory remedy of "petty assize" introduced in 1166. It has been suggested (Bigelow, pp. 173, 335) that the Romanizing teaching of Vacarius suggested the new "possessory" remedies: and questions of possession, being mainly matters of fact, are eminently suitable for the verdict of the country-side. Thence juries spread to all classes of actions at Common law. But they at first combined the functions of jurymen and witnesses. It was a recommendation, and not, as now, a ground of objection, to a jurymen that he knew a good deal already about the case and the parties. The exact manner in which the jury came to be impartial and unbiassed judges of other people's testimony is one of the obscurest subjects of English legal history.

The judge and jury so established lasted until quite recent statutes of the last reign but one enabled juries to be dispensed with, commencing with the Common Law Procedure Act, 1854, which however only allowed it when both parties and the court desired the judge to sit alone (§ 1). The only noticeable, (and shifting) landmarks are the demarcation of the respective powers of the judge and jury, and the elaboration of the rules of evidence, both of which substantially took place in the course of the late XVI. and the XVII. century²).

In 1873 a Judicature Act was passed by which the common law, chancery and admiralty courts were fused into "The High Court of Justice", with different departments ("divisions") but, as far as possible, a common procedure. Previously, a litigant, with a good case in equity, might have had to go through an action at law, and then be obliged to resort to the chancellor to nullify its operation: now, every division can give effect to equitable rules. Previously, partly because the parties themselves were (until 1851) precluded from giving evidence, a chancery suit for "discovery" (i. e. the administration of set interrogatories to be answered by the other party on oath) was a common adjunct of a common law action: now, every division can order such "interrogatories". Apart from such facilities, there is still a deep gulf fixed between the various divisions. In their atmosphere and traditions, in the subjects with which they deal, in their procedure and to a considerable extent in their Bar, the Chancery Division (Ch. D.) and the King's Bench Division (K. B. D.) are still almost as sharply distinct as when the King's judges sat at Westminster, and the vice chancellors who in the XIX. century supplanted the Chancellor as judges of first instance in chancery, at various rooms near Chancery Lane. All the Divisions are now housed at the Royal Courts, half-way between the seat of the legislature and the centres of business. The three common law Divisions were united into one (K. B. D.) in 1880. The Admiralty court (which used to apply somewhat Romanized

¹ See Bigelow, pp. 150, 170, and especially 196.

² See G. G. Alexander: *The Functions of the Judge and the Jury*. (Law Magazine, London, 1905—6, pp. 1, 185, 289, 551 and 1906—7 p. 72.)

doctrines) has since the amalgamation tended to approximate in its rules more closely to the common law. And the Chancery courts have to a large extent abandoned the practice of leading evidence in a written form: they have adopted, except in cases where the facts are uncontroverted, the practice of having the witnesses cross-examined in open court. Perhaps the most really valuable reform of 1873 was to do away with the necessity of bringing a common law action in one of the established formulæ. Previously, if one "declared" in Trespass it was fatal if the case turned but to be really one of Detinue. Many cases in the reports which are difficult to understand "turned on a point of pleading" in this fashion.

Since 1873 the principal changes have been the introduction of the "summons for directions" — by which the court officials (practically in the K. B. D. only) map out from the commencement of the action the course which its procedure is to follow in various details which used formerly to be the subject of separate applications by the parties; — and, what is really a different step in the same direction, the establishment of the so-called "commercial court". That court is not known to the law: it exists merely by arrangement between the king's bench judges, who distribute their business amongst themselves in such a way that one of them is in charge of this particular class of case and is supposed to be cognizant of all proceedings in each action of the kind. Special arrangements are made for the relaxation of the ordinary elaborate "pleadings" and for speedy trial and the modification of the strict rules of evidence in these cases.

To add a word on the history of appeals. These have never been much encouraged by English law. In Chancery, the judge of first instance was the Lord Chancellor; and until the House of Lords, after the Restoration, acquired a power of reviewing his decisions, there was no tribunal which could have ventured to do so. In common law matters, the "twelve judges of England" were of somewhat higher authority and consequence than the King's Bench and Chancery judges of to-day. An act of Elizabeth indeed established an appeal from each common law court: but the appeal was only to their brother judges of the other two. This was known as the Court of Exchequer Chamber, and by the time of the late Stuarts, its decisions could be again reviewed by the House of Lords. But such appeals were strictly limited to cases of "error apparent on the record". The most perverse verdict of a jury could not be corrected by the Exchequer Chamber, for the evidence on which it found its verdict was not on the record, and thus no error was apparent. Such appeals were therefore all on matters of law; and frequently very technical matters of law — namely, errors in pleading. Admiralty appeals went to a mixed court of judges and Roman civilians until 1834, when the new "judicial Committee of the Privy Council" was substituted for the "High Court of Delegates"; and here appeals of fact were (in accordance with the Romanized procedure) more freely entertained.

It will thus be seen that English Common law made little provision for appeals on the facts of a case. This is an inevitable consequence of its methods of trial. Unlike those systems which assume sworn testimony to be of almost conclusive weight, the process of English justice is to weigh and balance each witness's evidence on its merits; and to test its credibility by the most searching and wide cross-examination. This is a process which cannot be repeated twice. An untruthful witness knows, on the second trial, what the weak places in his story are, and can correct his deficiencies. He cannot be twice surprised into telling the truth. Unexpected cogent evidence cannot be produced unexpectedly more than once. On the other hand, if the evidence is not taken afresh, but is merely read to the appeal court, they cannot form any opinion as to the demeanour of the various witnesses, nor as to the straightforward, hesitating or over-confident way in which they answered the questions. The trial is a unique contest of wits which can never be repeated, and in which it is impossible for a non-spectator to award the victory. This applies with special force to jury trials. At the same time, there may be some miscarriage of justice in a trial, so violent as to render a new one necessary: it became recognised about the Tudor period that in such cases a "new trial" could be allowed by the full court. This was not an appeal, since if granted the whole process of trial had simply as a consequence to be repeated; but a very frequent occasion of it was in the case where the judge had "misdirected" (i. e. laid down wrong law to) the jury. If the jury had found a verdict "against the weight of the evidence", it was (and is) possible to grant a new trial: but the court, for the reasons above,

is most averse from disturbing the finding of a jury, or even of a simple judge, on matters of fact.

The functions of the Exchequer Chamber, and of a very modern (1851) court of corresponding functions on the chancery side, were transferred in 1873 to a "Court of Appeal", which is practically composed of the Master of the Rolls (an old Chancery title, retained out of sentiment) and five "Lord Justices", and it was at the same time made a court of appeal in Admiralty. Together with the High Court of Justice, it constitutes the "Supreme Court" — a term which is seldom used. There is in all cases a further (and expensive) appeal to the House of Lords.

The old court of King's Bench had a general superintendence of all "inferior" courts. The modern King's Bench Division of the High Court still exercises it, and appeals from the local "county courts" lie to it accordingly, but, here again, only in matters of law. County court Judges are said to frame their judgments as much as possible in the shape of "findings of fact".

Chancery judges invariably (except in modern appeal cases) sat alone. In the common law courts, cases were usually tried "at nisi prius", either in London or on circuit by a single judge¹) with a jury. But points of law, raised on the pleadings before trial ("demurrers") or reserved by the judge, were solemnly argued at length "in banco" in London before the full court, as in the case of applications for a new trial, or motions to enter judgment for either party in cases where the legal effect of a diffuse verdict was obscure. At the time of the Judicature Act, 1873, this procedure was to some extent preserved: certain proceedings were directed to be brought before "divisional courts" of two or more judges. Prominent among these are appeals from inferior tribunals.

II. Rules of Procedure.

The main features of Procedure are incapable of alteration except by legislative authority. But the details of the manner in which the steps in process are to be carried out are left to be regulated by the judges. "Regulae Generales" have been published in Chancery since the time of Bacon: similar regulations have been propounded in the common law courts by authority of the Common Law Procedure Act 1852 and by the Judicature Act of 1873. A special committee (the "Rules Committee") constituted to promulgate them, now consists of the Chancellor, the Chief Justice, the President of the Admiralty Division, five other judges, two barristers and two solicitors.

The Rules so enunciated are contained in 72 "Orders" of very various length, each dealing with a particular topic and containing from one to sixty "rules". They are cited as ("R. S. C., O. . . . r. . . .") (Rules of the Supreme Court, Order . . . , rule . . .). In what follows, the letters R. S. C. will be omitted as superfluous. There is another set of regulations known as the Supreme Court Funds Rules (S. C. F. R.), dealing with financial transactions, in respect of "funds in court".

In the conduct of proceedings, it is almost invariable to employ a "solicitor". "Parties in person" may conduct their own suits: but the intricacies of procedure render it a dangerous course. Besides, the personal relations between the officials and the solicitors who are constantly in touch with them is such that the wheels and springs of the whole machinery move much more smoothly when the regular agents are in charge of the proceedings. "Solicitors" are technically officers of the court; there is no limit to the minimum fees they can charge (though there is to their maximum); and they are not absolutely debarred from making remuneration dependent on success. In the "County Courts", even, it is only a very occasional litigant who relies on his own unaided efforts. County Courts were intended to be tribunals in which legal assistance might be largely dispensed with. For that very reason, county court judges do not extend to the litigant "in person" that great indulgence which will invariably be shown to him in the superior courts. Consequently, a solicitor is here, also, rather a necessity than a luxury. In the progress of the case, the intervention of a "barrister" may be requisite. A solicitor cannot address the Superior Court or examine witnesses there. He may do so before judges and officials in private ("in Chambers") but the business in open court must be left to the bar. Also, the solicitor is absolutely protected from any liability

¹) Statute of Westminster, *ut supra*.

for negligence towards his client if he takes and follows the advice of "Counsel" (barristers). Accordingly, the more important steps in an action — the drawing of pleadings, — the determination of the necessary evidence — the settlement of the parties in any case of complication; — and in short any step beyond common form, are generally undertaken on the advice of a barrister. Barristers are occasionally instructed to appear "in chambers" and in the county court. If once consulted in the progress of a case a barrister is by custom entitled to be consulted at every stage where a barrister is in fact employed, and to be "briefed" to appear at the trial (if any).

Many, or most, routine matters antecedent to and subsequent to, trial, can be disposed of by one of the "masters" in "chambers" (who are really sub-judges) or even by their clerks. They are well-paid officials (about £1500 p. a.) and usually selected from the ranks of solicitors. From them, an appeal lies to a judge "in Chambers", and then (in all cases of practice and procedure) to the court of appeal in public, and so to the House of Lords.

The "solicitors" will also, if they do not practise in London, employ "London agents"; since most of the minor proceedings in the action will take place in the "Central Office" of the Supreme Court there. An exception exists in the case of actions which are commenced in local offices of the Supreme Court called "District Registries", of which there are about 100. In that case, the local District Registrar takes the place of a Master. It is quite rare to find a chancery case commenced in a District Registry¹; nor can proceedings by originating summons, motion or petition be commenced there. In the case of the District Registries of Liverpool and Manchester, the District Registrar has somewhat wider powers, and can issue originating summonses. The defendant can always remove the action to London; either by electing to "enter appearance" there, or by giving early notice, or else by leave of a judge or master. It must be distinctly understood that the locale of the Registry has nothing to do with the place of trial: e. g. a Central Office case can be tried at Liverpool, and a Newcastle District Registry action in London. It merely regulates the place of "chamber" proceedings and formal steps in the process. After final judgement has been given in the action the District Registry is still the proper place to give directions as to how it shall be executed.

III. Jurisdiction.

The courts of England will take cognizance of almost any claim, relating to any subject-matter and between any parties. The sole ordinary requirement is that the defendant shall be served with process in England (of course service elsewhere in the Empire will not do). There are some cases in which a suit will be entertained when the defendant is abroad, and these will be discussed below.

And there are exceptional cases, in which though the defendant is in England, the court will decline jurisdiction. It will not do so on the ground of any agreement to refer matters to some different tribunal; though an agreement to refer disputes actually or prospectively to arbitration would be recognised in cases where the arbitration can be controlled by it, and the arbitration conducted under its rules (and in *Law v. Garrett*, (1878) 8 Ch. D. 26, an agreement to refer disputes to a foreign court (which could not be so controlled) was recognised under a different principle — namely, that process was, already, proceeding in the foreign court: in which event the English court has always an option whether to proceed concurrently or not). But it will decline to divorce persons domiciled abroad, and it will not affect to pronounce decrees affecting foreign immovables. Since, however, it will use its personal jurisdiction over parties within the realm for the purpose of compelling them to deal with foreign immovables, this exception is smaller than it seems. So in *Paget v. Ede*. (1874) L. R. 18 Eq. p. 118, the court enforced a mortgage of foreign land. Torts in respect of foreign immovables² are not treated as being within the jurisdiction: other torts are, provided of course that the defendant is served with process in England, and that the acts complained of would be illegal whether done in England or abroad.

¹ In the District Registries about 27, 500 writs of summons issued in 1905 (25, 000 in 1910) on the K. B. side, as compared with 303 (248 in 1910) in chancery [of which 115 (131 in 1910) were in Liverpool and Manchester].

² *Companhia de Mozambique v. Brit. S. Africa Co.* [1893] A. C. 602.

We must add that during the last five or six years the courts have developed a new tendency to refuse jurisdiction on the ground of alleged oppressiveness. The first of these cases was *Logan v. Bank of Scotland*¹⁾. There, both plaintiff and defendant were domiciled in another country; the case had no connection with England: above all, the defendant bank was only "served" in England by virtue of the legal fiction which allows a firm to be served where it carries on business. Considering these matters, and the great inconvenience of bringing a banking firm's books to London from Edinburgh²⁾ to repel a £50 claim, the Court of Appeal (reversing Mr. Justice Phillimore) declined jurisdiction. In *Egbert v. Short*³⁾ and *Re Norton*⁴⁾ the plaintiff was in each case a wife whose husband was in India. In *Egbert*, the plaintiff brought an action against a solicitor settled in India, for alleged negligence in collecting her maintenance from the husband. In *Norton*, she sued her husband for arrears of maintenance. The Court refused to entertain either claim; although, in *Norton*, the lady was unable, for reasons of health, to live in India. It thus uses a rare and peculiar prerogative (the power of declining to be the engine of oppression) for the every day, commonplace purpose of refusing to entertain cases which it would be very inconvenient for the defendant to come to England to attend to. The consequence is that no-one can say whether an action against a person who is settled abroad will be allowed to proceed or not — a most unsatisfactory state of things, and one which it may be hoped will speedily be corrected by the House of Lords⁵⁾.

As to the recognition of foreign judgments, these if final⁶⁾ and not interlocutory (although possibly subject to appeal) will generally be treated as a good ground of action (quasi-contract) in England. Only Irish and Scottish judgments are admitted to *exequatur* and execution as English ones. But in order that a foreign decree may be successfully sued upon, it must have been given by a court having jurisdiction over the matter: and the principles on which a foreign court is admitted to have jurisdiction are not precisely the same as those on which the English court claims to exercise it. The question has never been very thoroughly examined. In *Sirdar G. Singh v. The Raja of Faridkôt* [1894] A. C. 670, recognition was refused to a decree of the court of the Râja giving judgment in his favour against a foreign ex-official of his State who had absconded, leaving, as was alleged, heavy defalcations. But presumably a decree of the court of the territory where the defendant (a) was present (b) was domiciled (c) was resident (d) was a subject, or (e) had submitted, or agreed to submit, to the local jurisdiction would generally be regarded as made with jurisdiction, and conclusive. The same cannot be said of a decree of the court of the country where the cause of action arose, or where the defendant had property. Decided cases are scanty on these matters. The late eminent judge, Lord Blackburn, in *Schibbsby v. Westenholz* (1870) (L. R. 6 Q. B.), p. 161, was inclined to lay down a somewhat liberal rule, recognising in some measure the *forum speciale obligationis*. But since the Faridkôt case just referred to, it has been usual to regard residence, or at least presence, of the *reus* within the adjudicating jurisdiction, a necessity, unless he is a subject of that State. At the same time, the judgment in that case is not strictly binding: it was delivered by the late Lord Selborne on appeal from an Indian court. The judgment of Lord Blackburn is much more elaborate, and it is possible that the Indian case might be disregarded or limited to cases where the facts were precisely similar. The latest case on the subject is *Emanuel v. Symon*, [1908] 1 K. B., p. 302. An award in an arbitration cannot of itself be enforced as a judgment in England⁷⁾. But if duly made executory, it might be.

The same strictness does not apply to the recognition of judgments *in rem*. These have always been frankly accepted and admitted to execution in England without the necessity of commencing a fresh suit. For the ground of the suit in other cases

¹⁾ [1906] 1 K. B. 141.

²⁾ It does not seem, however, that this was necessary (Banker's Books Evidence Act: 42 & 43 Vic., c. 11 § 3).

³⁾ [1907] 2 Ch. 205.

⁴⁾ [1908] 1 Ch. 471. (Court of Appeal, reversing Mr. Justice Eady).

⁵⁾ See *Blätter of the Berlin Society of Comparative Jurisprudence and Political Economy*, III. 6, p. 189, II. 2, p. 106: *Law Magazine and Review* (London), Aug. 1908, p. 463.

⁶⁾ *Re Henderson* (1889) 15 App. Cas. 1.

⁷⁾ *Merrifield v. Liverpool Cotton Association* (1911) 105 L. T. 97.

was originally a fictitious promise by the judgment debtor to pay the sum adjudged due: and *ex hypothesi*, in an action *in rem*, there is no defendant in a position to contract in this way¹). Personal decrees, as has been said, must form the subject of an action, and there seem to be no instances in which any foreign decrees *in personam*, except for the payment of a certain fixed sum of money, have been successfully made the basis of a claim. Also, since the foreign judgment is regarded in the light of a contract or quasi-contract, the English court will apply its own limitation period to it, as part of the *lex fori* proper to the decision of such questions of procedure.

IV. Commencement of Action.

Actions are now generally commenced in all divisions of the High Court (except in Divorce) by the issue of a "writ of summons". In some cases however the legislature has made it necessary or sufficient merely to take some more summary step than the issue of a writ of summons with the elaborate proceedings entailed thereupon. There are certain interlocutory processes known in the progress of an action as "petitions", "motions" and "summonses". When the use of similar processes for the decision of questions, without any action being already in existence, is authorized by statute (or by statutory rules made by the judges), the proceeding is termed an "originating" petition or summons, or an "original" motion. In commercial practice good examples are an original motion to rectify the register of a company, an originating petition for the revocation of a patent and an originating summons to have a document judicially interpreted. They are seldom met with in the K. B. D. It is also possible, and quite frequent in the K. B. D., for a person already a party to an action as defendant, to commence proceedings against the plaintiff by "counterclaim", or to bring in other persons as being liable to indemnify him, by "third-party notice" or "interpleader summons".

All originating process²), whether a writ of summons or other, must as a rule be personally served on the defendant; service being effected by showing him the sealed writ, and tendering him a copy. This is done by the plaintiff (almost invariably in practice, by his solicitor's clerk). On applying at the Court office for the writ to be authenticated, the Solicitor takes two copies prepared by himself: one is left at the office, one is returned sealed (and is styled the "original"), whilst a third copy is made to be left with the defendant; and on effecting the service a memorandum of the date must at once be made on the original by the very person who served it. This is imperative³). Service cannot be made abroad without leave by a judge (usually accorded in private—"in chambers"): and this leave can only be given in the following eight cases.

I. Immovables.

1. Where "the whole subject-matter of the action is *land situate within the jurisdiction* (with or without rent or profits)"⁴) (O. XI. r. 2. [a]); even where the action is only for the perpetuation of evidence relating to land (R. S. C. May, 1912).

2. Where "any act, deed, will, contract, obligation or liability, affecting *lands or hereditaments*"⁵) *situate within the jurisdiction*, is sought to be construed, rectified, set aside or enforced in the action" (*Ibid.*, [b]).

[This needs a little explanation. The strings of words of nearly equivalent meaning are characteristic of English law, which prefers to specify rather than to generalize. But "deed" means "juristic act under seal" and may be contract, fiduciary declaration or conveyance: "contract" may be an informal written or verbal agreement: "obligation" includes fiduciary, delictual and quasi-contractual obligation, as well as contractual; and "liability" is almost identical in meaning, except that it rather implies that the obligation does not yet presently exist, but will do so at a future date. "Enforced" explains itself: the words "construed", "rectified"

¹) The *City of Mecca* (1879) 5 P. D., p. 28.

²) There is an exception in the instance of what is called an "original special case", but these are very rare. They are joint statements of fact agreed by the parties and laid before the court, for the interpretation of a document.

³) *Hamp-Adams v. Hall* [1911] 2 K. B. 942.

⁴) "Mesne profits" are an equivalent for rent, payable in some cases where no agreement sufficient to support a true rent can be alleged or proved to exist,—*fructus*.

⁵) "Hereditaments" practically means immovables and *jura in rebus immobilibus*.

and "set aside" refer to much less common proceedings, derived from old Chancery practice, by which an aggrieved party may have a transaction cancelled or remodelled on proving that it was vitiated by fraud, duress, or similar defects, or may have the terms of a document judicially interpreted.]

II. Personal.

3. Where "any relief is sought against any person domiciled¹⁾ or ordinarily resident within the jurisdiction" (*Ibid.*, [c]).

4. Where "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction" (*Ibid.*, [g]).

[See, as to the limits which the court is inclined to place on this broad rule, the case of *The Hagen* [1908] P. 189. Evidently there must be some limitation; otherwise actions would be brought against unnecessary parties in order to bring in foreign defendants who could not be otherwise sued here. But the case of *The Hagen* is complicated by the fact that proceedings were concurrently going on in Germany (cf. *Law Magazine*, Aug., 1909, p. 474). *Witted v. Galbraith* [1893] 1 Q. B. 431, 577 establishes the general principle that parties must not be joined for the mere purpose of bringing the clause into play. See also an even stronger case in *Pleskett v. Eddis* (1898) 79 L. T. 136: and cf. *Sharples v. Eason* [1911] 2 I. R. 436. The importance of absolute candour and full disclosure by the plaintiff, from the earliest stage of the application, cannot be too much insisted on.]

III. Locus Actus.

5. Where "the action is founded on any breach (or alleged breach) within the jurisdiction, of any contract, wherever made, which according to the terms thereof ought to be performed within the jurisdiction (unless the defendant is domiciled or ordinarily resident in Scotland or Ireland)" (*Ibid.*, [e]).

6. Where "any injunction²⁾ is sought as to any thing to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof" (*Ibid.*, [f]).

[This sweeps in many cases of tort, and quasi-contract. For, although it must be conceded that the claim for the injunction must be bona fide³⁾, and not colourable merely, yet in all cases where the injury is continuous, an injunction is a natural and proper remedy. It is also appropriate for the enforcement of the duties of persons in a fiduciary position. The express mention of nuisance⁴⁾ is difficult to understand. Private civil actions to restrain it can hardly take any other form than that of actions for an injunction, and public proceedings are regulated by a different set of rules.]

IV. Universal Succession.

7. Where "the action is for the administration of the personal⁵⁾ estate of any deceased person who at the time of his death was domiciled⁶⁾ within the jurisdiction" (*Ibid.*, [d]).

V. Universitas Bonorum.

8. Or for "the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of England" (*Ibid.* [d]).

[This does not apply to written instruments generally; but only to such as create the peculiar duty known as a "trust", which is neither contract nor exactly

¹⁾ *i. e. stricto sensu*. In British law, a person can only have one domicile; and it is the place where he has his principal establishment — with a strong leaning against change, where there is any competition of establishments. Thus a Manchester banker was held not to acquire a Scottish domicile by making his principal private home there.

²⁾ Interdict.

³⁾ *De Bernales v. N. Y. Herald*. [1893] 2 Q. B. 97 (n.). See also *Watson v. Daily Record* [1907] 1 K. B. 853 — which further limits the jurisdiction and shows that the claim must not only be bona fide, but such as would, if sustained, induce the Court to grant an injunction. *Alexander v. Valentine* (1908) 25 T. L. R. 29 shows that the limitation is not serious.

⁴⁾ Interference with the enjoyment of immovables, falling short of physical intromission with the possession.

⁵⁾ Since 1897, administration actions are no longer limited to personal estate.

⁶⁾ *Vide supra*: and note that residence is here insufficient.

fideicommissum. It is very difficult to say whether the English courts would consider that a trust could be created by a document not plainly referable to English law: but in any case the present rule is restricted expressly to trusts which "ought to be executed according to the law of England". What are such trusts? Those in which the trustees (*fideicommissarii*) or the bulk of them¹) are English, or domiciled in England? or those in which the property is English immovables, or (perhaps) movables? or those in which the phraseology points to an intention to refer to English law? The answer must be pronounced to be quite uncertain.]

Section 5 (relating to contract) has occasioned much dispute. A contract may give an option to the party sued to perform in England: this is not a case in which leave can be given²). A contract may be a purely negative one; e. g. not to dismiss an agent until the expiration of a certain term: — this, it seems, may be a contract "to be performed in England" by the principal if the agent's employment was there³), and leave can be given accordingly to serve the principal with a writ in Spain if the agent complains that he has been dismissed in breach of the contract. The tendency is at the moment to enlarge the jurisdiction. It ought also to be observed that the rules allow service abroad on a person having an English domicile or even residence. This does not enable service to be made abroad on persons who have merely contracted to accept an English domicile for purposes of the main contract. For they cannot confer on the court a jurisdiction which it does not in fact possess⁴). Somewhat inconsistently, an agreement to allow service on an agent resident in England to be valid, has been held to validate such service. Lastly⁵), leave cannot be given, in these cases of contract, to serve the defendant in Scotland or Ireland.

The process of obtaining leave is as follows. An affidavit, or sworn statement, duly stamped and filed at the court offices, must be prepared stating (1) the deponent's belief that the plaintiff has a good cause of action, (2) the place where the defendant is or probably may be found, (3) the grounds of the application for leave to serve him abroad, and (4) whether or not he is a British subject, (5) the amount in dispute and (6) the facts bringing the case within the rule. This will be left with the court officials; and, the matter being informal, the judge's decision will be communicated to the solicitor on calling in a day or two. Of course an appeal can be made, which would be heard in court.

The writ originally issued will not (unless it was issued by leave) be allowed to be served abroad: but a fresh "concurrent"⁶) writ, dated like it, will be issued for that purpose. For this reason it is more usual (unless the defendant is not known to be abroad at the time of issue) to make a single application to the judge, (I) for leave to issue the writ, (II) for leave to serve it abroad. The whole procedure originally applied strictly to "Writs of Summons" (including counterclaims and third party notices). "Originating summonses", "originating petitions", and "notices of original motion" (or, "originating notices of motion") could not be served abroad at all. This, however, has been altered by R. S. C. Aug. 1909 (O. II, r. 8a); and any "summons, order or notice" can now be so served (but not petitions). This rule was interpreted (e. g. by Eady and Joyce, JJ. — vide *An. Pr.* 1911 *in loc.*) with great breadth, and was not regarded as restricted to the eight cases above-mentioned. Since an originating summons may ground very serious consequences,

¹) This seems to be the test of whether the fiduciary instrument is English for the purposes of taxation on succession. Westlake, *Priv. Int. Law*, Ed. IV; § 153, 116; pp. 198, 137. Cf. *Cammell v. Sewell* (1860) 3 H. & N., 78.

²) *Comber v. Leyland*. [1898] A. C. 524.

³) *Mutsenbecher v. Aseguradora* [1906] 1 K. B. 254. But compare *Holland v. Bennett*. [1902] 1 K. B. 867, in which leave was refused. The subject is discussed shortly by the present writer, *apud Law Magazine and Review*, Febr. 1906 p. 216. The only substantial distinction between the two cases is that in the latter the defendants wrote a letter of dismissal: in the former they sent an agent to England to dismiss the plaintiff. In contracts c. f. i. and f. o. b., where the buyer is in England, the place of performance is *prima facie* the port of shipment (*Crozier v. Auerbach* [1908] 2 K. B., 161).

⁴) *Brit. Waggon Co. v. Grey* [1896] 1 Q. B. 35, *Montgomery v. Liebenthal*, [1898] 1 Q. B. 487. Cf. the Irish case *Limerick v. Crampton* [1910] 2 I. R. 416.

⁵) Leave is required for service in the Colonies, the Channel Islands, etc. which are juridically "abroad" as well as Scotland and Ireland.

⁶) Provision has been made (R. S. C. July, 1911; O. 6 (1a, 2a) for the issue of "concurrent" originating summonses.

this constituted a grave state of affairs. In *An Arbitration between Akt. Roberts-fors v. Soc. Anon. des Papeteries de L'Aa* ([1911] 2 K. B. 727) the Court of appeal held that such a restriction was implied. The rule would otherwise seem to be *ultra vires*, assuming for the Court a jurisdiction which only the Legislature could give. As Lord Coleridge says, Rule 8 A of Order 11 is only supplemental to but not independent of, the remainder of the rules contained in the order. Where the local law does not allow the service of foreign process, and also in cases where the defendant is a foreigner in a politically foreign country (including, no doubt, protectorates) "notice in lieu of service" is given instead of service of the writ itself. There is no difference in practical effect, except where, as in Russia, Germany, Portugal, Spain, Belgium and Japan, the notice is served through the national authorities. We have said that service must be personal. But in extreme cases "substituted service" may be allowed. Any means which are likely to bring the writ to the defendant's knowledge may be adopted for this purpose. Advertisement is one common method: service on a relative or a business representative may also be adopted. Postage is employed sparingly, and seldom as the sole method. The "notice in lieu of service" above referred to must be personally served, like a writ: here again, if that is impracticable, a substitute, e. g. advertisement, will be directed. To obtain leave for "substituted" service, the applicant must show that every effort has been made to serve the writ or notice personally, without effect; and that the proposed steps (which it must clearly specify) are likely to bring it to the defendant's notice. If the reason why personal service could not be effected was not a mere matter of practical difficulty, but arose from the fact that the defendant was not in England at all, substituted service cannot be ordered, unless the defendant absconded for the very purpose of avoiding service. It is not meant to confer jurisdiction on the court where none exists, but only to overcome practical obstacles.

Particular methods of service have also to be resorted to in particular cases. Thus minors, lunatics, corporations, limited companies and firms require special treatment. Regarding English limited companies, service may be effected by leaving the writ at their registered office, (even by post)¹. Foreign companies might be served, like other corporations, by serving their "head officer, [principal] clerk, secretary or treasurer". The company must, to enable this to be done, in some way be "within the jurisdiction", and it is not enough that it carries on business there: but very little in the way of an office will suffice; thus in *Dunlop v. Aktiengesellschaft*² sales at a stall in an exhibition during nine days were enough to ground a valid service, and the person in charge of the stall was held to be a "head officer". On the other hand, the mere keeping of a company's register in England, and the transfer of shares there, was insufficient, there being none but administrative work concerned³. Two shipping cases show very clearly the subtlety of the distinction. The *Cie. Gle. Transatlantique* was successfully served in London, where it paid the rent of an office where its agent worked on commission for it and for two other companies. The *Société John Cockerill* was unsuccessfully served there, where it had its name on the door of an office of a firm who acted as agents for it and others, and who paid their own rent⁴. The manager of such a firm was in no sense the foreign firm's officer. The present writer's opinion, for what it is worth, is that the distinction is unsubstantial and the former case wrong. It is a conclusive decision, but of course only in cases where the facts are substantially the same. It was followed, however, in the *Saccharine Corporation Case*⁵ [1911] 2

¹) 25 and 26 Vic., c. 89, § 62.

²) [1902] 1 K. B. 342.

³) *Badcock v. Cumberland*, [1893] 1 Ch. 362.

⁴) *The Bourgogne*, [1899], A. C. 431. *The Princess Clémentine* [1897] P. 18.

⁵) A strong feature in this case was that the defendants regularly sent some of their goods to be stored at their London agents' office (though the agent paid the rent). Even so, Lord Justice V. Williams had "very great doubt whether they was sufficient evidence to establish the fact that the defendants do carry on their business at the premises" in London. He added that "the place in this country where the foreign corporation carry on their business, must not only be a fixed place, but must also be the place of the foreign corporation in the sense that it has a right to be there." On the other hand, Lord Justice Moulton thought that "that was a very strong case indeed". Lord Justice Farwell also thought it a clear case. The Act of 1908 was not referred to, and the opinions of Lords Justices Moulton and Farwell appear to assume that it is enough to show that a corporation carries on business within the jurisdiction to enable it to be served there. That is certainly not the

K. B. 516 C. A.) in which the majority of the court appear to identify "residence" in the case of a corporation with "carrying on business". In future there will be less difficulty on the subject. For, if a foreign company "*has a place of business*" within the United Kingdom, it is bound by 8 Edw. VII c. 69, § 274 to register the address (which need not be in the same part of the U. K. as that in which it carries on its business) of a person authorised to accept service of process: and service on such person (even by post) is valid and sufficient.¹⁾ It should be remarked that, in accordance with general English principles, if once the personal jurisdiction is thus established, it will be immaterial that the cause of action had no special connection with the place where business is so carried on, or with the class of business carried on there²⁾; and this is so even when service is effected under the Act of 1908. The position of foreign associations which are neither incorporated companies nor firms is somewhat uncertain. But they would probably be assimilated to foreign firms. Firms (unincorporated) are in English law nothing but the individuals who compose them; yet the partners may, if the plaintiff chooses, and the firm carries on business in England³⁾ be sued in the firm's name; and then service may be effected in England (1) on any partner — there is nothing to exclude the case of a "limited partner" under the Act of 1907 — (wherever he may be, in England) — or (2) on any person then having the control or management of the business at its principal seat in England. In the second case, notice must be given at the time of service that the person served is served as a manager, or as a manager and partner. In both cases, the service binds any partners who may be abroad (but only as to their English assets). So that, if *all* the partners were abroad, and service effected on a mere manager, it would seem that the service would still be valid, though none of them could possibly have been served individually³⁾. Much the same rules apply as in the case of companies with regard to what is "carrying on business". It is not "carrying on business" to employ an agent in England to collect orders, with no power of accepting or rejecting them, even if the firm's name is on his office door. Nor is it within the rule, if a firm sends over responsible agents to purchase, without having an office⁴⁾. Nor if it sends over an agent to supply it with the means of doing business, even if he has an office⁵⁾. But where the financial business of a company is conducted in England, and its operations abroad, it can be served at its English office⁶⁾.

Lastly, it must be noted that it is permissible to sue a single person carrying on business alone under a fancy title or an assumed name, in that title or name. Then the rules as to service on firms will apply: but only "as far as possible" and if he is a foreigner abroad, service on his manager will *not* affect him⁷⁾.

A writ for the recovery of land may be served by nailing it on the door of a building on it, or other conspicuous place, when service cannot otherwise be effected: and a writ in an Admiralty action *in rem*, by nailing it on the main mast for a short time and replacing it by a copy: (or by serving the person in charge in the case of cargo).

law, according to the previous cases: and the act of 1908 has made no difference in that respect. The company must "be at home" here, as well as carrying on business here. A private person cannot be served in England merely because he carries on business there: why should a corporation be treated differently?

¹⁾ Note, however, that the company must "have" a place of business in the realm, and that it is doubtful exactly what this covers (though it expressly includes a share transfer office). In the *Princess Clementine* the ground of the decision was that the place of business was not that of the company, but of independent persons who incidentally did business for it. Again, the "company", to come under the rule of the Statute, must be "incorporated" abroad. Does this include bodies which are incorporated by custom and under no special legislative provision?

²⁾ *Haggin v. Comptoir*, (1889) 23 Q. B. D. 519.

³⁾ *Dobson v. Festi*, [1901] 2 Q. B. 92. *Grant v. Anderson* [1892] 1 Q. B. 108.

⁴⁾ *Singleton v. Roberts* (1894) 70 L. T. 687.

⁵⁾ *Allison v. Independent Press Cable etc.* (1911) 28 T. L. R. 128, where the agent supplied it with news.

⁶⁾ *Actieselskabet D. S. Hercules v. Grand Trunk Pacific* [1912] 1 K. B. 222.

⁷⁾ *St. Gobain v. Hoyeremann's Agency* [1893] 2 Q. B. 96. See generally as to firms, *Worcester Bank v. Firbank*, [1894] 1 Q. B. 784. *West. Nat. Bk. v. Perez*, [1891] 1 Q. B. 314. *Indigo Co. v. Ogilvy*, [1891] 2 Ch. 39.

The writ, usually filled up on a printed form and running in the sovereign's name, shortly informs the defendant (whose name, address and occupation must appear on its face) of the necessity for "entering an appearance", in the action: and it contains indorsements (1) of the kind of claim that is made and its amount (2) of the addresses of the plaintiff and his solicitors. The intimation of the nature of the claim is here made very succinct; for it will generally have to be expanded, defined and particularized in the pleadings, which may indeed raise quite a different case in the end. The persons who are to be parties to the action must be carefully settled, for leave will have to be obtained if it is desired to bring in fresh ones after the writ is once sealed. The question of parties is one of some intricacy: and a question further arises as to the joinder of different claims against the same party. Fluctuating views are entertained regarding the latter point.

At one time, not long after the passage of the Judicature Act (1873), there was some inclination to allow joinder freely, under the impression that the policy of the act was to abolish technicalities and to enable all controversies between the parties to be decided in one suit. The provision whereby separate trials may be ordered of separate questions ("issues") appeared sufficient to prevent any awkwardness arising. But during the last twelve or fourteen years the tendency has been decidedly to discourage any wide extension of the practice of joining different claims. So far as the claims of one person against others are concerned, the liberty to bring them all forward in one action is still permitted by the language of the rules, but is in practice not allowed unless they are in some way connected¹). And so far as the claims of different persons are concerned, it is still less easy to unite them in one action, because it has been expressly provided in this case that there must be some common element.

Where there is no connection whatever between the claims, any defendant who objected would, on making prompt application, have his name struck out by the court, or at any rate have separate trials ordered. When different persons are making different claims, there must be some connection in the facts, in order that they may join in one action; although it is no longer necessary that their cause of action should be actually one and the same. The claims must arise out of the same transaction, and raise common questions. We may indicate what is meant best by examples. In *The Universities of Oxford and Cambridge v. G. Gill & Sons*. [1899] 1 Ch. 55, the defendants were alleged to have published a book which infringed the exclusive (but not joint) rights of each university. The two universities were allowed to sue in concert. So in *Ellis v. Duke of Bedford* [1901] A. C. 1, persons who claimed certain market rights, each for himself, against the lord of the manor, were permitted to join in one action. And in *Walters v. Green* ([1899] 2 Ch. 696), on the occasion of a trade dispute, where different "trade unions" and different employers were involved, various employers were allowed to join in an action for damages caused by the alleged improper acts committed in concert by the union officials, some of the acts being actually committed by some of the defendants, others by all of them, some being to the prejudice of some of the plaintiffs, others to the prejudice of all.

Yet in *Stroud v. Lawson* (ibid. [1898] 2 Q. B. 44), it was alleged that a dividend had been improperly paid by directors of a company: one shareholder sued them for damages as on a fraudulent act, for deceiving him as to the wealth of the company, and he attempted (in effect) to join the general body of shareholders in a further claim for a declaration that the dividend had been illegally declared and should be repaid.

This was not permitted: the fraud on him in inducing him to take shares on the strength of a good dividend was too far remote from his right as a shareholder to question the propriety of its payment.

In one sense the claim for damages on fraud arose out of the same "transaction" as the claim for the replacement of the dividend — namely, its assumed improper payment. But in order to support the charge of fraud the plaintiff had to allege the further fact (which had no bearing on the question of replacement) that it had been represented to him that the dividend had been properly declared and paid. The

¹) It should be noted, however, that claims for the recovery of land (including of course buildings) can only be joined (except by leave) with claims for rent, or the like, or else for damages for breach of contract relating to the land, or for injury done to it.

causes of action were therefore not only distinct, but had no common element of commanding importance. The transactions out of which they arose were in the one case the declaration of a dividend, in the other, the making of representations as to its declaration.

We may refer to the recent case of *Comp. Sansinena &c. v. Houlder Bros. Ltd.* ([1910] 2 K.B. 354), where exporters were allowed to claim damages for injury to goods in one action alternatively against (1) the firm which had contracted to carry their goods by sea, and (2) the firm which by arrangement actually carried the goods and whose agent signed bills of lading for them.

Passing now from the question of joining claims, and taking each claim separately, it is of course permissible and proper for joint claimants to sue together, and for persons jointly liable to be sued together. It is likewise permissible, the cause of action being one and the same, for persons to sue and be sued in the alternative, where it may not be certain which is the person really bound or entitled. E. g., a van-driver negligently injures Sempronius. Uncertain as to whether Titius or Maevius is his employer, Sempronius may sue them both "in the alternative". Finally, *defendants* may be joined as alternatively liable, even in cases where the cause of action would not strictly be identical. Sempronius' door is broken in: uncertain whether Titius or Maevius did the damage, he may sue them in the alternative¹).

"Representative" actions may be allowed to be brought or against one or more individuals of a class all the members of which have the same (but not similar²) interests.

In chancery cases, more latitude is practically allowed. Chancery is accustomed to go widely into all the ramifications of transactions; and a chancery action cannot proceed unless all interested persons are made parties to the suit. Thus in a patent action, all persons interested in the patent in any way (e. g., for a limited time) are necessary³) and proper parties. The same is true of admiralty. Claims of all kinds may be freely joined against the *res*.

* * *

There are certain cases in which the action *must* be brought in the Chancery Division: in that event it will be assigned when the writ is sealed to one of the six chancery judges, and interlocutory proceedings in the course of it will always take place before one of his own Masters. There are so many interlocutory matters occurring in a Chancery suit (e. g. in the administration of a minor's property) that this course is necessary. In the king's bench, there are some half-dozen Masters who sit in rotation for all such business indiscriminately.

These proceedings assigned to chancery exclusively are not generally of much commercial interest: however, it should be noted that they include the winding up of partnerships and the taking of accounts between partners; also suits relating to mortgages, and property subject to hypothecary charges. (Note, that this does not apply to pledges, where the possession passes — which was always considered a proper subject for the common law.) The administration of the succession to a deceased person, or of property affected (by succession or *inter vivos*) with a "trust", or of the property and wardship of a minor, is also exclusively assigned to chancery. So are also suits for partition or sale of immoveables. A chancery suit may involve the supervision from year to year of a great estate, and may be prolonged almost indefinitely. On the other hand, it may (as in the case of a suit to foreclose a mortgage) be almost as summary as a common law case. It will be observed that the Chancery Division has no longer an exclusive jurisdiction to grant injunctions. As a matter of fact, however, wherever an injunction is the main object of proceedings, chancery is always resorted to. In the common law, injunctions are usually ancillary only. Thus, if a neighbouring proprietor begins to undermine one's wall, or is selling goods in infringement of one's trade-mark, the main object is to stop him, and a chancery action, asking for an injunction, will be the method. If the question is not raised in so acute a form, a common-law action for damages is more usual; the plaintiff may incidentally ask that the defendant be restrained by injunction from repeating the act complained of — but the main object is to get redress for

¹) *Bennetts v. McIlwraith* [1896] 2 Q. B. 464.

²) *Sale and Fraser v. Knight SS. Co.* [1910] 2 K. B. 1021.

³) See however *Warwick Tyre Co. v. New Motor Co.* [1910]. Ch. 248.

what has already been done. Again, patent and copyright cases are not exclusively assigned to Chancery. The desirability of having an immediate injunction, and the consequent familiarity of the patent lawyers with the chancery practice, has led to a practically exclusive jurisdiction in chancery in such matters. Lastly the exceedingly important proceedings relating to limited companies, e. g. winding-up, are appropriated to the Chancery Division.

Even if a case is properly brought in one division, it may be transferred by a judge or master in that division (with the consent of the president of another division) to the latter division. This may be done either because it is a more suitable case for that division, or because it is connected with some case already proceeding there, or for any other reason (see, for a case in which the Chancery Division refused to transfer to the Queen's Bench Division an action for the cancellation of even such commercial documents as bills of exchange, *Collyer-Bristowe v. Leslie*: Law Times Newspaper, Febr. 9. 1897, p. 343). It is not a power that is very much used.

And a chancery judge, in whose court an administration or liquidation is proceeding, may always attract to himself any proceedings relative to the subject-matter. So, a plaintiff who is suing a limited company for £500, the price of goods sold, in the K. B. D., may find the company liquidated, and the action transferred to the liquidating judge, who will decide his case without a jury.

The Admiralty Division, on the other hand, is a very frequent alternative to the K. B. D. in commercial cases. It is a necessary alternative where the plaintiff wishes to resort to the Admiralty practice of proceeding *in rem* against the ship or cargo concerned. But its jurisdiction (except as regards delicts on the "high seas") is purely statutory, and must therefore be limited by the exact words of the statutes. These are set out in Part XX. As will be seen, they are not very clearly distinguished from each other. It is quite admitted that their joint effect is to confer admiralty jurisdiction in cases of:

1. Disputes as to the ownership or possession of ships.
2. Mortgages of ships.
3. Damage done by¹⁾ or to a ship.
4. Wages of crew and disbursements by master.
5. Necessaries supplied to a ship away from her own port.
6. Salvage.
7. Towage: — provided that the case is one for an English court at all.

But great difficulty is caused by a section of the Admiralty Court Act of 1861 which confers a jurisdiction which in terms is wide enough to include all disputes on bills of lading. It is sometimes asserted that it covers only cases of damage to goods — but a careful reading of the section will show that that is not so: —

"6. The High Court of Admiralty shall have jurisdiction over any claim of the owner or consignee or assignee of any bill of lading of goods carried into any port of England or Wales in any ship for damage done to the goods . . . by the negligence or misconduct of, or *FOR* [not "by"] any breach of duty or breach of contract on the part of, the owner, master or crew" — unless some owner is domiciled in England or Wales. It has been held that this section confers jurisdiction when the goods are delivered undamaged but short, and therefore were never (so far as the "damaged" part is concerned) "carried into England"²⁾.

In admiralty the rule was formerly applied in cases of collision, where both parties are to blame, that (unless one had notice of the other's negligence, and could have avoided its consequences) the total damage must be divided equally. Singular questions arose under this rule when a tug or tow collided with a third vessel: or when the result of a collision was to drive one vessel upon another³⁾, or to damage cargo on board of one of the colliding vessels. In the latter case, the innocent cargo-owner could only recover half his damages from each ship⁴⁾. But the rule is, in accordance with the Convention of Brussels, abolished by the statute 1 & 2 Geo. V. c. 57, s. 1 (1), which provides that the judge is to apportion

¹⁾ I. e., by the ship as an instrument, and therefore, practically, by collision. The clause does not cover damage by the ship's tackle to things (though possibly to persons) on board. *The Beta* (1867), L. R. 2 P. C. 447. *The Victoria*, (1887) 12 P. D. 105.

²⁾ *The Danzig*, (1863) B. & L. 102.

³⁾ *The Frankland* [1901] P. 161. *The Englishman and the Australia*, [1894] P. 239. *The Morgengry*, [1900] P. 1.

⁴⁾ *The Milan* (1861) Lush. 388.

the damage according to the degree of blame: — a duty which the courts do not altogether welcome (see *The Rosalia* [1912] P. 113 — “the principle which has come upon us like a sudden blow”).

“Limitation” actions, for the limitation of an owner’s liability, are also brought in the Admiralty Division. It has been decided by the House of Lords (March 1908) that charterers, as well as full owners, are entitled to the benefit of the statutory limitation (£8 per ton — £15 when personal injury claims are concerned¹).

As regards the assumption of jurisdiction, the principles are somewhat different in Admiralty from those noted on p. 41 *supra*. It may be well to go through them for the various classes of cases *seriatim*.

1. *Disputes as to ownership and possession of vessels.* The court is reluctant to entertain these cases when the ship is foreign. Especially is this the case, if the representative of the flag (to whom notice must be given of the suit) objects. If the owners and claimants were domiciled in England, jurisdiction might not improbably be assumed: but the usual cases of its assumption are to give effect to some judgment of the courts of the flag²). The court will decline, unless perhaps all parties consent, to decide who is entitled to a ship by foreign law³).

The same principles would presumably apply to mortgage claims.

2. *Bottomry Bonds.* According to Judge Lushington, these bonds are valid by a “general law maritime”, and enforceable in England (or anywhere) independently of the legislation of any particular country. Dr. Westlake energetically combats any such doctrine. But the practical result appears to be that such bonds will be enforced by the English court, which will, however, apply its own rules to them whether under the style of “the general law maritime” or not. In *The Gaetano and Maria*, however ((1882) L. R. 7 Prob. 137), a judgment of Judge Phillimore’s, concurring in Lushington’s view, was reversed by a court of appeal whose judgment was delivered by an eminent chancery lawyer and by Lord Justice Brett, who was always opposed to the recognition of the peculiar principles and procedure of Admiralty. Williams and Bruce⁴) are probably justified in thinking that the case just cited will only be followed where the facts are precisely similar, i. e. where the contest is between two persons who are bound by implied agreement to accept the law of the flag. That an action on such a bond will be entertained (on whatever principles it will be decided) is beyond doubt.

3. *Delict on the High⁵ Seas.* This is an infrequent cause of action, except in the case of collisions, and will be best treated in connection with that subject. But it is quite a competent and proper subject of admiralty jurisdiction⁶), and applies to foreign vessels⁷).

4. *Collision.* If not on the high seas⁴), this is the subject of a merely statutory jurisdiction: but whether so or not, it applies to foreign vessels. In *The Mali Ivo*⁸) (the head-note of which does not represent the decision), a claim by Norwegians against Austrians in respect of a collision in Ottoman waters, in which a Turkish tug was involved, was entertained. That collision was on the “high seas”. In *The Ida*⁹), the court declined jurisdiction over a ship which had collided at Ibraila. In the following year (1861) the Act was passed conferring on the Court a general jurisdiction over cases of “damage done to or by a ship” in very wide terms, so that in 1862, in *The Diana*¹⁰), the same judge (Lushington) felt at liberty to assume jurisdiction over a ship which had collided in the N. Holland Canal: and in *The*

¹) *The Steam Hopper* No. 66, [1908] A. C. 126. While this case was pending (it had been unanimously decided otherwise in the Court of Appeal), statutory recognition was given to the same principle as the Lords adopted: 6 Edw. VII, C. 48 § 71. *The Seacombe* [1912] P. 21: *affd.* in H. L., W. N. 213.

²) *The See Reuter*. (1811) Dod. 22. *The Evangelistria*. (1876) 2 P. D. 241 (note). The court however has probably power to make a foreign admiralty judgment executory — a very unusual power. See *The Mecca*. (1879) 5 P. D. 28.

³) *The Johan and Siegmund*. (1818) Edw. Adm. 242.

⁴) *Admiralty*, page 66.

⁵) In this sense of the term, the high seas may be within foreign territory. It means all tidal waters.

⁶) See actions for assault such as *The Lowther Castle*. (1825) 1 Hag. Adm. 385.

⁷) *The Johan Frederick*. (1839) 1 W. Rob. 35.

⁸) (1869) L. R. 2 Adm. and Ecc. 356.

⁹) (1860) Lush. 9.

¹⁰) (1862) *Ibid.* 539.

*Halley*¹) (1868) the same course was taken respecting a collision in the *Scheldt*. English owners were concerned in these latter cases, but in *The Mali Ivo*, Judge Phillimore expressly says that "that circumstance does not affect the power of the Court to entertain the suit" (though its absence may be a ground for its declining to do so).

Note the provisions of the Mail Ships Acts 1891 and 1902, by which conventions can be made for their exemption from arrest. It is believed that no conventions exist.

5. *Salvage*. Here the claim will be entertained if the salvage service was rendered in British waters or on the high seas: not if in foreign non-tidal waters.

6. *Life Salvage*. This is a modern statutory invention, and does not apply to services rendered to a foreign vessel outside British waters (i. e. British tidal waters?). It may be made by convention to apply reciprocally to foreign ships, and has been so made applicable to Prussian vessels²).

7. *Towage*. These claims apply to foreign ships, whether the towage was on the high seas or in British waters.

8. *Necessaries*. The very essence of this claim imports a foreign element. The jurisdiction was successfully attacked by the common lawyers, and has only been restored by recent statutes. Stat. 3 & 4 Vict. c. 65. § 6 confers the jurisdiction in all cases where the vessel was foreign and was in British waters or on the high seas when the necessities were supplied. Colonial ships are not "foreign" for most maritime purposes: nor are colonial waters "foreign". In *The India*³), a Uruguayan ship was not liable to process for necessities supplied at Malaga. But a foreign port *may* be on the high seas⁴). § 5 of the same act confers a similar jurisdiction over "any ship" which is supplied with necessities *away from her port of registry*. The manifest absurdity of reading § 5 in so wide a sense as to make § 6 unnecessary led Judge Lushington to limit it to British and colonial ships. In *The Mecca*, Halsbury L. C. and Lords Justices Smith and Lindley purported to put the widest construction on § 5, and to overrule the case of *The India*. Williams and Bruce consider it better to distinguish the two cases on the ground that § 6 really applied to the case of *The Mecca*, open ports such as Algiers, Alexandria and Port Said being found as a fact to be "on the high seas".

9. *Wages*. This has always been a subject which the common law has permitted the admiralty to retain in undisputed possession. But it did not extend to the master's salary. A general jurisdiction (including master's wages) is conferred by statute, and it includes, in the case of foreign sailors improperly discharged, an allowance to enable them to return home. The claim extends to foreign vessels and to wages wherever earned: but notice is given to the national consul, and the court may decline jurisdiction if that is his wish, or even if he is neutral in the matter. "If he merely protested without giving any reasons, the Court would probably proceed with the suit"⁵). Especially would this be so if the crew were left in England destitute⁶).

10. *Bills of lading and charter-parties*. Here, the condition of jurisdiction is expressly laid down that the goods in respect of which breach of the contract is alleged must be "carried into" England or Wales.

For the details of Admiralty practice, see Part XV *infra*.

V. Appearance.

The first step in the progress of an action commenced by writ, after the defendant has been duly served, is for him to "enter an appearance" by delivering a memorandum at the court office and obtaining a sealed duplicate. This is a mere formality, but it has the advantage of putting the name of the defendant's solicitors (if he employs any) "on the record". At the addresses thus put on record on the writ and on the entry of appearance (which must be notified to the plaintiff's solicitors the same day), notices can thenceforward be left, without the necessity of personal service: and if no appearance is entered, they can be simply filed at the court office.

1) L. R. 2 P. C. 193.

2) British "Order in Council", 7. April 1864.

3) (1863) 32 L. J. (Adm.) 185.

4) *The Mecca*, [1895] Prob. 95.

5) Williams and Bruce, p. 212, quoting *The Leon XIII.* (1883) 8 P. D. 121.

6) *The Milford*. (1858) Swa. 362.

The time for appearance is 8 days: but in the case of a writ to be served abroad it is a time mentioned in each particular case, and varying from 10 days for Paris and the Isle of Man to 114 days for Samoa. If it is desired to object to the jurisdiction, the appearance should be entered "under protest"; and this is a matter of right¹). The result of failure to enter an appearance is (1) in chancery, (and Admiralty actions *in rem*), to preclude the defendant from taking part in the proceedings, unless and until permitted to enter it — (2) in the K. B. D., to render, in addition, summary default proceedings competent.

If, in chancery (and admiralty), the defendant does not "appear", the case goes on without him — the plaintiff has still to prove it. But, in the K. B. D., without any intervention of the judicial bench, the plaintiff can "sign judgment": i. e., can obtain from the court office a sealed judgment in his favour. To ground such a judgment he must file an affidavit that the defendant was duly served (or that substituted service or "notice in lieu of service", if ordered, was effected) and that no appearance has been entered. Such a "default judgment", moreover, can always be set aside on equitable terms, if the court thinks fit to allow the defendant to escape the effects of his negligence. And it will not be a "final", but an "interlocutory" judgment, if the claim is for anything but land or a liquidated sum of money: in the case of unliquidated damages, or a claim for goods detained, the court proceeds to inquire what the *quantum* of damages is, or what the goods are worth. It generally does this by the issue of a writ to the sheriff of the county where the action would have been tried, directing him to assess the damages with a jury. His under-sheriff, a solicitor of high standing, actually conducts the assessment. If there are several defendants a default judgment can be obtained and executed against one without prejudicing the rest.

VI. Preparation of the issues.

Assuming that appearance has been entered, there arises a certain divergence of practice, and we must first shortly glance at the ordinary course of a K. B. D. or C. D. action, of which the "commercial court" practice is a kind of condensation. According to the old practice, prior to 1900, each party had a definite time in which to state their respective cases. Six weeks (after appearance) were allowed the plaintiff in which to prepare and deliver his "statement of claim": the defendant then had ten days further to deliver a "defence": the plaintiff next had three weeks to "reply": Further "pleadings" could be delivered only by leave of a judge or master and the order giving leave would specify the time. Incidental matters arising as to the details of process, — e. g. place of trial, mode of taking the evidence of certain witnesses, and the like — were made the subject of incidental applications: and it was thought that these "summons" were somewhat too frequent; also that the masters ought to know better than the parties themselves when departures from the ordinary scheme of procedure laid down by the R. S. C. should be made.

It was laid down therefore, twelve years ago, that it should be the duty of the plaintiff (but only in cases where at least one defendant had "appeared"), before taking any fresh step in the action²), to apply to a master by summons (on notice to the defendant) for directions as to the following matters, or any others suitable to be dealt with then:

1. Pleadings and particulars (i. e. expanded details of pleadings).
2. Admissions.
3. Examinations (of witnesses elsewhere than in court): Inspection of documents and property.
4. Discovery (of documents) and interrogatories.
5. Place and mode of trial.

This is called "the summons for directions" and is unknown in admiralty. By its operation, the master acquires control from the outset over the whole course of proceedings. Unless the master orders (as he generally does in chancery cases) "that pleadings be delivered" no statement of claim, defence, reply etc. will be made, and the case will be tried without pleadings, in a summary manner. (The plaintiff can also propose on his writ to dispense with pleadings, and if the defendant acquiesces, no "summons for directions" is necessary.) If the matter

¹) *Keymer v. Reddy* [1912] 1 K. B. 215.

²) Except the urgent matters of applying for an injunction or "receiver".

is a commercial one, within the definition of the judges, the summons may come before the commercial judge, who may order the case to be tried by the commercial court, without pleadings. But it is noteworthy, that in trying to abolish pleadings, the commercial court has re-introduced them under another name — “Points of Claim” and “Points of Defence”. The difference is that “pleadings” are elaborate and full: “points” are short and concise (whether, as some think, the “points” are technically “pleadings” is highly dubious). Anyone, however, who looks at the specimen pleadings printed in the schedules to the R. S. C., will recognize that they strikingly resemble the “points” now customary in commercial cases. Sometimes, also, in a commercial case, a mere letter may be ordered to be written by the defendant’s solicitor and will be as binding as a pleading. See below, Part XIII.

Pleadings.

If “pleadings” are ordered, — as they probably will be in any case not strictly “commercial”, and almost certainly in a chancery suit, — they will have to comply with the technique of pleading, which is still somewhat of an art in itself. In pleading, the party sets out all the facts on which he relies, as giving him a cause of action, carefully avoiding the evidence by which he means to prove these facts, and also avoiding inferences of law. The *demonstratio* of the Roman law, considerably expanded and filling perhaps four pages of foolscap, charging the defendant in every possible way, would roughly correspond to the Statement of Claim. In a similar manner, the *replicatio* might in some ways correspond to the Defence. But each pleading is a separate document, headed with the names of the parties, like a writ; and not authenticated by, or necessarily within the cognisance of, the court, until the action is ready for trial. There are minute rules as to the proper size of paper etc. for writing pleadings on; and they are of course delivered to the opposite party. The latter may object to them, and, at the risk of having to pay the expenses of the application, may (by “summons”) invite the court officials to strike out the whole or portions of them. The most usual grounds of this are that the pleading discloses no ground of action or defence or that it is scandalous, irrelevant, or embarrassing. A pleading is not embarrassing by reason of setting up two, or any number of, inconsistent cases, provided that they are clearly distinguished as alternative. But it must not be ambiguous or evasive, nor must it contradict the party’s own previous pleading [unless leave is given to amend it]¹). Pleadings are signed by counsel who draws them: otherwise by the solicitor. A defence will be taken to admit any statement which is not denied: and almost all pleadings are broken up into numbered paragraphs, each dealing with some particular aspect of the case. In the common law division the time for delivering them is fixed on the hearing of the summons for directions: and their number is settled at the same time — it is almost invariably three. The plaintiff delivers a “Statement of Claim”, the defendant a “Defence”, and the plaintiff a “Reply”. Further pleadings require the master’s leave.

The scheme of the Judicature Act, 1873, was to make the pleadings very succinct, and to have them supplemented by “particulars” when asked for by the opposite party and allowed by the master. In practice, the desired succinctness was far from being attained; and yet particulars were very freely demanded. The usual order on the “summons for directions” in the K. B. D. when it directs pleadings to be delivered, adds “with full particulars”; thus rendering it right and proper to go into considerable detail in the pleadings. Further and better particulars can still of course be asked for. But the rule remains that *evidence* must not be pleaded. A party is bound at the trial by his pleading, and amendment at that stage is very sparingly allowed.

Points of law may be raised on the pleadings; and if they are such that their determination would make all inquiry into the disputed facts unnecessary, they may occasionally be ordered by the master to be argued beforehand. This will be done in open court in London. Sometimes the parties raise points of law by concurring in a special case for the opinion of the court: but this concludes the points of fact which they agree to embody in the case; it cannot be stated hypothetically. So that this process is not very often employed. In one rare case (the interpretation of an admittedly valid document) it is not even necessary to issue

¹) Leave is not difficult to obtain, nor very expensive.

a writ if the disputants ask for the court's decision in the form of an "original" special case. But an originating summons is usually preferred.

There is one conspicuous case of proceedings commenced by writ, in which a summons for directions is unnecessary (besides that in which the defendants all fail to "appear"). That is the case where the writ is "specially indorsed", and where, in consequence, the plaintiff has the right to apply for immediate judgment, whether the defendant appears or not. Such an application would be a "fresh step" in the action, and therefore could not be made¹⁾ until after the summons for directions had been heard. Yet it would be ridiculous to give directions respecting the course of proceedings in an action which, *prima facie*, will come to a speedy end by the plaintiff's obtaining summary judgment next day on his summons for leave to sign judgment. Accordingly, in such cases, the summons for directions is not to be issued. If the master refuses leave to sign immediate judgment, on the hearing of the summons for leave, he can give all necessary directions on that occasion: if he accords leave, none are needed. If no such application for immediate judgment is made by the plaintiff, it was long uncertain whether a summons for directions had to be taken out. The special indorsement is itself made by the rules a "pleading" — and it would be absurd to give a master power to say there should be no pleadings, in a case where one, in the shape of a special indorsement on the writ itself, had actually been already delivered. This view has prevailed, and a summons for directions need not be taken out when the writ is specially indorsed, at all.

Such cases, in which the defendant may be shut out from defending the action, unless he satisfies the master (subject to appeal) that he has a *bonà fide* defence, form far the largest proportion of cases for which writs are issued. Leave to defend is only given to about one out of three defendants in this class of "specially indorsed" writs; so that the process affords a cheap and swift means of recovering a *bonà fide* demand — one which is much superior to a county court action, and which is encouraged by the rules for the recovery even of small sums. But the procedure is only competent when the claim is one for the recovery of land, or is a liquidated claim arising out of —

1. *A contract*, express or implied.

[The rule (O. 3. r. 6) gives as examples, bills of exchange, promissory notes, cheques "or other simple contract debts". This almost suggests that verbal contract debts are not within the rule; but they certainly are. Foreign judgments are included under this head (*Grant v. Easton*, (1883) 13 Q. B. D. 302).]

2. *A bond or contract under seal*.

3. *A statute* (except where the liquidated sum is imposed by the statute as a penalty).

4. *A guarantee* (where the claim against the principal debtor is in respect of a liquidated sum).

[The reason for this clause is hard to assign. Every guarantee is a contract.]

5. *A trust*²⁾.

A writ may also be "specially" indorsed, so as to ground summary judgment, in simple cases of claims for the recovery of land, with or without rent or mesne³⁾ profits.

It being so advantageous to indorse a writ "specially", much discussion has been spent on the terms of the rule. One of the most controverted topics is, how far can interest be claimed without destroying the liquidated character of the demand? Any unliquidated claim mixed up with the liquidated one prevents the indorsement from being "special", and until recently the defect could not be cured by abandoning the unliquidated part of the claim. Interest can be claimed by a litigant up to the date of the writ, when expressly promised, or when authorized by statute (as in the case of accounts rendered with notice that interest will be charged), or in the case of negotiable instruments such as bills of exchange. If interest has been promised at a fixed rate, then it can be recovered as a liquidated sum: and in the case of bills of exchange interest at the current rate has expressly been made liquidated damages by the Bills of Exchange Act, 1882, § 57.

Interest during the pendency of the action can also be claimed without prejudice to the liquidated character of the demand⁴⁾: though *ex hypothesi* its exact amount

¹⁾ Vide, p. 53 *suprà*.

²⁾ See p. 44 *suprà*.

³⁾ See p. 43 *suprà*.

⁴⁾ *London and Universal Bank v. Clan-carty* [1892] 1 Q. B. 689.

is not ascertainable when the writ is issued. But in many other cases where interest is recoverable, it can only be recovered as an unliquidated amount. Thus in the case just mentioned, of interest on an overdue account, the statute conferring the right only gives such interest as may be allowed at the trial¹).

Reasonable remuneration for a service rendered or goods supplied on express or implied request is however "liquidated". And the costs of process can of course be recovered, on a moderate fixed scale (£ 3. 3. 0 minimum).

The application to sign judgment must be supported by a sworn statement, not necessarily by the plaintiff, but at all events by someone who can swear of his own knowledge to the facts (see *Lagos v. Grunwaldt*, [1910] 1 K. B. 41 and *Symon v. Palmer's Stores* [1912] 1 K. B. 259).

Default.

Supposing that summary judgment has not been obtained in default of appearance, or on a specially indorsed writ, and that pleadings have been ordered, then it is possible (except where minors are concerned) that summary judgment may be had in default of pleading. It is very usual for the time allowed to be extended, and in a proper case, the other party ought to agree to a reasonable extension. If a further extension is allowed by the master as an indulgence, the costs of the application may have to be paid by the applicant "in any event": — say about £2. Or the expenses may be made "costs in the cause", and will have to be paid by the party who ultimately proves unsuccessful. This is a general principle with regard to interlocutory process; the expense is entirely within the discretion of the judicial officer and will be apportioned according to the view he takes of the party's conduct and the necessity for the application.

If further time has not been allowed, the opposite party can in some cases obtain a default judgment. In the case of a defendant in default with his "defence", this can be done without the intervention of the court or any but its ministerial officers, just as in a case of default of appearance. But if it is a plaintiff who is in default, the defendant must apply to the court (generally to the Master in Chambers) to dismiss the action: and even this can be done only when it is the "statement of claim" which is not forthcoming. Failure to deliver a subsequent pleading merely amounts to a denial of the whole of the defendant's pleading. If no times are fixed by order for the delivery of pleadings, the following are to be taken — 21 days from order for statement of claim (12 days from appearance, in Admiralty) — 10 days for defence and 10 days for reply (6 days in Admiralty).

In the so-called "commercial court", if the delivery of "points of claim" or "points of defence" is ordered on the summons for directions, failure to deliver them would simply form an occasion for a further application to the judge in charge of commercial matters (who generally deals with procedure matters himself, dispensing with a Master). Mathew identifies them with true "pleadings", and if he is right, the default process would be competent. But we can scarcely think so. Mathew's view appears to be acted on in practice. But it would scarcely be sustained in the Court of Appeal in view of the strong remarks on the vague character of "points of claim", made by Vaughan Williams L. J. in *Comp. Sassinena v. Houlder Bros.* ([1910] 2 K. B. 362.)

Admissions.

It may be that during the progress of this process, one party or his agent may make admissions (in the pleadings or otherwise), which the other considers conclusively entitle him to all he wants, or to some part of it. In that case, the latter can get judgment on admission. But this can never be summary. He must apply to the court for judgment; and generally in open court before a judge — not to a Master in Chambers. Such admissions can also be extracted by "interrogatories". This process is termed "discovery", and anciently used to form the subject of an ancillary suit in Chancery. Only the parties themselves can be "interrogated", for which reason it sometimes happens that persons are improperly made defendants simply for the purpose of administering interrogatories to them. The particular questions to be asked must be submitted to, and approved by a Master; and are then delivered to the party to be answered upon oath. A party is not bound thus to disclose his evidence, but merely facts

¹) 3 & 4 Will. 4 c. 42. § 28.

relevant to the case. Thus, he cannot be asked. — “Whom does the plaintiff allege to have seen the defendant receive the goods for which he is sued?” — but he might be asked — “In whose hearing did the defendant use the words complained of?” in a slander action. The answers to these questions become evidence, and can be read at the trial.

Discovery.

It should be remarked that failure to answer the interrogatories entitles the other side to apply to have judgment in their favour; and also that “fishing questions” are discouraged. It is clearly unfair to allow a litigant who cannot make out a case for himself, to make one out by interrogating his opponent. And to check this, it has often been held that a party suing ought not to be allowed to interrogate until he has furnished all the detailed “particulars” of his claim which the defendant may require. But there is no general rule. The defendant may know the facts, whilst the plaintiff does not; so that the latter actually cannot give particulars until he has had discovery by interrogation. It is a matter for the appreciation of the Master: and few processual questions lead to more frequent appeals to the Judge in Chambers and to the Court of Appeal¹).

One peculiar kind of interrogatory has developed into quite an institution by itself. This is an inquiry as to what writings the opposite party has in his possession or under his control relating to the matter. It has come to be regarded as quite a separate matter from other interrogatories. The latter, though not unusual, are not a universal feature of process. The interrogatory as to documents (specifically termed “discovery”) is practically an incident of every contested case. It is capable of being used somewhat oppressively, for the documents scheduled must be produced for the inspection of the opposite side. This is a universal rule, subject to the narrow exceptions of (1) professional communications between client and legal adviser, (2) documents prepared in contemplation of litigation, (3) documents which might expose the party to criminal proceedings, (4) documents which he swears merely tend to support his own case.

This leaves such correspondence as, say, the correspondence passing between partners, entirely unprotected. It may place the other side in possession of most damaging admissions. But it is distinctly dangerous to neglect to disclose it. Such “discovery” of documents is ordered as a matter of course in the K. B. D. on the “summons for directions”, to be made by both sides; and in the commercial court, the parties’ oath verifying them is dispensed with. So soon as the list of documents is furnished, the other side is at liberty to inspect and have copies of them.

VII. Trial.

The issues having been ascertained by the process thus detailed, and no judgment having been obtained, a trial becomes necessary. A marked distinction here occurs, according as the trial has been directed to take place in London or “on circuit” at the Assizes. In neither case can the plaintiff, nor indeed can both parties, ensure its taking place on a fixed day. In London cases, entered in the “commercial list”, a day is usually fixed for it by the judge who has all business of that sort in hand, and who knows approximately when it can be reached. But of course it may not be reached on that day, though it would not be taken before. In assize cases, “notice of trial” can be given by the plaintiff for the first available assize after the pleadings close; or if there are none, then after the issues of fact are ready for trial. If he fails to give notice in six weeks, the defendant can either (a) give notice himself (b) ask the judges in open court in London to dismiss the action. The notice must be one of 10 days, unless otherwise agreed or ordered. In ordinary London cases, similar rules apply, only the notice is nominally given for a fixed date (at which the case may, or may not, in fact be reached). If the limited time allowed at assizes does not enable the trial to be finished, the judge may return to the particular assize town for that purpose after completing his tour of the others (as was done by Mr. Justice Day, at Carlisle in *Irton v. Brocklebank* some years ago) — or, much more frequently, it may be made a *remanet*, and stand over until the next assizes. He also often gives

¹ See *Kent Coal v. Duguid*, [1910] 1 K. B. 904 and dissenting opinion of Vaughan Williams L. J. S. C. [1910] A. C. 452, also *Maass v. Gas light & Coke Co.* [1911] 2 K. B. 543, *Nash v. Layton*. [1911] 2 Ch. 71 and *Elrington v. London etc.* (1910) 27 T. L. R. 329.

his decision on points of law at some other assize town. The case is actually "entered" for trial, within 6 days of the notice to the opposite party. This is effected by handing in the prescribed form of entry with two copies of writ and pleadings, to the court officials. In an assize case, this need not be within 6 days after notice, but must not be within 7 days prior to the opening of the assize at the particular assize town selected. If the plaintiff fails to enter the case, the defendant can do so, within the fixed period, after waiting a couple of days— but at assizes the entry can be made by either or both parties.

It must be added that summonses (as distinct from writs of summons), motions and petitions, even when independent proceedings, do not usually lead to a "trial", but to a "hearing". This takes place almost invariably in London, as does the trial of every chancery action, and will be on a day named in the summons, notice of motion, or official "answer" to the petition. In these cases, the day in question will usually be the actual day of hearing.

In past days, the assize system was much important than it is at present. The great advantage which it offers, besides the sentimental one of bringing the administration of supreme justice home to the provincial public, is that the expense of taking witnesses to London is avoided. The facility of communication in modern times is such that this is reduced to a minimum. Agitation is continually proceeding against the system. The local "county" courts have lately received a considerable extension of jurisdiction (£50 extended to £100): but their position is by no means equal to that of the High Court. London is constantly attracting business in greater proportions. Still the circuits go on, as in the days of pack-horses, when judge and bar travelled from town to town, and feasted nightly together at the "Bar Mess". At Liverpool and Manchester, the assizes are important; and they have a certain amount of business at other great centres of population. But there is an impression that, from want of time and libraries, matters are disposed of somewhat hurriedly on circuit. The court sits late: long past the London 4 o'clock. It may be taken that the few towns which are still visited by a pair of judges are the only ones at which the assizes retain a real importance. The consecutive sittings in London are on the whole at present more convenient to all parties.

Whether at London or on circuit, the trial may be either of the whole action, or of particular issues arising in it. The trial of separate issues is nevertheless very rare. Formerly the only method of deciding questions of fact was by a jury. Now, a judge is preferred in about half the actions that go to trial. There is power to associate expert assessors with the judge: but in practice it is never invoked. The reason given is that experts are invariably divided into two opposing camps, being attached to one or other great group of technical interests. This accounts, perhaps, for their not being placed on the bench in patent actions: but it fails to account for the universality of the phenomenon. In the Admiralty Division, nautical assessors are the rule in cases involving questions of seamanship: they are selected from the members of the great nautical corporation the "Trinity House", and are so termed "Trinity Masters". Matters involving mechanical application to details may be ordered to be tried by a Referee. Such are cases which involve the prolonged examination of documents, or scientific or local investigation; or, above all, matters of account. There are 3 "Official" referees (members of the Bar), and the parties may agree that anyone else should act as a "Special" Referee. The Referee acts in these cases as a judge: sometimes a question is referred to him merely "for inquiry and report", in which case his decision is not enough to lead to judgment — it must be adopted by the court, which is in no way bound to approve it. Referees may be assisted by assessors, but not by a jury. If points of law incidentally arise before them, they have no authority to decide them. They may sit anywhere in the kingdom; and perhaps elsewhere if they think fit.

The actual procedure at a trial, before a judge in court, whether in London or on circuit, is the same. The single judge, seated on an eminence, presides: below him is the Registrar (or Associate at assizes), whose duty it is to note the various formal steps in the proceeding, and to keep account of every document produced, satisfying himself incidentally that they are properly stamped. Below is the "well" of the court, where will be found a table at which solicitors may sit, and from which a litigant appearing in person will have to shout up at the Bench. Rising again on the other side are benches for counsel with desks in front. If there are more rows than one, the king's counsel occupy the foremost row. Behind these are more seats,

for solicitors and witnesses. The general public are relegated to the back of the court, or to a gallery. The most imposing and finest courts are found on circuit, in the various municipal palaces; the courts at London are small and uncomfortable. On one side of the Registrar is a raised stand for witnesses; on the other a raised pen for the jury, in case a jury is required.

The first business is to swear a jury, if necessary. There is never a jury in chancery or admiralty¹). In ordinary common law cases (which include broadly all cases of contract and tort) either party can have a jury almost as a matter of course: and the master on the summons for directions will invariably order a jury if requested except in such cases of minute investigation as are proper for a referee. A "special" jury can be ordered: but it is often left to the option of one or both parties to claim one by giving notice at a later stage than the hearing of this preliminary summons. But quite as many common law actions are tried without a jury as with one. A common jurymen is drawn from the class of small shopkeepers, clerks, and managers, the principal qualification being the payment of municipal rates on the occupation of property rated at £ 20 per annum (the rental value being usually a little higher). The "special" jurymen is of quite a different class: being rated on an occupation of £ 100, or at any rate being a banker or merchant. Professional men are generally exempted. The jury are summoned by the sheriff of the county: who returns a "panel"²) or list of qualified persons to a sufficient number, from whom twelve are chosen for each few cases. It is very rarely that they are challenged for partiality, but of course they can be. Common jurymen are unpaid: special jurymen are paid a guinea each by the parties.

The Registrar then "calls the case" by reading its short title — "*Brown against Horton and others*" —, and the junior counsel for the plaintiff (if two or more are retained) "opens the pleadings", stating quite drily the gist of the action. The senior, who will almost certainly be a king's counsel, proceeds to amplify the statement in a speech, in the course of which he indicates for the first time the main outlines of his evidence³). He then calls witnesses, and he or (more generally) his junior examines them "in chief". In this they must observe the rules of evidence detailed below. The judge is at liberty to interpose at any time with a question. The opposing leader usually cross-examines each witness in turn, this being the most critical and delicate business of the trial: though it has been said that the task is still more difficult of restoring the credit of a witness after a searching cross-examination. The theory of an English trial is not that the statement of a witness made under the sanction of an oath is entitled to conclusive credit. It is only when his statements and character have stood the test of every conceivable strain — surprise, suggestions, hectoring, subtlety, artifice, — that they will be accepted as approximating to truth. Evidence is weighed, rather than taken, in an English court. Prosecutions for perjury are very few; and the presumption that a witness is speaking the truth goes only a very little way.

The licence allowed in cross-examination is very wide. It has its limits: but it depends greatly on the judge and counsel engaged how far it may go. The character of a witness being, in the English view, a most important element in his credibility, anyone who comes forward as a witness lays himself open to an investigation in open court of all his past life.

Witnesses usually appear voluntarily. An unwilling witness is not likely to do those who call him much benefit. Facts are very elusive things, and memories can be very treacherous at times. Still an unwilling witness may be wanted: and if so, he can be compelled to come by a royal "writ of subpoena". Each such writ may cover any number of witnesses, except when it calls on them to bring named documents with them, when it is called a "subpoena duces tecum" and cannot be addressed to more than three. A subpoena, unlike a writ of summons, may be served in Scotland or Ireland. At its service, the witness must be tendered his reasonable expenses, without the offer of which he is under no obligation to comply with the writ. And until he is paid he may refuse to answer questions.

¹) There is power to order a jury trial: but it is seldom or never exercised; and the effect would be that a chancery case would be transferred to the K. B. D.

²) In Scottish jurisprudence, this word signifies an accused person.

³) Sometimes the defendant has the "right to begin". The rule is expressed by saying that the party begins who would lose the case if no evidence were offered by either side. The "right to begin", carrying with it the right to reply, is very valuable.

There are other reasons for which he may refuse to answer: (A) That the answer would tend to expose him to the risk of criminal proceedings: (B) That it would violate the protection with which all communications between lawyer and client are sacredly invested, and which may extend to cover all information obtained by or under the direction of the lawyer or client with a view to the particular litigation. The privilege is the privilege of the client: and can of course be waived by him. A witness who without such excuse, fails to appear or to answer (if physically capable of doing so) is liable to be arbitrarily fined or imprisoned (though not precisely as a criminal) for "contempt of Court". The court never summons a witness on its own initiative. The utmost it does is to indicate a strong opinion to one party or the other that such-and-such a person ought to be tendered for examination, and to make unfavourable comment to the jury if it is not done.

The defendant's leading counsel next opens his case with a speech. It may be that he does not desire to call any evidence, but rests his case on the results of his cross-examination. Such a course (frequent in criminal cases), deprives the plaintiff of a right of reply. Otherwise, when the defendant's witnesses have been called, cross-examined and re-examined, the defendant's counsel and then the plaintiff's are each at liberty to sum up the whole result from their respective points of view. The judge then sums up impartially to the jury, if there is one, and if not, gives his own decision. Juries frequently consult as to their verdict by screwing round in their uncomfortable seats and chattering freely among themselves. Occasionally they leave the court and discuss the case in a more seemly way. The summing-up directs them as to the law, and generally gives them considerable guidance as to the facts. The jury are not only amateurs in law, they are amateurs in the appreciation of evidence; the judge is a professional, and it is not thought amiss that he should direct their attention to weak and strong features of the testimony, and to fallacies employed in their speeches by counsel. While the jury are considering their verdict is sometimes found a convenient time for the argument of points of law. (Another common occasion is the defending counsel's first speech, in which he frequently asks the judge to rule that the plaintiff's evidence discloses no case in point of law for the jury to decide). If the jury cannot agree, they are discharged (unless the parties consent to take the verdict of a majority). This necessitates a new trial.

The jury having returned a verdict, or the judge, sitting without a jury, having given his decision, the court gives "judgment" for the successful party. It is usual for counsel formally to get up and ask for it, though this is perhaps not strictly necessary where the verdict is for a liquidated sum and no difficulty arises as to costs. But where the verdict is a "special" one; i. e. where the jury (whether in answer to questions left to them by the judge, or not) find specific facts, a motion for judgment becomes necessary. It may be that both parties regard the findings of the jury as entitling them to judgment. If the question of the effect in law of the finding is at all difficult, the argument of the motion may probably be deferred at assizes, and even in London, until a future day. In Chancery, the course of a trial in which a single clear issue is raised follows much the same course as a common-law trial by a judge alone. In Admiralty the same may be said.

VIII. Evidence.

It is better to treat in a separate section of the somewhat arbitrary and complicated English rules of evidence. They are for the most part, if not entirely, of comparatively modern growth. "Hearsay" evidence was, for example, freely admitted in the reign of James I. (1603). The late Chief Justice (Lord Russell of Killowen) observed of them that "the rules of evidence which prevail in this country are much less liberal and wide than those which prevail in many other enlightened countries, and . . . shut out large bodies of testimony which are received, and I confess, for myself, I think are properly received, in other countries: evidence of great cogency and probative force". And the Regius Professor of Civil Law at Cambridge agrees that the courts "ultimately went unfortunately far in excluding evidence".

The rules of evidence, it must be premised, apply mainly to examinations in chief (i. e. by the party calling the witness). Cross-examination is practically unfettered by rules, except those of expediency and good taste. For, although it must theoretically be, like all other examination, relevant, it is impossible to say of any

particular question, apparently irrelevant, that it is not part of the developement of the attack on the witnesses psychological attitude. The oath is a very unimportant feature in an English trial, and sits lightly on many consciences. Consequently, the the cross-examination of witnesses in England stands to their cross-examination in countries where false swearing has very probable serious consequences, as war does to chess. An apparently irrelevant question may lead up in a few minutes to the breakdown of the hostile witness. On the other hand, this must not be taken in too wide a sense. There is no more frequent cause of friction between bench and bar than for a judge to interrupt a barrister with—"What is all this leading to, Mr. A?" It should also be noted that the defendant cannot set up a case on which he has not afforded the plaintiff's witnesses an opportunity, in cross-examination, of expressing their views.

Let us add that written evidence is most uncommon. The interrogatories and the answers to them, above referred to, can be read. But other evidence is, in practice, always given orally, except in interlocutory proceedings. The parties may, but scarcely ever do, agree to have it taken in writing ("affidavit"). It may be agreed or ordered, but seldom (except in the "commercial court") is, that a particular fact may be proved or a particular witness give evidence, in writing.

But even then, the other side must have an opportunity of seeing the written evidence and cross-examining the witness. Wherever there is a sharp conflict of fact, English lawyers distrust affidavits. They are drafted by the solicitors, and simply signed, often rather carelessly, by the witness, who relies on the solicitor to get them properly drawn up. Different from affidavit evidence is evidence which is produced to the court in writing, but was taken orally. Such are depositions of invalid or infirm witnesses, or those who are abroad. Three methods are available of taking their evidence. A commission may be appointed: or, much more usually, an official examiner, or an unofficial, but impartial, extraordinary examiner, is appointed to go to the invalid person, or to proceed abroad, at the expense of the party desiring the testimony, and to conduct a fraction of the trial by having the witness examined and cross-examined, taking down the answers, and transmitting them to the court. Or, thirdly, in countries where such a procedure would be a contravention of the local law as to oaths¹), letters of request will issue to the local court, asking it to conduct the inquiry (this may also be done where the witness is in India or the colonies; only these courts are obliged to comply)²).

Otherwise, the evidence is purely oral. And the witness is usually instructed as to what his story is to be, by being furnished with a copy of the "proof" which is supplied to counsel as containing his evidence. It is an inflexible rule that the barrister who examines a witness in court shall not have previously interviewed him in person as to his evidence. (This does not apply so strictly that counsel may not see the respective witnesses at all, if they are necessary parties to be present at any conference which he holds with the solicitor.) It is the solicitor's business to "get up" the case, subject to the barrister's advice as to the kind of evidence that is necessary, by interviewing the persons whom it is desired to call as witnesses, reducing their statements to a narrative, and communicating it to counsel. The latter then analyzes the synthesis, in open court, by asking the witness questions. It is quite exceptional and unusual for a witness to make a statement of any length. Such speeches as those of de Pellieux in the Dreyfus case would not be admissible. This brings us to the first technical rule of evidence.

1. Leading questions are inadmissible. Leading questions are such as suggest the answer; so that the barrister, although he has the witness's full statement before him, cannot put it to him in a series of descriptive questions to which the witness need only answer "Yes", or perhaps "No". The questions must be colourless. Very occasionally, indeed, it is necessary to depart from the rule; thus, in an action for the value of a damaged article, the thing may be produced in court, and the witness asked "Is this the article you received from Messrs. X?" . . . to which of course he can only answer "Yes, it is".

¹) Letters of request are rapidly supplanting commissions in all cases: except in cases where the witness is in the United States of North America. But since the foreign court does not take the evidence in the English manner, there are signs of a reaction.

²) As to Ireland and Scotland, see 17 & 18 Vict. c. 34, ss. 1, 2; Jud. Act 1884, s. 16.

2. *Hearsay evidence*¹⁾ is inadmissible. This is because the statements were not made under the sanction of an oath and the liability to cross-examination, rather than because they are apt to be coloured by the personal equation of the reporter. But there are certain exceptions. Statements on oath are received as to declarations

1. Of matters of general, public or family interest (made *ante litem motam*) e. g. pedigrees, parish boundaries etc.
2. By a deceased person against his own interest or in the course of his duty (usually, if not necessarily, in writing).
3. Which form part of the *res gestae*.
4. Made previously by a witness and contradicted by him at the present trial.
5. Made by a party or his agent (admissions).

There are many perplexing and contradictory decisions on these exceptions. Statements made in writing by a carter, a servant of the plaintiff, were, in *Price v. Torrington* (1703)²⁾ received (after his death) in the plaintiff's favour, as having been made in the course of his duty. But an entry by a Jewish rabbi of a circumcision in the synagogue registry was rejected when tendered as proof of the patient's age. Entries made in a person's own business books are not considered as made in pursuance of a duty, and so are excluded³⁾. They may sometimes be evidence for his opponents, as being "admissions". And in the "commercial" court the strict rule is very much relaxed⁴⁾.

3. *Documents must be proved by being produced*. This is expressed also by saying that "secondary" evidence of documents is not admissible. Documents which are merely evidentiary, and which purport to be narratives of transactions, and of no intrinsic validity, are not regarded as evidence in themselves at all. If the person who prepared them is alive, he ought to be called: if not, then they may possibly be admissible, under the exceptions to rule (2) *suprà*, as embodying what he would have been able to say. Thus a diary, even if contemporaneous with the facts narrated in it, is not evidence, and cannot be read in court. If the writer is dead, and it was kept in pursuance of a duty, or it otherwise falls within the exceptions referred to, then, on proof of handwriting, it may be received as a substitute for his oral testimony. Or, the writer, if living, may be called to depose to the facts narrated, and may "refresh his memory" by reference to the diary, provided that, (1) it is the original and not a copy, (2) it was made at the very time of the occurrence or immediately after.

Leaving these classes of writings, and turning to documents which are evidence, of themselves, having an intrinsic operation and validity, we find the case where usually nothing but the production of the genuine original will suffice. Thus, to prove a conveyance, the sealed transfer must be forthcoming: to prove a contract of certain kinds, the signed writing must be produced⁵⁾. Deeds over 30 years old, and coming from a natural custody, "prove themselves": i. e., it is unnecessary to give formal evidence of execution or handwriting. But it is seldom that the authenticity of a document is challenged, and the expense of preparing formal proof which will probably never be wanted is avoided in practice by the interchanging between parties of "notices to admit" documents. The costs of proving strictly documents included in such a notice, which the opposite party declines to admit, will have to be borne by the latter, unless the judge at the trial certifies the refusal to have been reasonable. And if no such "notice to admit" is given, the party who might have given it and thus avoided the necessity of strict proof, will probably have to bear the expense, whether he succeeds in the action or not.

Suppose a document, which is admissible or necessary as evidence is lost, destroyed or not in the party's possession. In the latter case, he can summon the possessor to come as a witness and to bring the document with him. Or, if it is in his opponent's power or possession, he can give him "notice to produce" it at the trial: and if it is not then produced, he is at liberty to do what could not otherwise be done, namely, give secondary evidence of its contents (e. g. by proving a copy). It is usual to give simultaneously notice to the other side to admit all one's own,

¹⁾ I. e., evidence of other persons' written or verbal declarations or statements.

²⁾ 1 Salk. 285.

³⁾ *Davis v. Loyd*, (1844) 1 C. & K., 246.

⁴⁾ See p. 74 *infra*.

⁵⁾ See the Title Contracts. The principal instances are contracts relating to land and contracts for the sale of goods of £10 value.

and to produce all their own, documents, so far as they may be considered useful. In the "commercial" court, the rules of evidence are greatly relaxed, and these notices, the object of which is to secure the same result of facile proof, can seldom be required. And, generally, banker's books need not be brought to court, but certified copies may be ordered to be used instead¹). The same is possible where business books are in question: but (except in the "commercial court") the practice is less frequent.

Foreign evidence used formerly invariably to be taken by the court's proceeding abroad in the person of its commissioners or examiner (generally barristers of some seniority, appointed *ad hoc*). This was the mode adopted in the case of sick or infirm witnesses; and the same procedure seemed natural in the case of witnesses abroad. It had this great advantage, that the person charged with taking the evidence was acquainted with the English evidentiary system, and thus the evidence was taken precisely as it would have been at home. The process of questioning by the advocates of the parties, under the presidency of the Examiner, was followed²). Such an examiner cannot decide as to the admissibility of any question, but must reserve such objections for the court.

Where such an examination upon oath is objected to by the local law (and it seems that the English law itself penalizes the administration of oaths by unofficial persons in England), the only course is to issue letters of request to a local court. These are transmitted through diplomatic channels, except in the case of Brazil, which prefers that its courts should receive them direct. And in the last four or five years it has become the fashion to issue letters of request, even when the local law would not be infringed by a commission. For the United States of North America, a commission is still preferred. In Ireland and Scotland a subpoena is effective and no commission is needed. In the colonies either plan (commission or letters) may be adopted, and the local courts are bound to comply with letters of request, which may take the form of a "mandamus".

By a remarkable provision of the Merchant Shipping Act, 1894, evidence taken before any British consular officer is receivable as evidence in any proceedings in England, whether any opportunity for cross-examination³) was given or not.

Very often counsel do not think it worth while to object to questions on technical grounds.

IX. Appeals.

The hierarchy of the courts for appeal purposes may be exhibited as follows:—

K. B. D.	C. D.	Adm. D.
Master or District Registrar.	Master (or dist. regr.)	Registrar.
Judge in chambers.	Judge in chambers.	Judge in chambers.
Judges in court (Divisional Court).	Judge in court.	Judge in court.
Judge in court (1st. instance only).		
Court of Appeal.		
House of Lords.		

Interlocutory proceedings may pass through all these stages⁴). The trial of an action commenced by writ of course begins with the third. Interlocutory deci-

¹) Stat. 42 & 43 Vict. c. 11: 45 & 46 Vict. c. 72.

²) In the case of commissioners a set of written questions was formerly prepared, by the party desiring the evidence, and propounded by the commissioners. Cross-examination, however, was allowed. But this process has long been disused in practice, and the examination before an examiner is termed a "commission" in common parlance.

³) Unless the proceedings are criminal.

⁴) Except in "commercial" list cases (see p. 74), where they begin with the second.

sions of a master may be taken by appeal to a judge: or the matter may be referred by the master to the judge without giving a decision. Most interlocutory matters in the K. B. D. now¹) skip the next stage (that of appeal to a Divisional Court) and go straight to the Court of Appeal. This is so in the case of all matters of "practice and procedure": and in all such cases the leave of the judge appealed from, or of the Court of Appeal, must be obtained, unless the decision:

1. Concerned the liberty of the subject or the custody of children.
2. Refused leave to defend a specially indorsed claim, or made it subject to conditions.
3. Concerned the appointment of a receiver or the grant of an injunction.
4. Determined liabilities under the Companies Acts.
5. Dealt with the finding of an arbitrator or referee.

Mere orders extending time or *giving* leave to defend cannot be appealed from. And appeals from a judge as to costs are greatly discouraged, this being regarded as a matter for judicial discretion.

In the Chancery Division the step corresponding to the hearing in the Divisional Court still remains—the hearing by the judge in open court. But this is not strictly an appeal. In the K. B. D., the suitor goes (or rather went) from Mr. Justice X, sitting in Chambers to the King's Bench Division (represented by the Divisional Court) sitting in court: i. e. to Justices X, Y and Z. But in the Chancery Division, the suitor goes from Mr. Justice A in Chambers to Mr. Justice A in court: obviously this is not an appeal at all, but a re-hearing²). Although not abolished, in "matters of practice and procedure" it can be dispensed with, and the suitor can go direct from chambers to the Court of Appeal, if he can get the judge's certificate that no further argument in open court is desired.

Final judgments go to the Court of Appeal from the trial judge in all divisions. All roads converge in the Court of Appeal: and nearly all its orders are appealable to the House of Lords. It is now the place to make some reference to the composition of these various tribunals. Of the masters we have already spoken. The Judge in chambers is, in the K. B. D., one of the judges of that division, who, like the "Lord Ordinary on the Bills" in Scotland, is deputed for the business. The Judges of the High Court must be barristers of 10 years' standing. As successors of the judges of the old Court of King's Bench, they enjoy very high consideration socially, and are chosen as a rule from counsel of the most extensive practice who are beginning to feel the active life of the Bar burdensome. Since the institution of the Court of Appeal, however, the same weight scarcely attaches to their judgments as formerly. For appeal purposes and for purposes of argument of points of law, the K. B. judges sit in a tribunal designed to imitate, at a minimum expenditure of judicial power, the old Court of King's Bench holding a plenary sitting. This is the so-called Divisional Court, and was, until Lord Alverstone introduced a different fashion, composed of two judges. At present, the Lord Chief Justice and two puisne judges frequently compose the Divisional Court. In Admiralty the President and another judge constitute it; in Chancery it is never required, a single judge in court being competent to dispose of all matters. The Lord Chancellor is the head of the Chancery Division, but has no longer any but a supervisory connection with it. The Lord Chief Justice, on the contrary, is an active member of the King's Bench Division, and tries causes, in London and on circuit, as an ordinary judge of first instance.

The Court of Appeal is composed of the Master of the Rolls as working president, and five "Lords Justices", though the Lord Chancellor, Lord Chief Justice and President of the Probate, Divorce and Admiralty Division are nominally members also. Judges of the K. B. D. and C. D. may be invited to sit there on emergency, and also ex-Lord Chancellors. It sits in two (occasionally in three) divisions of three judges each³). Its decisions are authoritative in a sense which can hardly be said of those of the High Court.

Appeals to the House of Lords are costly and infrequent, but its decisions are of conclusive authority. The matter, so far as form is concerned, passes out of the purview of the courts of law altogether. It goes from the Royal Courts to Westminster, in the form of a petition to the King in Parliament, and is ad-

¹) Since 1894.

²) *Boake v. Stevenson*, [1895] 1 Ch. 358.

³) But two can decide interlocutory matters.

judicated on in the great Chamber of Peers by a fluctuating body of law lords from three to ten or more in number. In theory, any peer can vote on the question. It required the greatest efforts to prevent lay peers from taking part in the decision in O'Connell's case (the Irish agitator) in 1844. Lord Romilly, the law reformer, was strongly of opinion that it was well for them to do so, as it tended to keep the law in touch with ordinary lay opinion. But at present the official "law lords" alone decide. At one time, the only law lord who could be relied on to attend was the Lord Chancellor; and he occupied himself comfortably in re-hearing his own decrees. Sometimes an ex-Lord Chancellor would assist to keep him straight, and many most important cases were so decided by Erskine and Brougham, with a lay lord or two to form a quorum. Now, there are four salaried Lords of Appeal appointed (usually an equity, a common-law, a Scottish and an Irish lawyer), and at least three law lords (including peers who hold, or have held, high judicial office in Great Britain or Ireland) must take part in every decision.

Time for Appealing.

The time is generally rather short. For a House of Lords Appeal, a year is always allowed. Appeals may be entered in the Court of Appeal within 3 months in the case of final judgments, 14 days in the case of interlocutory orders. When there is an appeal from Chambers to a Divisional Court, it must be actually entered to be heard on a day within 8 days of the decision, provided such a court is available, and 2 days' notice must be given to the respondent. An appeal to the judge in chambers must be made within 4 days (in the K. B. D.)—in the C. D. the master will fix a day if the resolution to appeal is taken at once, otherwise he must be applied to for an appointment.

Evidence on Appeal. New trials.

On an interlocutory appeal, the evidence, being written, is available for production to the appellate tribunal in the form in which it was produced to the court below. On a final appeal, the court has to rely on the notes of evidence taken during the progress of the case by the judge, and on the shorthand notes (if any) privately agreed to be taken by the parties. These, or as much of them as is necessary, are read by counsel, who can also supplement the account from their personal knowledge. The admission of fresh evidence is very unusual, and the production of a witness for examination and cross-examination almost unheard of. Great reluctance is always felt to entertain any appeal upon matters of fact: and the ground of appeal is almost always error in law.

If it is the finding of fact by the court of first instance which is impeached, the standard remedy is not strictly an appeal but an application for a new trial. This used (K. B.) to be made to a Divisional Court: but now that it has to be made to the Court of Appeal, which has power to enter judgment for the applicant instead of directing the new trial to take place, it has nothing to distinguish it from a strict "appeal". Such an application is possible when the verdict of a jury or the decision of a judge sitting as a jury is alleged to be vitiated by such circumstances as the following:

1. Verdict against the weight of the evidence.
2. Damages grossly excessive or inadequate.
3. Evidence improperly admitted or excluded.
4. Jury misdirected as to the law by the judge.

The last in the most frequent case in which the Court of Appeal reverses the judgment, instead of allowing a new trial. It is virtually an appeal from the law laid down by the trial judge. Very frequently, where the damages are too large, or too small, the Court of Appeal will decline to give a new trial if a more reasonable sum will be accepted or paid.

Stay of Execution.

Pending an appeal, the court from which the appeal is brought or the appellate court may "stay" execution; so that the successful party can take no proceedings to make his judgment available in the meantime. It may, and very generally does, impose terms: thus it is often ordered that a substantial part of the damages should, as a condition of the stay, be paid into court.

Form of Appeal.

The form of appeal is what is technically called a "motion", except in the House of Lords, when it is a "petition". Two counsel on each side, or in each interest, are generally heard: and three copies of all documents must be supplied for the use of the Lords Justices.

In the Lords, the formalities attending appeal are elaborate. A recognizance in £500 must be executed, and £200 deposited in cash, or guaranteed with approved security: the appellant's petition must be printed and signed by two counsel, served on the respondents and presented to the House. The appellant must also lodge at the House, and deliver to the respondent, a detailed printed case, and by taking out and serving an "order of service" on the respondents, the appellant makes it incumbent on them to lodge a similar printed "case" in reply within 6 weeks (8 weeks in Scottish and Irish cases). Appendices to these cases contain prints of all the documentary evidence. The appeal must then be set down for hearing. The House will not receive fresh evidence. A committee sit occasionally in private to deal with interlocutory matters.

X. Execution.

On obtaining from the proper officer a certificate of the result of the trial, the judgment can be "entered" at another department of the Central Office (or at the District Registry, as the case may be). But in the Chancery Division the judgment is not one for the simple payment of damages, but is a complex adjustment of rights, and it requires to be "settled" by repeated appointments before the Registrar, at which the solicitors of the parties attend, and take any objections they may have to his official "minutes" of the decree. Or, again, a Chancery judgment may be simply one for the taking of certain accounts, and the payment of what may be found due on balance. Referees are never resorted to in chancery cases, for the chancery courts have a complete apparatus for taking accounts: and their practice is not to refer cases of account to a referee to try, but to pronounce judgment for an account, and leave it to be worked out in detail in chambers by the masters in chancery (never by District Registrars). Such judgments are frequent in actions on mortgages of land: the judgment directs an account of what is due, and an order that on payment of principal, interests and costs, the mortgage shall be discharged; otherwise that the land shall be definitely vested in the mortgagee. So also, in an action for winding-up a partnership. The process of verifying the accounts need hardly be detailed, but it should be mentioned that other persons more or less interested in the proceedings, may at this stage be brought in to participate in taking the accounts, although not originally parties. The upshot of the proceeding is that the Master signs and files a certificate embodying the result of his investigations.

Any party may then apply to the judge to alter it. The matter will be entered "for further consideration", and the judge will confirm or alter the certificate, after which its finding can be enforced by the ordinary methods. In the same way, the original judgment may direct certain inquiries to be made—such as what persons were the next-of-kin of a deceased partner—and the Master will investigate the facts and certify the result in a similar way.

Attachment.

When the final judgment directs—as a Chancery action frequently does—that the defendant shall do, or abstain from doing, certain definite things (other than the mere payment of money, such as concurring in a sale of a partnership business, assigning a patent to a person for whose benefit it has been declared that he possesses it), the decree is enforceable by an order of committal or attachment, i. e. imprisonment. A mere judgment for the recovery of a sum of money, or an order for the payment of such a sum cannot be thus enforced, since the Debtors Act of 1869—unless in a few rare cases¹). Such process against the person is surrounded by various safeguards. It absolutely requires to be grounded on personal service of the judg-

¹) But such judgments may form the subject of an application to a court with bankruptcy jurisdiction (usually a county court) for an order committing to prison for six weeks or less a debtor who has the means to pay and does not do so. See the sections, p. 94 *infra*.

ment or order on the defendant, and the intervention of the court in the person of a judge (usually sitting in Chambers). The judge must be satisfied that the order has been brought to the mind of the party and disregarded, by sworn testimony in writing, before the attachment will be allowed. If permitted, it is not unusual to direct that the warrant shall "lie in the office" for a few days or weeks, to give the party another opportunity of complying. The warrant takes the form of a "writ of attachment", prepared by the party asking for its issue, sealed at the court office, and delivered to the sheriff in whose county the party to be attached is living, whose duty it is to execute it by his bailiffs.

Fieri Facias.

Much the most common method of execution is, however, the well-known writ of *fieri facias*, by which the judgment-debtor's movables are made available to satisfy a sum certain adjudged to be due. This also is a writ framed in a common form by the solicitor to the "judgment creditor" (who may be the defendant, since the judgment may have given him a right to receive his expenses or some of them from an entirely or partially unsuccessful plaintiff). It is sealed at the court office (central office or district registry), and then taken to the sheriff (in practice, to the under-sheriff) of the county, for execution by his bailiffs. The great advantage of proceeding to actual seizure is this, that the creditor may be thenceforward (provided he had no notice of any recent act of bankruptcy on the part of the debtor) preferred to others. A second creditor may subsequently seize, or as it is technically termed, "levy on", the goods already seized (of course through the sheriff): and this will secure a secondary preference, and so on. It is not proper to seize more goods than are necessary; but the uncertainties of forced sales are such that it is usual to seize a considerable amount for complete protection. The goods, unless bankruptcy supervenes and the bankruptcy officials interfere, are sold by the sheriff's officers by public auction; and by modern legislation¹), if the judgment was for over £20, the sheriff must retain the proceeds for 14 days, during which time he must pay it over to the bankruptcy officials (deducting expenses) if he receives notice of a bankruptcy petition's being presented against the debtor. As an unsatisfied judgment for a substantial amount usually precipitates a bankruptcy petition, it will be seen that there is not very much benefit in levying a *fieri facias* nowadays, unless for the behoof of the general body of creditors.

The process, being ancient, presents striking anomalies. It is applicable to corporeal moveables capable of being sold (and to interests for a term of years in immoveables, and to growing crops.) This excluded money, bills, and securities generally. Money and its equivalents are however made seizable by 1 & 2 Vic. c. 110, § 12. Things let or pledged to the judgment-debtor can be seized and sold *pro suo interesse*. Those which he has let or pledged to third parties cannot be affected. But this is not because the mere custody of the third parties protects them. On the contrary, the sheriff may always break into a stranger's house to get the debtor's goods (subject to an action for damages if they are not actually there), though he may not break into the debtor's own premises, or take goods from his own personal custody. A special exemption is given to tools and professional requisites, bedding and dress to the total value of £5. The levy can be made at night.

It will be seen that the process closely resembles that of extra-judicial distress for rent. The two are apt to collide, and the collision is the subject of statutory regulation. The landlord, as a preferred creditor, has some advantage. He is not bound to notice probable levies (though of course he cannot seize what is already *in custodia legis*): but the sheriff is bound, on levying on the tenant's goods, to make provision for the landlord's rights, being directed by statute to pay to the landlord a year's arrears of rent (or in the case of a weekly or monthly tenancy four weeks or months as the case may be). It is well known that a landlord can (subject to the recent revolutionary Act of 8 Edw. VII, c. 53.) distrain for rent on all goods found on his tenant's land, no matter whose. This is not so by common law, in the case of levies by a judgment creditor: but the Bills of Sale Acts²) have gone

¹) Bankruptcy Act., 1890, § 11.

²) 41 & 42 Vict., c. 31: 45 & 46 Vict. c. 61.

a considerable way in the direction of making goods leviable which have been (1) conveyed away by the debtor, without leaving his custody, by an unregistered document, — or (2) allowed to remain in his possession in the way of business by the real owner.

Elegit.

A sort of analogy to *fieri facias* for immovables (including terms of years, short or long) is offered by the writ of *elegit*, which is so named from its having originally been an exclusive writ, which the creditor could have if he “preferred” it to any other. The land is seized and sold by the sheriff: and after that, no other process of execution can, even now, be admitted¹). Just as the interest of a letter or pledgor is not liable to be taken under a *fieri facias*, so the interest of a person entitled to the possession of land *in futuro* cannot be taken in *elegit*. The land (unless so ordered) is not sold, but its value is ascertained by a jury, and itself delivered *in specie* to the creditor, to satisfy his claim out of its annual proceeds. Bankruptcy proceedings do not seem necessarily to interfere with the operation of this writ: but it is defeated by a conveyance of the land to a bona-fide purchaser prior to delivery to the creditor.

Charging Order.

These ancient writs are not available in the case of many species of property of modern growth: in particular, to stocks and shares. In virtue of 1 & 2 Vic. c. 110, § 14 it is possible for a judgment creditor to gain a certain priority in respect of these: only, however, where they are British Government stock, funds or annuities, or stock or shares of a public company in England. This is effected, not by empowering the creditor to sell, or get the sheriff to sell, the shares; but by the more elegant expedient (to modern ideas) of giving him a “charge” or statutory hypothec over them. This charge is made by virtue of a “charging order” issued by a Master in Chambers *ex parte*, and this can at once be notified to the government financial officers, or to the company, and they will then be disabled from continuing to pay dividends to, and from recognizing transfers by, the debtor. The latter can “show cause” against this “charging order *nisi*”; and if no good cause is shown, it will be “made absolute”. After this, the creditor has a good and effective charge on the stock etc., as though it had been voluntarily created by the debtor at the date of the first “order *nisi*”; and can proceed to get the benefit of it in the usual way, i. e. by commencing a chancery action claiming sale of the property for his benefit: and of course he is recognized as a secured creditor in bankruptcy. Shares in unincorporated trading associations, i. e., partnerships, can also be attacked by the creditor. Formerly the latter sold the actual chattels of the firm *pro debitoris interesse*: since the Partnership Act, 1890 (§ 23), the Master can make an order charging the debtor’s interest in the firm, and the creditor stands to that extent in his place as entitled to participate in the profits, though with no liability to the creditors of the firm and no powers of management.

Garnishee Proceedings.

Formerly, also, the debts owed by other persons to the judgment debtor could not be made available for the satisfaction of the judgment. Now, however, if the judgment is one for the recovery of a fixed sum of money, proceedings called “garnishee” proceedings may be taken in order to make them available for the purpose. These proceedings operate somewhat harshly on the debtor’s debtor, or “garnishee”: but they can only be taken when the debt is of a simple character; i. e. not a debt depending on the peculiar rules of equity jurisprudence or on the performance of some condition. Consequently, the process is not unlike an application for summary judgment against the third party on a specially indorsed writ. A “garnishee order” is made, like a “charging order *nisi*”, *ex parte*, on sworn evidence being produced to a Master; but it must be shown that the garnishee is in England. A firm carrying on business there is nevertheless within the rule. It illustrates the quasi-independence of each pair of Chancery judges, that the garnishee summons, if taken out in a matter assigned to Justices Warrington and Parker (or rather their predecessors) had formerly to be served on the judgment debtor as well as the garnishee. This however is now made the regular practice in all cases. In the first instance,

¹) *Hele v. Bexley* (1853) 17 Beavan, 14.

the order is made very informally, and almost as a matter of course. But it has no operation until it is served personally on the garnishee: after which he may no longer pay the judgment-debtor. But of course he may allege that he does not owe the debt at all, or that he has previously been instructed to pay it to some stranger. The order therefore calls upon him to appear in chambers and state his position. If he chooses to pay the debt to the court officers, he need do nothing further. But if, without this, he fails to answer the summons, or appears and admits the debt, an order may be made ordering execution to issue against him just as if he were an original judgment debtor. If he disputes the debt, or says it has been assigned to a stranger, whose title he is bound to recognize, the Master may, by an extraordinary stretch of power, comparable to the jurisdiction on a specially indorsed writ, ignore his contention, and order execution to issue against him. Or he may direct that the question be tried as though it arose in an independent action, alleged assignees being given an opportunity of participating in it.

Equitable Execution and Miscellaneous Writs of Execution.

Where no other process is available, the court is increasingly inclined to assist the creditor to get the benefit of his judgment by appointing some person "receiver" or official custodian of the property sought to be affected. It will not do so to overcome merely practical difficulties. This process derives the loose denomination of "equitable" execution, from the fact that it was first employed to render the interests of trust-beneficiaries available for their judgment-creditors. It is an expensive process, since the receiver works independently of the sheriff, and must be remunerated. It will accordingly be sparingly conceded: and only on special application. Somewhat like this process is the ancient process of sequestration, by which commissioners are appointed to enter into possession of the whole of the defendant's legal property, until he complies with the order of the court. This operates as an alternative to attachment¹), and a very useful one in the case of corporate defendants. But the property cannot be sold, except (by judicial order) when perishable, or to raise a definite sum of money which the judgment directs the defendant to pay. It is not a common—in fact it is, except as against corporations, a very rare—writ. We may just mention three other uncommon writs of execution:—the writs of possession, delivery and assistance.

The former issues upon a judgment for the recovery of land, commanding the sheriff to enforce it *militari manu*. The writ of assistance is the corresponding writ for movables. It is hardly ever²) used: plaintiffs preferring to levy a *fieri facias* for the value of the goods detained: or to issue a writ of delivery, which allows the defendant the option of paying for the goods.

Generally.

There are certain limits on the use of these processes. Except on judgments for so much cash or for the recovery of land, they are not available until 14 days from the date of judgment: and they are never available without leave after the lapse of 6 years. There are other cases in which leave is required before a judgment can be enforced, of which the most important is that of the enforcement of judgments against the private assets of individual partners who have been sued in the firm name. In such a case it is indispensable that the particular partners against whom execution is desired, should have either

1. Been personally served with the originating process (e. g. writ of summons).
2. Appeared in their own names.
3. Been adjudged partners.
4. Admitted partnership.

And as we have seen, service on a manager or one partner in England binds all the partners though they may all be foreigners who have never been in England in their lives, provided that the firm carries on business there, and that they are sued in its business name. But a judgment based on such service can only be enforced against the partnership assets; and no leave can be obtained to enforce it against any private property a partner may have in England; unless he (1) was

¹) Suprà, p. 66.

²) For a case of its employment, see *Wyman v. Knight*, (1888), 39 Ch. Div., 165. And see forms of writs, Annual Practice, Volume II.

personally in a position to be served with process, if the plaintiff had chosen to follow that method, or (2) has recognized the jurisdiction by "entering an appearance", or (3) has been served with the writ or notice of it either in England or under the rules allowing foreign service.

It will be observed that by no process is it easy to arrest a debtor, even when the judgment has been obtained. *A fortiori* is it difficult to arrest him, as was formerly common, "on mesne process", whilst yet the trial is in the future. There is indeed a very rare proceeding known as the issue of a writ "*ne exeat regno*" by which (if it still exists) a defendant may be arrested and detained in England until he gives security for the amount of a liquidated claim against him¹), if he is attempting to leave the country. And, prior to judgment, the Debtors Act 1869 (§ 6) authorizes a Master to order the arrest of a defendant if it is proved that he is intending to leave England and that this will prejudice the plaintiff in his action, which must be one for £ 50 at least.

A more useful process, after judgment, is that which enables judgment-debtors to be brought before the court and examined as to their financial position, with their books and documents. But, in practice, if a judgment is not discharged by compliance, bankruptcy process almost invariably follows in the case of a trader, unless some arrangement is come to between the parties.

XI. Interlocutory Applications.

Incidental applications to the Court or its officers may be made by motion, petition or summons. The last is the commonest and simplest, and can be made to a Master or district registrar, who may refer it to a judge (to whom there is always an appeal). In chancery the close relations which exist between a judge and his Masters enables precise directions to be given as to what matters each judge wishes reserved for his own determination. The process is simple: the party desiring it fills up a form of summons, files it at the office, gets a copy sealed, and serves it on the other side, by leaving it at the solicitor's "address for service". The date of hearing is inserted by the Master's clerk in a chancery case, as being convenient to the Master. Two days notice are generally given to the other side. A *motion* is formally made in open court, either before a Divisional Court²) in the K. B. D. or before the judge in charge of the action (or his colleague) in the C. D. Notice (2 days) is given to the other side, but not to the court (except in the K. B. D., where motions are entered in a list for hearing). In the Chancery Division, certain days are set apart as "motion days", and counsel move in order of seniority. Sometimes a motion is made *ex parte*: thus if an injunction is urgently wanted, pending the trial of an action (as where a builder is interfering with one's foundations) the court may make an *interim* injunction *ex parte*. In such a case it is unnecessary to wait for a motion day, but the business of the Court may be interrupted for the purpose: frequently by interposition after the mid-day adjournment.

An opportunity would naturally be given in such a case for the opposing party to come on a future day and object to the interim injunction being continued: and the party obtaining it would probably have to undertake to be responsible for damages if it eventually should prove that he had no right to the injunction at all. But it is much more regular and usual instead of moving *ex parte*, to apply for leave to serve regular notice of motion for an interim injunction simultaneously with the service of the writ commencing the action³). The application will then not be *ex parte*, but the merits can be fully gone into. Occasionally they are gone into so fully that there remains no substantial question to try: the parties then often agree to treat the hearing of the motion as the trial of the action; and the injunction will be made perpetual (instead of interim) or refused altogether as the case may be.

Similar motions are frequently made for the preservation of property the subject of litigation by the appointment of an impartial "receiver", who gives security to the court for its safety and proper employment. This is common in the case of partnership disputes.

¹) *Sobey v. Sobey*, (1873) L. R. 15 Eq., 200.

²) See. p. 40.

³) Leave is necessary, because generally interlocutory process cannot be served on a defendant who has not yet appeared, and the time for whose appearance has not expired.

Petitions are of comparatively rare occurrence, and characteristic of chancery practice. They are heard in court, and are somewhat elaborate statements of fact, grounding a title to relief. E. g. a person asking for payment of large funds out of court must often so proceed.

XII. Interpleader. Third Party Process. Counterclaim.

1. Interpleader:

One important kind of summons stands quite by itself, since it brings in an entirely fresh question into the action. It is called an "interpleader" summons, and is taken out by a defendant who is in the position of laying no personal claim to the subject-matter of the action, but is in doubt whether the plaintiff or some third person is really entitled. This is the position of a sheriff who has levied on goods which are claimed as the property of some person other than the judgment-debtor: it is also the position of a stakeholder. The summons may even be "originating". The neutral holder may not actually have been sued by anyone, but he may expect to have rival claims set up; and by taking out an interpleader summons, he can secure protection. The summons must be supported by an affidavit of—

1. No interest.
2. No collusion.
3. Willingness to put the disputed property under the control of the court.

On this the Master, or district registrar, may (1) (if an action is already in existence) add the new claimant as a defendant, or substitute him for the neutral holder—or (2) (whether an action is pending or not) direct a fictitious issue to be stated between the rivals (or a "special case" if the dispute be one of law)—or he may (3) decide the question himself (if it be one of law)—or (4) (by consent, or where the sum in dispute is under £50) dispose of the matter summarily and without appeal.

2. Third Party Notice.

A somewhat analogous procedure exists where the defendant is not quite neutral, but insists that, if he is liable to the plaintiff, he has a right to indemnity or contribution from a third party. Ex. gr., a farmer claims damages for bad seed from a retail dealer, who falls back in his turn on the wholesale merchant who supplied them. It was held that the chain could not be continued further: the "third party" could not bring in a fourth, but had to pursue his claim (if any) in an independent action.

Since 1911, however, (R. S. C., July: O. 16, r. 54a) a "third party" is allowed to bring in a fourth party: and since the proceeding is made strictly analogous to third party proceedings, an endless chain of fifth, sixth and further parties is admitted.

The notice always requires leave for its issue, and if this is granted, it must be served on the new third party in the same way as a writ. It must then be appeared to, and unless this is done, the third party is taken to admit the defendant's liability to the plaintiff, and his own liability to indemnify him, and if judgment then goes against the defendant, and he pays, or obtains leave for the purpose, he may enter judgment up to that amount against the third party. If, however, the latter duly appears, the defendant must take out a summons for directions, on which the master will say how the questions between the various parties are to be ascertained and tried. Or if he thinks the third party has no case, he can give judgment for the defendant against him, just as though the latter had sued him on a specially indorsed writ. There is some laxity, it will be seen, about these provisions. And the notice can be served outside the jurisdiction, in the same circumstances as a writ could be¹).

3. Counterclaim.

Perhaps the most important and common class of case in which the defendant asserts a claim is, however, when he asserts it against the plaintiff. This is done by "counterclaim". When pleadings are being delivered, it can be raised in the "defence". Otherwise notice of the defendant's contention must be given to the plaintiff within 10 days after "appearance". And fresh parties, besides the plaintiff, may be brought in as quasi-defendants [but not as quasi-plaintiffs²)] to the

¹) *Dubost v. Macpherson* (1889), 23 Q. B. D. 340.

²) *Pender v. Taddei* [1898] 1 Q. B. 798.

counterclaim and cannot counterclaim in their turn (*Alcoy v. Greenhill*. [1896] 1 Ch. 19).

As to the distinction between set-off and counterclaim: The former operates as a defence to the plaintiff's claim, which ought to have been reduced by its amount. The latter is an independent demand, allowed to be tried with the plaintiff's claim, grounding a separate judgment, but available to reduce the amount for which the plaintiff can levy execution.

There is little, if any, restriction on the kind of claims that can thus be put forward by the defendant. Where fresh parties are brought in, they must be served with the counterclaim as though it were a writ, and the rules for service of writs outside the jurisdiction apply. Common-law claims may be urged by counterclaim in Chancery and Admiralty cases¹), and vice versa.

On receiving notice of counterclaim, the plaintiff may use the "third party" procedure for the purpose of obtaining indemnity²). If pleadings are being delivered, he must plead to the counterclaim in his "Reply".

XIII. Miscellaneous provisions. Infants and Lunatics.

Actions can sometimes be remitted to an inferior court; or "consolidated", i. e. fused into one, to save expense. This can be done on summons. Again, the plaintiff may "discontinue"; or abandon the action, by simple notice to the defendant (though a counterclaiming defendant cannot thus abandon his counterclaim but must obtain leave to do so³). This prevents the matter from being *res judicata*, and the discontinuing plaintiff remains at liberty to bring fresh proceedings. Orders can be made in the course of proceedings for the protection or even sale of the subject-matter; and in a chancery case the protection which is afforded by a sale of land under the authority of the court, makes such sales very frequent. The court officials choose the auctioneer, fix a reserve price, and settle the conveyance; and the purchase-money is paid into court. Or they can authorize a sale by tender, or a sale by private contract. Or, again, they can authorize a sale to be made by some party without the supervision by the court of the details just mentioned: but this is less usual.

Particular rules apply to actions to which infants (under 21) are parties. When plaintiffs, they need a "next friend" who will be personally responsible for the costs, if unsuccessful (but who may sue *in forma pauperis*, if absolutely necessary). When defendants, they must have a "guardian ad litem", appointed by the plaintiff's obtaining an order of appointment, in default of appearance by a suitable guardian vouched for as disinterested by the defendant's solicitor. (The legal guardian of the infant is not as such entitled to be guardian *ad litem*: but service of a writ may be effected on him. Similar rules apply to lunatics. Default judgment cannot be had against infants.

XIV. The "Commercial" Court.

The existence of this court is a striking instance of the English propensity for erecting a substantial structure out of mere understandings and acquiescence, without there being any positive enactment to point to (as in the case of "cabinet" government, and colonial autonomy). The sole written foundation for the practice of the court has no legislative or customary validity, and is not even a statutory Rule of Court. It is a mere memorandum, explaining an arrangement made by the King's Bench judges for the disposal of their business. We print it in Part. XX. It notifies (Para. 11) that a particular judge will be set aside for commercial business, and states that it is "desirable" that interlocutory applications should be made to him in person, and not to a Master, in commercial cases (P. 2). It enables him to "make such order as he thinks fit, *in accordance with the existing rules*", "for the speedy determination of the questions really in controversy", and also to dispense with the technical rules of evidence (for the avoidance of expense and delay)—again, only in accordance with existing statutory rules. None such have been made, except one (R. S. C., O. 30, r. 7), which allows hearsay evidence to be given of

¹) Cf. *The Cheapside*. [1904] Prob. 339.

²) *Levi's case* [1902] 2 K. B. 481.

³) As to the discontinuance of proceedings commenced otherwise than by writ, see *Re Dyson's Trade-Mark*, (1891) 65 L. T. 488.

particular facts, if specially ordered, and also allows particular facts to be proved by the production of writings (originals or copies)—“or otherwise as the judge shall direct”. These words “or otherwise” are very wide: but they can hardly be supposed to enable the judge to disregard the whole law of evidence (Paras. 6 and 8)¹), and in fact, Mathew, who is a strenuous advocate for the powers of the “commercial” judge, cannot argue that they do. The real power of disregarding the strict rules of evidence, he admits, rests upon the consent of parties. And this in turn seems to rest on the dislike of solicitors to run counter to the strongly expressed wishes of the Bench. The whole presents a very curious problem of constitutional law. Lord Coleridge, when Lord Chief Justice, was strongly impressed by the danger of adopting an arbitrary procedure in any class of cases, and during his life-time nothing could be done in that direction. Probably the true remedy might have been to recast the Rules of Court and render them less complex. But that would have been a herculean undertaking: and just as Redlich has shown us the Cabinet usurping the functions of the House of Commons, so we may see in the “commercial court”, an elastic practice asserting itself and reducing the established rules of court to a hollow shell.

It will be seen that the memorandum authorizes nothing new. Its importance lies in the fact that dormant or unusual powers, which actually exist in the Rules of Court, are officially put forward as proper to be exercised in this class of case. And the safeguard is attached to this invitation, that the authority which is put forward to exercise them is a judge in person, and not a Master.

On this elastic and slender foundation, the capable men who have filled the position of “commercial” judge, have built up a system of procedure which rests in reality on the good sense and concurrence of that important body, the solicitors. It is not obligatory to proceed in the “commercial court”: but it is convenient, and the legal advisers of parties are prepared to acquiesce in the directions given by the judge, even where they involve somewhat startling departures from the ordinary practice.

But the fact that one judge out of eighteen in the King’s Bench Division is capable of dealing with the business, shows that the term “commercial case” has by no means a wide interpretation. Although defined as “including causes arising out of the ordinary transactions of merchants and traders, amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking, mercantile agency and mercantile usages”, it is in reality hardly so extensive as it appears.

It is said that claims connected with shipping transactions (if brought in the K. B. D. and not in Admiralty) can hardly fail to be cases for the commercial list: but they have been withdrawn from it when raising questions of international law. Mathew observes that cases involving the interpretation of a mercantile statute are always treated as commercial. Yet an action by a merchant against a customer, on a bill of exchange for goods sold, was refused a place in the commercial list²). And Mr. Justice Scrutton, when a leading counsel of eminent experience in commercial cases, said in a public address, in February 1908³), that the question of whether a case will be put into the “commercial” list or not depends very much on who is the judge in charge of it, and whether the list is full. “If the list is not full, the judge is very ready to take cases; if it is full, he becomes very discriminating as to what are commercial cases: and if one knows one’s judge, one will find what remark will keep it out of the list.” He added that there was one judge before whom it was enough to say that the case was an engineering case, to ensure that it would not go into the commercial list. “The very mention of engineering seemed to act as a warning that the case ought not to come within the precincts of the commercial court. . . . Generally, the court tried all shipping cases and all insurance cases⁴). When you get to the Stock Exchange it is a little more difficult. . . . and when you come to the sale of goods it is very difficult to say whether they ought to take them or not.” Mr. Justice Scrutton “thought the bills of costs were less”.

Some cases may be of a kind assigned to the Chancery Division. If the necessary consents can be had, such an action may be transferred to the K. B. D. and

¹) See Judic. Act, 1875, § 20, (*infra* p. 89).

²) 39 Solicitors’ Journal, 715, 720.

³) Law Times Newspaper, 29 Febr. 1908, p. 417.

⁴) *Scilicet*, when not brought in the Admiralty Division.

proceed as a commercial case¹). But it cannot of course be previously dealt with by the commercial judge, as he has no cognizance of chancery cases. Admiralty cases would generally be left in that division, and not transferred to the commercial list in the K. B. D. The question of whether or not the case (assuming it to be in the K. B. D. originally or by transfer) is to go into that list will be settled on the summons for directions²) (or in cases of a specially indorsed writ, on the summons for leave to sign judgment if such leave is refused). And the plaintiff may take out the summons for directions itself before the commercial judge (though of course the latter need not necessarily retain the case). Since no summons for directions can be taken out until the defendant appears, the plaintiff, if he wishes to have the case made a commercial one immediately, must make a special and independent application to the judge. And this can be done, although the defendant is not yet formally before the court, because the whole theory of the matter is that it is a mere question of what judge is to try the case—which is clearly an affair which concerns only the judges themselves³). Yet with some want of logic, an appeal to the Court of Appeal is allowed from the judge's decision⁴). Summonses for directions in commercial cases are heard by the judge in court, and not in chambers — a departure from custom. The trial may be at London or Liverpool.

A special series of "Reports of Commercial Cases" (Com. Cas.) has regularly appeared, dealing with cases tried by the commercial judge. The more important are also reported in the ordinary Reports. As the case is, in theory, nothing more nor less than an action in the King's Bench Division, judgment, execution and appeal differ in no respect from their ordinary course. The process is, in short, a tacit reversion to the old common law system, as it existed before 1873, when the delicate and expensive machinery of chancery practice (properly applicable to cases concerning *universitates bonorum*) was imported wholesale into the practice of the common law. One example will suffice. We have seen that in chancery sworn lists of all documents which could possibly be said to be relevant, must be furnished by each party to the other: after which it became necessary to expend much time and labour in inspecting their contents. The new "commercial" practice is to order mere lists of documents to be exchanged, and to rely on the court's summary powers over solicitors, for the sufficiency of these lists and the due production of everything material. If a party were to sue or defend in person, or to discharge his solicitor, the new system loses a powerful lever, and in such a case it is quite possible that it would be directed to proceed in the ordinary fashion.

The "commercial" practice is not intended to apply to cases in which the main question is one of account. Matters of account are best left to be decided by a referee under the old practice. And so with cases where the main question is one of law.

The system which it was desired to establish, of having one single judge in charge of all the commercial work, has been found to be inconsistent with the circuit system: and a rota of three or four judges taking it in turn has been arranged. The result is that the idea of having one judge who should be cognizant of the whole process in each case from beginning to end, is not carried out.

Of the Commercial Court practice, Vaughan Williams L. J. observed in *Comp. Sansinena v. Houlder Bros.* [1910] 2 K. B. 362, — "I understand that, according to the practice which prevails in the Commercial Court, and, I am afraid, to some extent, in the courts generally under the Judicature Acts, no greater precision in pleading is required than appears in these "points of claim". I regret it, and am not by any means the only judge who has commented on the lamentable want of precision which is prevalent under the system of pleading now in force".

The elasticity of the process is a recommendation. But its esoteric and unwritten character are hardly commendable. The result is to make it very difficult for any but practitioners well acquainted with the *arcana* of the court to conduct a case with credit. Its popularity appears on the decline. Only 94 cases were tried in this court in 1910. Some attempt was made in 1908 to assimilate the entire K. B. practice to that of the "commercial court" — with indifferent success.

¹) *Baerlein v. Chartered Mercantile Bank*, [1895] 2 Ch. 488.

²) See p. 53 *suprà*.

³) *Barry v. Peruvian Corporation*, [1896] 1 Q. B. 208.

⁴) *Sea Insurance Co. v. Carr*, [1901] 1 K. B. 7.

A series of rules (R. S. C., July 1908) was appended to O. 54 (rr. 30—41), directed to secure that interlocutory applications should be dealt with by the judge who might be expected to try the case. This was found impossible in practice; and the attempt was attended by much inconvenience. New rules (R. S. C., Aug. 1909) reverted to the older practice, while regularizing it. A judge is now formally assigned to deal with interlocutory business, and it is left to his discretion to transfer it in any particular case to the probable trial judge if and when convenient. The rules, both of 1908 and 1909, appear to have been exceptionally badly drafted. They are partly inconsistent and partly *ultra vires*. At present they are in a condition of virtual suspense, under the wide powers² conferred by them on the Lord Chief Justice.

XV. Admiralty Division.

We have already noted the jurisdiction of the Admiralty Division, which is to some extent co-extensive with that of the King's Bench. An ordinary action *in personam* might be brought in the Admiralty Division, and if of a mercantile or shipping character would probably not be ordered to be transferred to the K. B. D.¹). So that the chief importance of knowing what matters are properly the subject of Admiralty jurisdiction is this—that such matters may generally form the subject of an action *in rem*. An action for damage by collision, if restricted to damages against the owners personally, might be quite well brought in the King's Bench. Conversely, an action for damage on a breach of contract to carry goods safely by sea to England, though naturally a case for the King's Bench, might form the subject of an action *in rem*, and in that case would have to be brought within the terms of the Admiralty jurisdiction. The peculiarities of Admiralty procedure apply mainly to actions *in rem*.

It has been observed that, in such actions, the periods for delivery of pleadings are shortened, and that the summons for directions is unknown in Admiralty practice. It should be added that trials may be expedited. The "Master" of the other divisions is replaced by the "Registrar", and nautical assessors are frequent. They can be had as of course in collision and salvage cases. But their view does not bind the judge in any way²). In actions *in rem*, the great advantage is that the ship and [or] cargo concerned can be arrested and detained for the satisfaction of the demand. This procedure requires some detail.

The writ having been served on the *res*, as explained above³), the plaintiff can apply for a "warrant of arrest", which will be served by the officer of the Court (the Admiralty Marshal), and must be so served within 12 months. The ship is now *in custodia legis*: but even prior to the service of the warrant it is contempt of court for those in control of her to disregard notice that a warrant is out. An owner can however prevent or terminate the arrest by giving security. If he desires to prevent the issue of a warrant altogether, he can, even though no action has yet been commenced, enter what is called a "*caveat*" at the court office, by signing an undertaking to enter appearance and either give security or pay cash into court to a named amount in any action that may be instituted against the property⁴). This *caveat* makes it necessary for the plaintiff to serve the owner as well as the *res*: and if the plaintiff then unreasonably proceeds to arrest, in the face of the owner's expressed undertaking to give bail, he incurs a liability to pay damages for demurrage and other loss. On the other hand, if this precaution has not been taken, a Warrant of Release must be obtained. To such a Release there is only a qualified right. If security is given for the value of the *res* (or the value of the *res* paid into court), the release will be accorded, unless the plaintiff has entered a "*caveat*" against it, at the risk of damages if his conduct in doing so is unreasonable. Thus the plaintiff, who has *prima facie* an absolute right to arrest, does so at his own risk—(1) in the face of a *caveat* by the owner against arrest, or (2) by entering a *caveat* of his own against release. And the court can always, on motion, overrule a *caveat*.

To ground the issue of a warrant of arrest, a sworn statement (affidavit) must be produced to the officials, (though they may dispense with some of the

¹) Cases of marine insurance are constantly so tried.

²) See *The City of Berlin*, [1908] P. 120: *The Konig Willem II.* *ibid.* 125.

³) P. 47 *suprà*.

⁴) A solicitor signing such an undertaking becomes personally liable on it: *The Crimdon*. 1900] P. 71.

particulars), verifying (1) the party (2) his claim (3) the fact that it is unsatisfied (4) the name and nature of the *res*: and also stating in an suit for seamen's wages or for possession of a vessel (1) the flag of the vessel (2) the fact that the London consul of the flag has had notice. If the action is on a bottomry bond, it must be produced, as well as a notarial translation, if in a foreign language.

We have said that Security ("bail") must be offered in an owner's *caveat*; and tendered in order to obtain a Release. Bail is an equivalent for the value of the *res*, and is given by means of a contract of record, entered into by sureties before the Registrar, or even a District Registrar or any commissioner for oaths, or a special commissioner appointed *ad hoc*. To secure the benefit of a *caveat* against arrest, this security should be given within 3 days of service of the writ on the caveator. The caveator informs the officials and the plaintiff of the proposed sureties; the marshal immediately satisfies himself as to their solvency, and the bond can then be completed. Although the bail is in theory an equivalent for the *res*, it is usual, to avoid the trouble of a hurried appraisal at this early stage, to put in bail for the amount of the claim; and it cannot be exacted beyond it. Nor can it be enforced beyond the true value of the *res* as ultimately ascertained by appraisal: upon due application, it will be reduced to that amount.

The most remarkable subsequent feature of an Admiralty action occurs in cases of collision: where, before any pleading is delivered (and therefore before either side is cognizant of the other's case), each party must file¹ what is called a "Preliminary Act". These are sealed up, and opened at the trial. They contain particulars of the following details from each party's point of view:

1. Names of vessels and masters.
2. Time of collision.
3. Place of collision.
4. Direction and force of wind.
5. State of weather.
6. State and force of tide.
7. Course and speed of vessel when the other was first seen.
8. Lights carried by her.
9. Distance and bearing of other vessel when first seen.
10. Lights of the other vessel which were first seen.
11. Whether any other lights of hers came into view before collision.
12. What measures were taken, and when, to avoid collision.
13. Parts of each vessel which came into contact.
14. What sound signals were given, and when.
15. What sound signals were heard from the other vessel, and when.

As in the Chancery Division, sales by the court and accounts and inquiries are frequent incidental proceedings. Accounts and inquiries are gone into before the registrar, who may, in accordance with ancient practice, have the assistance of merchants. Evidence in these incidental matters is usually taken *viva voce* (twenty-one days are allowed to the claimant to file his claims and the vouchers in support of them): and the registrar's final determination may be objected to before the judge (six days are allowed to proceed on it, and fourteen more to object to it) in court. Thus, an inquiry may be made as to the state of accounts between co-owners, or mortgagees and owners, or as to the value of goods. See R. S. C. 17 July 1911 (O. 56).

It has been questioned, and apparently with much force, whether a judgment *in personam* beyond the value of the *res* can be given in an action *in rem*. A person who appears, for the purpose of giving bail and releasing his property, does not seem to submit personally to the jurisdiction. In *The Gemma*²) and *The Dictator*³) a defendant, who had appeared and given bail, was obliged to pay personally the deficiency over and above the amount of bail. But that was because, in *The Dictator*, the bail (and the original claim) was much below the value of the *res*: whilst, in the *Gemma*, the point was, not whether a judgment beyond its value was good or bad, but whether (assuming it good) it could be executed against property for which bail had been at a previous stage given. Williams and Bruce say that

¹) Plaintiff—within 7 days of issue of writ. Defendant—within 7 days of appearance.

²) [1899] P. 285.

³) [1892] P. 304.

such a judgment, exceeding the value of the *res*, is unknown to the records of the court¹).

If the plaintiff obtains judgment, he will wish to make his arrest or bail effective. If bail has been given, the court must be asked to order payment by a limited time, in default of which the ordinary processes of execution can issue against the cautioners. If not, the *res* may be sold under a commission of sale taken out of the Registry by the plaintiff, and executed by the Marshal, who must first have the *res* valued by sworn experts. Leave is required from the judge before any lower price can be accepted. The process *in rem* being an international process, bail will not be exacted where it has already been given for the same claim in a foreign court²).

On the whole, the admiralty process is effective and speedy. The parties are sure of a specially skilled judge: there is no danger of a jury, and cases have occasionally been known to go to trial in three weeks from issue of the writ. Its drawback is that the procedure is rather special, and almost renders it necessary to engage the first-rate firms of solicitors who are accustomed to it. But it is preferable to the commercial court, and might be more extensively resorted to.

XVI. County Courts.

These tribunals are established for minor civil cases. Solicitors and barristers have alike a right of audience. The limit of their common law jurisdiction is £100, and they have practically an exclusive jurisdiction (except where the claim can be specially endorsed) in cases of contract up to £50 or in tort up to £20: for in such cases, a successful plaintiff in the High Court will only be allowed county court costs, and if his claim is under £20 in contract or £10 in tort, he will usually get no costs in the High Court at all. The judge may however always allow him full costs, and would do so if there was good reason for bringing the case in the High Court—e. g. if it were brought to decide an important question of law, or were one on which large sums *indirectly* depended. An action of tort may be remitted to the county court if a plaintiff has no visible means and does not give security. These courts have also a chancery jurisdiction (very seldom invoked) where the mass of property involved does not exceed £500 in value: and some of them have an Admiralty jurisdiction, limited to £150 for towage, wages or necessities, and to £300 in most other cases.

They cannot entertain cases of libel, slander, malicious prosecution, false imprisonment or breach of promise to marry: and they may (but seldom do) have a jury of 8.

Their jurisdiction is limited to their local district: and they cannot order foreign service of their process, which is not executed by the plaintiff or the sheriff, but by their own "high bailiff". Their decrees are usually enforced by committal to prison on proof of ability to pay and failure to do so. But a "warrant" against goods, equivalent to a *fiери facias*, can be issued to and executed by the high bailiff. Committals cannot be for more than 6 weeks, but may be again and again renewed. They vary in frequency very greatly on the different circuits. The strict rules of evidence apply to county court trials.

Particulars of the demand must be given, and notice must be given of certain special defences. Otherwise the procedure is summary. Appeal lies on questions of law to the High Court; and by leave, to the Court of Appeal and House of Lords.

Some other local "inferior courts" exist. The Court of Passage at Liverpool, the Salford Hundred Court at Manchester, and the Mayor's Court at London are of commercial importance.

XVII. Irish Courts.

The Irish system is in all essentials precisely the same as the English. There is a Supreme Court, with a Court of Appeal in which sit two Lords Justices and one of the presidents of the divisions of the High Court: a Chancery Division, in which the Master of the Rolls sits as a first instance judge, and a King's Bench Division, with which is merged the Admiralty Division (one judge being assigned to Admiralty business). No "commercial" court exists. The old office of Chief Baron

¹) Admiralty Practice, p. 25.

²) *The Christianborg*, (1885) 10 P. D. 141.

of the Exchequer still exists, (though the Exchequer Division has long been merged in the K. B. D.), through the happy survival of Chief Baron Palles. The last English Chief Baron has long been deceased. County Courts also exist under the name of "Civil Bill Courts", with an appeal to the assizes. The Supreme Court is regulated by Stat. 40 & 41 Vic. c. 57, and Rules made under it. Applications for summary judgment on liquidated claims are made by "motion" in open court: — an improvement on the English procedure in Chambers.

Service of process may be made (if personal service is impracticable) by serving an employee or relative of the defendant at his house or place of business, or (in the case of a disturbed district) by post. The "summons for directions" is unknown, therefore pleadings proceed according to rule. There are no district registries in Ireland: nor are Referees known. Motions for new trials still go to an Divisional Court, and not to the Court of Appeal. Provision is made for official shorthand notes to be taken, if the court permits, and charged for with the other costs of the action. (See the Rules of the Supreme Court, Ireland 1891, 1902, ditto 1899 [admiralty].)

An Irish "Rule of Court" of 1891 assimilated the Irish practice as to service of process abroad to the English procedure: except that *all* process, and not only writs of summons etc., can be so served (by leave) and also that leave for foreign service can be given in a case of contract made in Ireland, whether to be performed there or not. The Irish courts are under a statutory obligation to consider the comparative cost and convenience of proceedings in Ireland or in the defendant's place of residence (Act of 1877 § 4).

XVIII. Scottish Courts.

In Scotland the system is totally different. The Supreme Court is termed the Court of Session, or officially the College of Justice. The judges are all styled "Lord"¹), and are divided into an "Inner" and "Outer" House. The Inner House is an appellate court, sitting in two or three divisions, and presided over by the Lord Justice-General (usually a member of the House of Lords), and the Lord Justice-Clerk. The Outer House normally consists of five judges ("Lords Ordinary"), sitting separately. The junior judge usually deals with matters of interlocutory procedure (the "Lord Ordinary on the Bills"). The court sits in Edinburgh, and circuit sittings (except in Glasgow) are infrequent. Sometimes, in important cases, a court of 7 or 13 judges is made up specially (as in the Moray Firth trawling prosecution).

No separate admiralty or chancery divisions exist.

The Rules of the Court of Session are termed Acts of Sederunt, and are quoted thus: — "A. S. March 27th 1908".

There is no appeal from the Court of Session to the House of Lords in interlocutory matters, except in the case of a difference of opinion on a point of law. In Scotland there is nothing corresponding to the Chancery Division: the fusion between law and "equity" is complete: but some cases which in England would be "equitable", deriving from the ancient high prerogative of the Chancellor, (e. g. guardianship cases) go direct to the Inner House ("nobile officium"), as do some other cases by statute. The litigant selects his own judge, which he cannot do in England or Ireland, but the Lord President has a power of transfer. There are statutory provisions for joint sittings of 5 or 7 judges of the Inner House, or of the whole Court: but the two permanent divisions of the Inner House are much more markedly separate from each other than are the two branches in which the English Court of Appeal usually sits.

There is no occasion for a "commercial court" in Scotland: since the same Lord Ordinary superintends all the steps in each action which he will eventually try, just as the commercial judge is supposed to do in England. The "Masters" are replaced by the Principal Clerks of Session, and the Assistant and Depute Clerks, who also perform the functions of the English Registrars. But the Scottish judges leave less to these officials than is the case in England. Inter-

¹) Neither they nor the English "Lords Justices" are "lords" in the sense of peerage: though the "lords of appeal" in the House of Lords, of course, are such. Great confusion arises in popular periodicals between the "Lord Justice", who is a judge of the Court of Appeal, and the "Lord of Appeal" who is a life peer and a member of the House of Lords.

locutory proceedings are heard in court; and the court does not, as in England, require a sworn statement of fact (affidavit): it relies on the statements of counsel and the written petition of the solicitor, (cf. the English "commercial" practice). When elaborate accounts have to be taken, as in the administration of a minor's property, they are referred to "the accountant of court". Scottish practice is much more strict in formal details than English: and it is not so easy to disregard technical regulations at the risk of a little extra expense.

The Court of Session never sits on Monday. Its counsel are termed advocates; and solicitors may be either "Writers to the Signet" (W. S.), "solicitors" (S. S. C.), or "law agents" (L. A.). Writers to the Signet occupy a station midway between barristers and solicitors, and are in theory eligible for judgeships. Solicitors of all kinds, as distinguished from advocates, are often called "writers". The crown lawyers (Lord Advocate and Solicitor General and their deputies) are not as in England the official representatives of the profession, although they are at its head. The Dean of Faculty, appointed by the advocates, occupies that position. King's Counsel are a modern innovation in Scotland. The etiquette which regulates their employment is not firmly established, and the title is said to be little more than an honourable distinction.

The Scots courts will give a declaratory judgment, declaring rights without giving any substantive relief: this can seldom be had in England. Another important feature is that totally different views are taken of jurisdiction. The English practice of entertaining cases against transient visitors, served within the realm, has been gravely threatened in England itself. The recent cases of *Norton* ([1908] 1 Ch. 471); *Egbert* ([1907] 2 Ch., p. 205) and *Logan* ([1906] 1 K. B. p. 141)¹ show that it is incompatible with modern conditions². In Scotland it never existed. The grounds of jurisdiction are (1) domicile, (2) 40 days' residence (except in determinations of status and immoveables), (3) cause of action arising in Scotland, coupled with defendant's presence there, (4) consent ("prorogation", "reconvention"), (5) possession of immoveable property by defendant in Scotland, (6) possession of moveable property by defendant there, if (a) the action is for the judicial division of a fund of which it forms part; or (b) the moveables have been "arrested" (i. e. impounded) *ad fundendam jurisdictionem* (cf. Voet, II, 4, 22). Mackay adds in the case of companies, that the fact of carrying on business in Scotland would probably suffice to found jurisdiction in cases connected with its Scottish house³. But it will generally be possible to proceed in such cases by "arrestment". Regarding numbers (2), (5) and (6), it is to be remarked that they do not apply to questions of status: it is doubtful whether this includes bankruptcy.

Jurisdiction may be declined on the ground of "*forum non conveniens*". This is in theory incompetent in England: but we have just seen that there is a strong tendency to introduce it in practice. Jurisdiction is usually declined in cases of taking the accounts of foreign administrators and managers.

The court will not generally proceed with an action when a similar one has already been commenced or decided in a competent foreign court, unless the object is to make property situate in Scotland available in satisfaction of a foreign decree. It is probable that the court would not enforce a decree rendered by a court which it did not consider competent. Jurisdiction may also be declined on the grounds personal to the judge of relationship to parties to the cause and of interest in the subject matter. E. g., that he holds shares in a litigant Company.

An English action commences as *lis pendens* with the issue of the writ: a Scottish one only when served on defender. Prior proceedings are (1) the *citation*, which is effected by a public functionary (the messenger-at-arms⁴), acting in the presence of a witness on a "summons" addressed to him in the sovereign's name. This is personal citation, and the safest form: but a person may be cited by leaving a copy of the "summons" at his residence; or "edictally" (if resident out of Scotland)⁵,

¹ See these cases noted in *Blätter of the Berlin Society of International Law and Comp. Jurisprudence* III. 6. p. 189, and II. 2. p. 106.

² Mackay: I. 183.

³ Mackay: I. 183.

⁴ He is a lineal successor of the ancient heralds: and is under the control, not of the court, but of the Lord Lyon King of Arms.

⁵ Citation may be made by leaving process at a party's Scottish residence within 40 days of his departure from it: but if he has quitted Scotland altogether, the citation must pro-

by filing at the Court office. The "Summons", though directed to the messenger, contains a full statement of the relief claimed, and attached to it is a "condescendence", which is tantamount to the English pleading known as a "statement of claim", setting out the facts in full, and also a statement of "pleas in law" in which (as is never requisite or proper on the part of a plaintiff in England) the points of law are set out on which the "pursuer" relies. The summons is then filed at the court and appearance is entered to it by marking it with a marginal note within 7 days ("induciae"), the defender being entitled to borrow the summons for a sufficient time, to enable him to prepare his defence. In this pleading he denies the "condescendence" *seriatim*, and then gives his own version of the facts—much as a defendant pleads in an English chancery case. Pleadings are allowed much latitude in Scotland, and may and do plead evidence. Instead of delivering further pleas, parties by leave "revise" their condescendence and defence, and then "close the record", under the personal directions of the Lord Ordinary in open court, when his lordship hears argument as to further procedure and decides the case if possible; and, if not, determines whether any and what mode of proof or trial should be allowed.

There is no process corresponding to the English summary judgment on a liquidated demand, without permitting the defendant to go to trial. But judgment can be had without trial if the defender does not enter appearance, or does not put in a defence. The judgment must however be pronounced by the judge, but he requires no proof. Such a decree *in absentia* can be recalled on application within 10 days, and payment of £ 2. 2. 0 of expenses. And registered negotiable instruments can ground execution ("diligence") without any judgment being necessary. Further, when a liquid document of debt contains a consent to register for execution, registration is equivalent to a decree of the Court¹).

As to the method of proof. This, if the parties differ, is to be settled by the Lord Ordinary, and may be before a judge, judge and jury, judge and experts, or a Commissioner. It is impossible to state precisely in what classes of cases a jury will be ordered. In a collision case it was refused (*Mc Lean v. Johnstone*, [1906, Fraser's Rep. VIII. 836]): so also in a workman's accident case (*Vallery v. Mc Alpine*, *ibid.* Vol. VII. 640), and in a case of alleged fraud (*Young v. Healy* [1909] S. C. 687). In a recent case (*Gibb* [1912] S. C. 584) the Lord President spoke of "the constitutional tribunal" for cases of personal injury as being a jury: a singular attitude in Scotland. And see especially *Sharples v. Yuill*, 7 F. p. 657, as to cases removed from the Sheriff Court. It was usual in former times for particular judges to take the evidence; they transmitted the proofs to the court for consideration. This was supplanted by the appointment of commissioners for the purpose, in 1800; and in 1815 jury trial was introduced. Lastly, in 1868, the system of the judge to whom the action was assigned taking his own proof himself was introduced. It is specially provided that the evidence shall be taken down in full by the judge or a sworn shorthand writer: a provision unknown in England. If a commissioner takes the evidence, he does not decide upon its effect, but merely transmits it to the court. Witnesses are compelled to attend by "letters of diligence". The rules of evidence are wider than in England. "Hearsay" evidence is admitted in all cases when the person originally making the statement is deceased; but it must be relevant as proceeding from the deceased witness. Books of trade are evidence for or against the party to whom they belong. On the other hand the general roving inquiry into a witness's discreditable antecedents is not encouraged; it is only relevant in questions where the plaintiff seeks to set up a good character.

The jury (if any) decide by a majority. A peculiarity is the "oath of reference": a party (even if defeated at the trial) can have the case decided solely on his opponent's oath (Ff 50. 12. 2), (but only if he has not already cross-examined him as a witness): or even on that of some other person, in certain cases. Great difficulties sometimes arise from the uncertainty of the terms in which such oaths are expressed. In enforcing the decree, it has been seen that the defender's shares, stock, and credits (like other moveables), can be "arrested": and that even before the beginning of the action. To make them available in satisfaction of the debt, an "action of

bably be edictal (i. e. filed at the Registry. *Morrison*. 1907, Session cases 999). It is desirable that citation be personal if possible by serving on the defender himself; since 1882, however, citation may be made by registered letter, provided that it is delivered in due course, and is directed to the defendants proper place of citation.

¹) See Brodie-Innes, "Comparative Principles", pp. 729, 730.

furthercoming" must be brought against the defender's debtor or the company in which the defender holds stock.

If the verdict is that of a jury, the court must be asked to "apply" it. Execution (termed "diligence") cannot generally issue until 15 days after judgment. It is necessary first to obtain an official copy of the decree and a consequent warrant to enforce it ("warrant to charge"). This must be served on the defender. The creditor can then (1) poid (seize movables) (2) arrest (seize them in the hands of third parties) (3) inhibit (interdict dealings with immovables) (4) adjudge (acquire immovables), concurrently and by the force of one warrant. The messenger-at-arms enforces the first of these acts of execution. Inhibition must be served and registered (and this may be before trial). Adjudication corresponds to the English writ of elegit, and must be registered: but every creditor who obtains such an adjudication within a year and a day of the first, is entitled to participate in the benefit. Costs are generally allowed on judgments for £5 or more, but only half costs if not more than £25 is decerned for.

A new trial may be had if new facts are discovered which could not reasonably have been known at the trial (*res noviter*). This is not in accordance with English practice: and, generally, a new trial is granted with more facility than in England. Where the objection to the first trial is improper admission or rejection of evidence, or a mistake of law, on the part of the judge, the application for a new trial takes the form of a "bill of exceptions", which the judge must sign, and which then comes before one of the Divisions of the Inner House, like an appeal. The judge who tried the case sits also. Other grounds proceed on motion for a new trial; e. g. where the objection is excess of damages.

Interlocutory or summary applications are made by petition (occasionally by motion) and are heard in open Court. "Summonses in chambers" are unknown. But "Notes" in a small measure take their place. Among matters settled by motion are the time and place of trial, which is now scarcely ever on circuit (though circuit trials are still competent in theory) and all other incidental matters arising in the conduct of the case. These matters come before the Junior Lord Ordinary ("Lord Ordinary on the Bills").

The Sessions of the Court are—Winter Session from 15 October to 20 March, with a recess of a fortnight at Christmas and a week in February: Summer Session from 12 May to 21 July, when the Court ceases for the Autumn Vacation. In vacation, work proceeds in the Bill chamber, the duties of which are performed by various Lords Ordinary in rotation of a fortnight each.

The process of interpleader is represented in Scotland by what is called "multiplepoiding". It is always in the name of the holder of the fund *in medio*, that the initial summons is taken out. If the summons is actually raised by the holder of the fund he is designated Real Raiser: if by another party who is nominally defender it is the latter who is designated in the summons as "Real Raiser" while the holder of the fund is then "Nominal Raiser". The action has a much more frequent and wide operation than the English interpleader—including many subjects of the English equitable jurisdiction, e. g. the distribution of a trust fund, the administration of a deceased person's property, and the like. See as to the practice in multiplepoiding, by which persons may be allowed to come in and assert claims at a late stage of process, *Landale v. Wilson*, 1900, Fraser's Rep. II, 1050. This will not be allowed if they had notice earlier, but delayed to save themselves costs. The court has the power of giving interdicts or injunctions: and the court can also, by "suspension", put a stop to the improper use of its own process. Technically, interdict is always coupled with suspension. It may be resorted to, to prevent the consequences of an irregular diligence (in England, an irregular execution is generally a mere nullity). Or it may be ancillary to other relief. Or it may be the main object of proceeding (*viz.*, to prevent a threatened wrong). In the latter cases the process is to present a Note in the Bill Chamber (court for summary affairs). On this, the Lord Ordinary on the Bills may grant an interim interdict *ex parte*: but not if a caveat has been entered by a party apprehensive of interdict. Frequently the interim award is only granted on caution being found. Appearance has then to be entered and answers lodged, when the judge again has the case before him, and unless there is no colour of ground for the Note, he "passes" it for trial in the ordinary way, and meanwhile may or may not continue the interim interdict.

It will be seen that the process of interdict *substantially* much resembles the English claim for an injunction to prevent apprehended damage. In the latter case, the plaintiff brings an action to enforce his right, and asks for the interim injunction, as it were, by the way. In Scotland the immediate injunction, which is really what is wanted, is made the subject of an appropriate summary proceeding independent of any action. If the "Note" is passed, the question of making the interdict perpetual, or of granting perpetual interdict where the Lord Ordinary on the Bills has thought it safer not to concede an interim interdict, comes before the court as an ordinary action would. The respondent chooses a Lord Ordinary and appellate Division, and the case proceeds in the Court of Session (of which the Bill Chamber is not technically a part, though it has really in practice become so since A. S. 20 March 1907).

The practice as to documents is different from that used in England. A litigant has to deposit in court all documents in his possession on which he relies. In England he can get inspection of his opponent's documents (even if not forming part of that opponent's case) by the process of "discovery". But he cannot inspect the documents held by third parties prior to the trial; when he can summon them as witnesses to bring documents with them. In Scotland, it is otherwise. Whether documents are in the possession of a party or of strangers, an order may be made on motion for their production. But the order is not so sweeping as the English order for discovery, which entails the production and inspection of all papers which may in any way remotely affect the issue. It takes the form of a commission directed to independent lawyers, and the documents to be produced must be more or less clearly specified as relative to the points at issue. Third parties are even compelled to produce their title-deeds, if founded on or relevant, but precautions are taken to prevent the disclosure of any but the relevant parts of business books. As in England, the court has wide powers of directing the inspection of places, things and processes, connected with the subject matter of the action.

Appeals from a Lord Ordinary of the Outer House go to one or other Division of the Inner House. The form is a "Reclaiming Note". The whole "record" is printed, and it is usual to print all material documents (which is not done, except in the House of Lords, in England). Twenty-one days are allowed in which to "reclaim" against an "interlocutor" (decree), except where it does not in any way dispose of the action *au fond*, in which latter case ten days constitute the period (or six days if the interlocutor merely settled the mode of trial). Leave is necessary for an appeal at all, unless the cause has been finally disposed of in the Outer House (except in cases where the interlocutor merely settled the mode of trial). It is important to observe that an "interlocutor" is by no means synonymous with the English "interlocutory order": but applies to all decrees, "interim" or final.

The taxing officer in the Court of Session is the "auditor". It is much more usual in Scotland than in England for a judge to take time to consider his judgment, and to refrain from giving it immediately upon hearing counsel.

The Court has Admiralty jurisdiction (as successor to the Scottish Court of Admiralty since 1830). The Admiralty jurisdiction has always been wide in Scotland, and comprises marine insurance, bottomry, charter-parties, contracts of freight (bills of lading) wreck, salvage and collision, contracts concerning the lading and unloading of ships in Scotland, and actions for the delivery of goods sent on ship board, or for recovering their value, or where the subject of the suit consists of goods transported by sea from one port to another. Actions on bills of exchange, and some other mercantile contracts were also recognized as proper subjects of admiralty jurisdiction. Decrees *in rem* are not necessary, since jurisdiction can in any case be assumed by "arrestment" of property; and any decree enforced against it. But a defendant in an admiralty case may be called upon to give caution "*judicatum solvi*".

Although there is no summary process by which a debt can be recovered, it is always competent in any ordinary action, to insert in the summons by which proceedings are commenced a warrant to impound ("arrest") the defender's movables until caution be found. The "arrestment" can be removed on the defender's application by the Lord Ordinary, with or without caution *de judicio sisti*. Letters of inhibition can also be granted, restraining him from alienation. Litigants (British or foreign) not resident in Scotland (and not in Ireland or England), instead of giving security for costs, "sist a mandatory", i. e. appoint a person to be responsible

for the conduct of the action, including the payment of costs: and this applies to defenders as well as pursuers. This is not necessary if he has land in Scotland: nor generally if he has solvent partners there, who are already defenders. But a co-defender cannot be mandatory.

So, in a multiplepounding, if the party claimant has been judicially found entitled to a sufficient share of the fund to cover expenses, no mandatory need be sisted¹⁾ for him. A mandatory who is in England or Ireland is competent to be sisted²⁾, because decrees of Court can be made effectual against him under the provisions of the Judgments Extension Acts reciprocally applicable to England, Scotland and Ireland.

The mandatory must be solvent, but not necessarily rich enough to bear all costs of process. It is sufficient if he is of the same condition as the defender: thus a farm-servant was admitted as mandatory. A mandatory may decline at any time to be further responsible, but continues liable for past expenses—perhaps even after his successor is appointed. Failure to appoint a mandatory when directed is equivalent to loss of process. The mandatory can recover disbursements from the “mandant”. He must carry out any decree that the court pronounces, not being one for the payment of damages or its equivalent.

Unlike English, Scottish practice allows a party to sue by an agent, if he chooses, and to this end he can appoint a mandatory.

Litigation by poor persons has long been specially provided for. A certificate by the parish minister and two “elders” of the Established Church or Inspectors of Poor as to the applicant’s poverty and good character is requisite: and they are liable to an action if they improperly refuse it. If the action is against the church or minister, or for any other valid reason, the court may refer it to the “sheriff” to certify. For admission to the Poor’s Roll in the Sheriff Court “The Sheriff Courts (Scotland) Act 1907” § 162 requires the applicant to produce a certificate of poverty signed by the inspector or assistant inspector of poor of the parish or district in which he resides. Or, if the poor person lives out of Scotland, any qualified person may be invited by the Court to certify (e. g. an army chaplain, in a case where he is serving as a soldier in India. *Forrest* [1907 Sess. Cases 435]). The adverse party must have notice of the intention to apply for a certificate. The certificate is then transmitted, with the party’s declaration, upon which it was made³⁾, and a certificate of intimation by letter to the adverse party, to one of the official “Poor’s Agents”, who then obtains from the court a direction remitting the case to be examined by four lawyers (two being advocates) on the merits. If a good ground of action is found, proceedings may be instituted under the direction of an advocate, and other lawyers, chosen by rotation from a special list of persons willing to undertake the duty.

As in England, the pauper litigant pays no expenses or court fees, and need not “sist a mandatory”⁴⁾. And if successful, he recovers the full fees and costs which he has then to pay—this is not so in England, nor in the House of Lords. But he is not, as in England, entitled to the services of his counsel and solicitors free of charge: if he ever obtains means, he must pay them. A limited company, as in England, can be ordered to find caution, if pursuers (plaintiffs).

The Court of Session is held to have a narrow criminal jurisdiction, in cases of perjury, fraudulent bankruptcy, forgery, assault on its officers (“deforcement”) or breach of its interdicts: but the ordinary tribunal is the Court of Justiciary.

The “Sheriff Court” has a much wider jurisdiction than the English County Court. The Court of Session dates only from James I (1425) and in its present form only from James V. (1532). The Sheriff appears as a judicial officer from the earliest times and above him the Judiciar and Chamberlain (See for a comparison of the Court of Session at its institution with the Parliament of Paris, *Mackay: Court of Session Practice I. 21*). The Sheriff Court is presided over by the Sheriff of the County, who at present is always an advocate of not less than five years standing,

¹⁾ See *Elmslie v. Pauline*, (1905) Fraser’s Rep. VII. 541. The same case shows that in Scotland there is no difference in this respect between an original hearing and an appeal.

²⁾ *Blow v. Ecuadorian* (1903). Ibid. V. 444.

³⁾ This must follow the form of A. S. 21 Dec. 1842.

⁴⁾ Cf. *Dessau v. Daish* (1897), Rettie’s Rep. 976: in which Lord Kinnear says that poverty is not in itself a ground for requiring a mandatory, even if the party is not suing *in forma pauperis*.

but since the Sheriff Court (Scotland) Act 1907¹) may now be a law agent (Solicitor) if he has served for five years as a Sheriff Substitute. He receives a salary which varies in accordance with the importance of the district from £700 to £2000. He has certain administrative and considerable criminal jurisdiction, but in civil matters his personal duties are chiefly of an appellate nature, except in the County of Lanarkshire²) which includes Glasgow, and Midlothian, which includes Edinburgh. He is not obliged to reside in his Sheriffdom nor is he debarred from practising as an advocate. The resident judges of a Sheriffdom are termed Sheriff Substitutes, and their qualifications are the same as for Sheriffs.

The Sheriff Court has jurisdiction in pecuniary cases up to any amount, but exclusive under £50; and appeal lies to the Court of Session. The latter court has exclusive jurisdiction in questions of status. In actions relating to heritage (immovables) and declaratory causes valued up to £1000 or £50 annual, the Sheriff Court has jurisdiction concurrently with the Court of Session. The Sheriff Court has however jurisdiction only within its limits (i. e. a group of counties): and it has jurisdiction against a foreigner only if property of his is "arrested" within the sheriffdom.

The case is generally heard by the Sheriff Substitute, holding his office from the Crown, with appeal to the Sheriff. Where the action concerns immovables, or is an action for damages or is otherwise appropriate for jury trial (which cannot be had in the Sheriff Court) the defender can have the cause removed to the Court of Session, subject to the risk of costs.

There are "small-debt courts" in the counties for the speedy and informal recovery before the Sheriff Substitute of claims under £20, without right of appeal on the merits, but only on rare limited grounds e. g. incompetency, abuse of process and oppression on part of the judge. These appeals are considered by the Court of Justiciary. The old jurisdiction of the local magistrates (Justice of Peace) to try cases under £5 value is gradually falling into desuetude.

XIX. Costs. Payment into Court. (England and Ireland.)

The expense of litigation in England is heavy. Counsel's fees cannot be less than a guinea, and on appearance in court they are seldom less than £3.3.0, besides a fee for a "conference" previously. If two are employed, the fee of the junior is calculated at about three-fifths that of the leader. In chancery, leading counsel are attached to particular judges, and their fees do not vary very much. A select circle of some half-dozen "go special", i. e. they appear in any chancery court, or in the Court of Appeal, and charge higher fees. But in the K. B. D., where advocacy is at a premium, the fees of the more noted counsel reach fancy figures. As to solicitors, their remuneration is calculated by allowing a fixed small charge for every small act performed by them. Thus the entry of a cause for trial, which simply means sending a clerk down to the office with the necessary papers, is the subject of a separate charge, which in reality helps to pay for the solicitor's expenditure of time and thought over the case. A solicitor's bill consists of multifarious small items, for each of which a definite charge is prescribed.

The total expense to a suitor of carrying an action through an assize trial, or nisi prius trial, in the K. B. D. may roughly be put at about £100; but if expensive counsel are engaged, it may reach thousands. The expense of maintaining witnesses, it may be for a week or more, in readiness for the case to come on, is also a most serious item. When the case appears in the list, it is not safe to be unprepared, because no-one can possibly know how long the cases before it may take, or whether they may not be settled. So that country witnesses must be kept at the assize town, or in London, in readiness for the hearing. The cost of the summary process called an originating summons, in Chancery, may be estimated at, say £30, assuming that it goes into court, and is not disposed of by the master. Regular actions in chancery are generally of an administrative character, and the expense may be looked at in the light of a payment for the cost of judicial administration, and may vary to any extent. They are, besides, frequently ordered to be paid out of particular funds, the subject of dispute³). The costs in Admiralty are roughly

¹) Stat. 7 Edw. 7. c. 51.

²) See Order in Council, 11 March, 1911.

³) A very common instance is where a testator has used difficult language, causing rival claims. The unsuccessful claimant will not have to pay costs personally, and will even get his own costs out of the testator's estate.

comparable with those in the K. B. D.: but of course on a seizure the Marshal must be paid. The costs of an appeal to the Appellate division of the Supreme Court may be as little as £ 20 a side. Those of an appeal to the House of Lords are almost prohibitive for private persons.

Fees are usually denoted by stamps impressed on the documents in respect of which the fee is charged. Every affidavit must bear a stamp calculated *ad valorem* in proportion to its length. The bills of solicitors are subject to official revision, or taxation. This may proceed on two different principles. The client may say the solicitor has over-charged him, and claim taxation accordingly. Although a solicitor very frequently modifies his charges in a small case—for the official scale bears little or no relation to the magnitude of the sum at stake—yet he is in no way bound to do so. But he must not exceed the official allowance, or incur needless and extravagant costs; and the client can, in such a case, have his bill reduced. Much of the expense of actions consists in the taking of copies of documents of one kind and another; and this is a fruitful source of extravagance. Bills can be taxed by taking out an originating summons.

But there is another sort of taxation: not, like this, “between solicitor and client”—but “between party and party”. This is requisite when one party is ordered to pay all (or more rarely, some) of the other’s costs, and no special direction is given that all the costs shall be paid which that party’s solicitor might properly be allowed to charge his client with, as proper expenditure. If a solicitor properly employs counsel at a fee of £105, the fee will be allowed as against the client,—but it does not follow that the opposite party, if he is ordered to pay the costs, will be saddled with the cost of employing this first-rate advocate, when a less celebrated lawyer, at a fee of say £26.5 would have been competent (though less certain of success).

The same principle was employed in other forms. Certain items of expenditure were regarded as luxuries, which a solicitor might properly procure for his own client, but for which an opponent should not (unless so ordered) be called upon to pay. In the result, it became nearly as serious a matter to win an action as to lose it. For the amount of the verdict might easily be swallowed up by the disallowed costs. An order promulgated in 1902 directs the taxing officers now to allow all costs properly incurred (not through over-caution, or by paying special fees to counsel). This is far from giving a complete indemnity: but it is believed to have gone some way towards making litigation less expensive. It is not, however, the same thing as awarding “solicitor and client” costs¹).

A purely common-law verdict “carries costs” unless the judge for good cause deprives the successful party of them²). In other cases the costs are in the discretion of the court. This affords a most powerful weapon to the bench, which if it were used upon any concerted plan, would be irresistible. Judges constantly mark their sense of the moral rights of parties by making special orders as to costs. And, since costs are so heavy, the party who gets a verdict in point of law, may find his defective morality cost him dear. Sometimes the judicial discretion is usefully exercised in awarding a lump sum *nomine expensarum*. This saves the parties the expense of a minute investigation before the taxing official.

Security for Costs.

This may be ordered in cases where a plaintiff (or a person who is substantially in the position of a plaintiff, ex gr. an interpleading or counterclaiming defendant)³) either—

1. Resides abroad: or is privileged from arrest.
2. Is a limited company and in liquidation (or even if of small resources; *Diamond Steel M. Co. v. Harrison* (1910) 27 Rep. Patent Cas. 451. (Security £100 out of maximum estimated assets £700).
3. Is a nominal plaintiff only⁴).
4. Does not correctly state his residence (or evasively changes it).

¹) *The Bradshaw* [1902] 1 Ch. 436. Cf. *Re Ermen* [1903] 2 Ch. 156. *G. W. R. Co. v. Carpalla* [1909] 2 Ch. 471.

²) But see p. 77 as to cases which might have been brought in the county court.

³) Cf. *Pretoria Petersburg Railway*. [1904] 2 Ch. 359 (claim in winding-up); *New Fenix Co. v. General Accident* [1911] 2 K. B. 619 (counterclaim).

⁴) See *Greener v. Kahn & Co.* [1906] 2 K. B. 374 (insolvent suing for benefit of creditors).

5. Is without visible means (and the action is one of tort)¹).

But an *appellant* can be ordered to give security on the mere ground of insolvency²), or even poverty³)—but not where the liberty of the subject is affected⁴). Such appeal security has varied from £5 to £1500. It may be given by an approved bond, as well as in cash.

If a substantial plaintiff is in England (or perhaps the British Islands), the others need not give security. Nor need plaintiffs who are themselves in Scotland or Ireland give security, nor if they have property within the realm: for in either case their liability for costs can be enforced by the ordinary process. The British nationality of a plaintiff is immaterial, unless he is abroad on the public service.

Paupers.

Is justice then denied to the poor, who cannot find a lawyer to finance them on speculation? Practically, the Supreme Court is not a poor man's court. Yet there exist provisions by which a person who is sunk in the very depths of poverty can resort to it with almost improper facility. On swearing that he is not worth more than £25, and (if a plaintiff) obtaining the signature of a barrister to his case, as one proper to be heard, a litigant can proceed *in formâ pauperis*, and is entitled to have a solicitor and counsel assigned to him: though we do not know of a case in which unwilling solicitors or counsel have been constrained to act. The procedure is by way of petition to the Court; but the petition is simply handed in to the Registrar⁵), and answered as of course in the affirmative. The pauper can go on to the appeal court: but he must obtain a fresh order if he appeals to the House of Lords: and a litigant can become a pauper at any stage. At no stage does he pay court fees. And, if costs are given in his favour, his opponent cannot be forced to pay on the footing that court fees have been included in the pauper's expenses. It is sometimes felt a serious hardship that an irresponsible man of straw who has perhaps been ordered to give security for the costs of an appeal should be allowed to evade the order for security, and to carry a party whose right is adjudged good, to successive appeals by becoming "a pauper".

If the pauper succeeds, his solicitor and counsel will not get their costs from the defeated party⁶).

Payment Into Court.

We have seen the effect upon the incidence of costs of delivering "notices to produce" and "notices to admit". Another step which may have an important bearing on costs is payment of money into court; i. e. the transfer of cash into the Bank of England (Law Courts Branch) to the credit of the Paymaster-General. By doing this, the defendant gives the plaintiff the opportunity of taking the money out in satisfaction of his claim without any further trouble. And the defendant may either admit his liability (in which case, if the plaintiff does not take out the money, the only question will be as to whether the tender was sufficient)—or he may deny it, in which case the tender is regarded as an offer to buy off the plaintiff, and to save the trouble and expense of a presumably successful trial. This latter course cannot be followed in a libel or slander case: for it would be unfair to deter the plaintiff from proceeding to vindicate his character, by offering him a sum of money. If a plaintiff, on receipt of such an offer as may thus be made, declines to accept it, and eventually recovers no more at the trial, he is regarded as having failed in his action, and the defendant is entitled to all costs subsequent to the payment into court. So that a defamed individual who is refused the satisfaction of the defendant's admission that he was wrong, but is offered a moderate sum by way of solatium, would, but for the above rule which prevents such an offer from being accompanied by a denial of liability, be placed in a very difficult position. He would either have to put up with the imputation and pocket

¹) In this case, if the security is not given, the action will not be dismissed, but will be remitted to the county court.

²) *Re Ivory* (1872), 10 Ch. D. 377.

³) *Harlock v. Ashberry* (1878) 19 Ch. D. 84.

⁴) *Hood-Barrs v. Heriot*. [1896] 2 Q. B. 375.

⁵) Or the Practice Master for the day in the K. B. D.

⁶) *Carson v. Pickersgill*. (1885) 14 Q. B. D. 859.

the money; or go to trial and risk getting rather less awarded him, and so incurring all the costs of the proceedings.

In chancery proceedings, payment into court is frequent, for quite a different purpose. In the course of the judicial administration of property, cash or securities, or even valuables may be directed to be paid into court, or, in time, to be paid out. Orders directing or empowering such transactions have a "lodgment schedule" or "payment schedule" respectively appended to them, which show the precise accounts or "ledger credits" to which the transfer relates, and the persons or accounts by, to or from whom or which precisely the transfer is to be made. On production of these to the paymaster-general, the operation can be carried through, by his issue of corresponding directions to the Bank of England.

No order is required for the payment in or out of money merely paid into court in satisfaction of a claim.

XX. Statutes.

Supreme Court of Judicature Act, 1873.

(36 & 37 Vict. c. 66.)

Union of existing Courts into one Supreme Court.

3. The several Courts hereinafter mentioned (that is to say), The High Court of Chancery of England, the Court of Queen's Bench, the Court of Common Pleas at Westminster, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes, and the London Court of Bankruptcy, shall be united and consolidated together, and shall constitute, under and subject to the provisions of this Act, one Supreme Court of Judicature in England.

Division of Supreme Court into a Court of original and a Court of appellate jurisdiction.

4. The said Supreme Court shall consist of two permanent Divisions, one of which, under the name of "Her Majesty's High Court of Justice," shall have and exercise original jurisdiction, with such appellate jurisdiction from inferior Courts as is hereinafter mentioned, and the other of which, under the name of "Her Majesty's Court of Appeal," shall have and exercise appellate jurisdiction, with such original jurisdiction as hereinafter mentioned as may be incident to the determination of any appeal.

Rules as to exercise of jurisdiction.

23. The jurisdiction by this Act transferred to the said High Court of Justice and the said Court of Appeal respectively shall be exercised (so far as regards procedure and practice) in the manner provided by this Act, or by such rules and orders of court as may be made pursuant to this Act; and where no special provision is contained in this Act or in any such rules or orders of court with reference thereto, it shall be exercised as nearly as may be in the same manner as the same might have been exercised by the respective courts from which such jurisdiction shall have been transferred, or by any of such courts.

Rules of Court to provide for distribution of business.

33. All causes and matters which may be commenced in, or which shall be transferred by this Act to, the High Court of Justice, shall be distributed among the several divisions and judges of the said High Court, in such manner as may from time to time be determined by any rules of court, or orders of transfer, to be made under the authority of this Act; and in the meantime, and subject thereto, all such causes and matters shall be assigned to the said divisions respectively, in the manner hereinafter provided. Every document by which any cause or matter may be commenced in the said High Court shall be marked with the name of the division, or with the name of the judge, to which or to whom the same is assigned.

Assignment of certain business to particular Divisions of High Court subject to Rules.

34. There shall be assigned (subject as aforesaid) to the Chancery Division of the said court:

1. All causes and matters pending in the Court of Chancery at the commencement of this Act.
2. All causes and matters to be commenced after the commencement of this Act, under any Act of Parliament by which exclusive jurisdiction, in respect to such causes or matters, has been given to the Court of Chancery, or to any judges or judge thereof respectively, except appeals from county courts.
3. All causes and matters for any of the following purposes: — The administration of the estates of deceased persons; — The dissolution of partnerships or the taking of partnership or other accounts; — The redemption or foreclosure of mortgages; — The raising of portions, or other charges on land; — The sale and distribution of the proceeds of property subject to any lien or charge; — The execution of trusts, charitable or private; — The rectification, or setting aside, or cancellation of deeds or other written instruments; — The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases; — The partition or sale of real estates; — The wardship of infants and the care of infants' estates.

Divisional Courts of the High Court of Justice.

40. Such causes and matters as are not proper to be heard by a single judge shall be heard by Divisional Courts of the said High Court of Justice, which shall for that purpose exercise all or any part of the jurisdiction of the said High Court. Any number of such Divisional Courts may sit at the same time. Every judge of the said High Court shall be qualified and empowered to sit in any of such Divisional Courts. The president of every such Divisional Court of the High Court of Justice shall be the senior judge of those present, according to the order of their precedence under this Act.

As to discharging orders made in Chambers.

50. Every order made by a judge of the said High Court in Chambers, may be set aside or discharged upon notice by any Divisional Court, or by the judge sitting in court, according to the course and practice of the division of the High Court to which the particular cause or matter in which such order is made may be assigned; and no appeal shall lie from any such order, to set aside or discharge which no such motion has been made, unless by special leave of the judge by whom such order was made, or of the Court of Appeal.

Provision for absence or vacancy in the office of a Judge.

51. Upon the request of the Lord Chancellor, it shall be lawful for any judge of the Court of Appeal, who may consent so to do, to sit and act as a judge of the said High Court or to perform any other official or ministerial acts for or on behalf of any judge absent from illness or any other cause, or in the place of any judge whose office has become vacant, or as an additional judge of any division; and while so sitting and acting any such judge of the Court of Appeal shall have all the power and authority of a judge of the said High Court.

Power of a single Judge in Court of Appeal.

52. In any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single judge of the Court of Appeal; and a single judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single judge may be discharged or varied by the Court of Appeal or a divisional court thereof.

Proceedings to be taken in district registries.

64. Subject to the Rules of Court in force for the time being, writs of summons for the commencement of actions in the High Court of Justice shall be issued by the district registrars when thereunto required; and unless any order to the contrary shall be made by the High Court of Justice, or by any judge thereof, all such further proceedings, including proceedings for the arrest or detention of a ship, her tackle, apparel, furniture, cargo, or freight, as may and ought to be taken by the respective parties to such action in the said High Court down to and including entry for trial, or (if the plaintiff is entitled to sign final judgment or to obtain an order for an account by reason of the non-appearance of the defendant) down to and including final judgment, or an order for an account, may be taken before the district registrar, and recorded in the district registry, in such manner as may be prescribed by Rules of Court; and all such other proceedings in any such action as may be prescribed by Rules of Court shall be taken and if necessary may be recorded in the same district registry.

Supreme Court of Judicature Act, 1875.

(38 & 39 Vict. c. 77.)

Short title, and construction with 36 & 37 Vict. c. 66.

1. This Act shall, so far as is consistent with the tenor thereof, be construed as one with the Supreme Court of Judicature Act, 1873, (in this Act referred to as "the principal Act,") and may be cited as the Supreme Court of Judicature Act, 1875.

Constitution of Court of Appeal.

4. Her Majesty's Court of Appeal, in this Act and in the principal Act referred to as the Court of Appeal, shall be constituted as follows: There shall be five ex-officio judges thereof, and also so many ordinary judges, not exceeding three at any one time, as Her Majesty shall from time to time appoint.

The ex-officio judges shall be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls.....

The first ordinary judges of the said court shall be the present Lords Justices of Appeal in Chancery, and such one other person as Her Majesty may be pleased to appoint by letters patent.....

No judge of the said Court of Appeal shall sit as a judge on the hearing of an appeal from any judgment or order made by himself, or made by any divisional court of the High Court of which he was and is a member.....

Sittings of Court of Appeal.

12. Every appeal to the Court of Appeal shall, where the subject-matter of the appeal is a final order, decree, or judgment, be heard before not less than three judges of the said court sitting together, and shall, when the subject-matter of the appeal is an interlocutory order, decree, or judgment, be heard before not less than two judges of the said court sitting together.

Any doubt which may arise as to what decrees, orders, or judgments are final, and what are interlocutory, shall be determined by the Court of Appeal.

Subject to the provisions contained in this section, the Court of Appeal may sit in two divisions at the same time.

Provision as to making, &c., of rules of court before or after the commencement of the Act.

17. Her Majesty may at any time after the passing and before the commencement of this Act, by order in council, made upon the recommendation of the Lord Chancellor, and the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and the Lords Justices of Appeal in Chancery, or any five of them, and the other judges of the several courts intended to be united and consolidated by the principal Act as amended by this Act, or of a majority of such other judges, make any further or additional rules of court for carrying the principal Act and this Act into effect, and in particular for all or any of the following matters, so far as they are not provided for by the rules in the first schedule to this Act; that is to say,

1. For regulating the sittings of the High Court of Justice and of any divisional or other Courts thereof, and of the judges of the said High Court sitting in chambers; and
2. For regulating the pleading, practice, and procedure in the High Court of Justice and Court of Appeal; and
3. Generally, for regulating any matters relating to the practice and procedure of the said courts respectively, or to the duties of the officers thereof, or of the Supreme Court, or to the costs of proceedings therein.

The Supreme Court may at any time, with the concurrence of a majority of the judges thereof present at any meeting for that purpose held (of which majority the Lord Chancellor shall be one), alter and annul any rules of court for the time being in force, and have and exercise the same power of making rules of court as is by this section vested in Her Majesty in council on the recommendation of the said judges before the commencement of this Act.

All rules of court made in pursuance of this section shall be laid before each House of Parliament within such time and shall be subject to be annulled in such manner as is in this Act provided.

All rules of court made in pursuance of this section, shall from and after the commencement of this Act, and if made after the commencement of this Act shall from and after they come into operation, regulate all matters to which they extend, until annulled or altered in pursuance of this section.....

Provision as to Act not affecting rules of evidence or juries.

20. Nothing in this Act.....or in any rules of court to be made under this Act, save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read, shall affect the mode of giving evidence by the oral examination of witnesses in trials by jury, or the rules of evidence, or the law relating to jurymen or juries.

Appellate Jurisdiction Act, 1876.

(39 & 40 Vict. c. 59.)

Appeal to the House of Lords.

3. Subject as in this Act mentioned an appeal shall lie to the House of Lords from any order or judgment of any of the Courts following; that is to say,

England.

1. Of Her Majesty's Court of Appeal in England; and

Scotland.

2. Of any Court in Scotland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute; and

Ireland.

3. Of any Court in Ireland from which error or an appeal at or immediately before the commencement of this Act lay to the House of Lords by common law or by statute.

Form of appeal to House of Lords.

4. Every appeal shall be brought by way of petition to the House of Lords, praying that the matter of the order or judgment appealed against may be reviewed before Her Majesty the Queen in her Court of Parliament, in order that the said Court may determine what of right, and according to the law and custom of this realm, ought to be done in the subject matter of such appeal.

Quorum and description of "Lords of Appeal."

5. An appeal shall not be heard and determined by the House of Lords unless there are present at such hearing and determination not less than three of the following persons, in this Act designated Lords of Appeal; that is to say:

1. The Lord Chancellor of Great Britain for the time being; and
2. The Lords of Appeal in Ordinary to be appointed as in this Act mentioned; and
3. Such Peers of Parliament as are for the time being holding or have held any of the offices in this Act described as high judicial offices.

Appointment of two "Lords of Appeal in Ordinary."

6. For the purpose of aiding the House of Lords in the hearing and determination of appeals, Her Majesty may by letters patent appoint two qualified persons to be Lords of Appeal in Ordinary.

A person shall not be qualified to be appointed by Her Majesty a Lord of Appeal in Ordinary unless he has been at or before the time of his appointment the holder for a period of not less than two years of some one or more of the offices in this Act described as high judicial offices, or has been at or before such time as aforesaid, for not less than fifteen years, a practising barrister in England or Ireland, or a practising advocate in Scotland.

Every Lord of Appeal in Ordinary shall hold his office during good behaviour, and shall continue to hold the same notwithstanding the demise of the Crown, but he may be removed from such office on the address of both Houses of Parliament.

There shall be paid to every Lord of Appeal in Ordinary a salary of six thousand pounds a year.

Every Lord of Appeal in Ordinary, unless he is otherwise entitled to sit as a member of the House of Lords, shall by virtue and according to the date of his appointment be entitled during his life to rank as a Baron by such style as Her Majesty may be pleased to appoint, and shall during the time that he continues in his office as a Lord of Appeal in Ordinary, and no longer, be entitled to a writ of summons to attend, and to sit and vote in the House of Lords; his dignity as a Lord of Parliament shall not descend to his heirs.

On any Lord of Appeal in Ordinary vacating his office, by death, resignation, or otherwise, Her Majesty may fill up the vacancy by the appointment of another qualified person.

A Lord of Appeal in Ordinary shall, if a privy councillor, be a member of the Judicial Committee of the Privy Council, and, subject to the due performance by a Lord of Appeal in Ordinary of his duties as to the hearing and determining of appeals in the House of Lords, it shall be his duty, being a privy councillor, to sit and act as a member of the Judicial Committee of the Privy Council.

Appointment of two additional Lords of Appeal in Ordinary on vacancy in office of paid Judges of Judicial Committee.

14. Her Majesty may appoint a third Lord of Appeal and a fourth Lord of Appeal in Ordinary in addition to the Lords of Appeal in Ordinary aforesaid; and may from time to time fill up any vacancies occurring in the offices of such third and fourth Lord of Appeal in Ordinary.

Any Lord of Appeal in Ordinary appointed in pursuance of this section shall be appointed in the same manner, hold his office by the same tenure, be entitled to the same salary and pension, and in all respects be in the same position as if he were a Lord of Appeal in Ordinary appointed in pursuance of the power in this Act before given to Her Majesty.....

Supreme Court of Judicature Act, 1877.

(40 Vict. c. 9.)

Style of judges.

4. The ordinary judges of the Court of Appeal shall be styled Lords Justices of Appeal, and the judges of the High Court of Justice (other than the presidents of divisions) shall be styled justices of the High Court.

Supreme Court of Judicature Act, 1881.

(44 & 45 Vict. c. 68.)

Master of the Rolls to be Judge of Appeal only.

2. Every Master of the Rolls shall by virtue of his office be a judge of Her Majesty's Court of Appeal, and shall retain the same rank, title, salary, right of pension, patronage, and powers of appointment or dismissal, and all other powers, privileges, and disqualifications now and heretofore belonging to the said office of Master of the Rolls and all other duties of the said office except that of a judge of Her Majesty's High Court of Justice: Provided that any Master of the Rolls to be hereafter appointed shall be under an obligation to go circuits and to act as a commissioner under commissions of assize, or other commissions authorized to be issued in pursuance of the Supreme Court of Judicature Act, 1873, in the same manner in all respects as he would have been under the lastmentioned Act, or any Acts or Act amending the same, if he had continued to be a judge of the Chancery Division of the High Court of Justice.

Existing vacancy in Court of Appeal not to be filled up.

3. The number of ordinary judges of that court shall henceforth be five.

President of Probate Division to be an ex-officio judge of Court of Appeal.

4. The President for the time being of the Probate, Divorce, and Admiralty Division of the High Court of Justice shall henceforth be an ex-officio judge of Her Majesty's Court of Appeal with the same powers, and in the same manner in all respects as the other ex-officio judges thereof; he shall not be entitled in the said court to any precedence over any existing judge to which he would not have been entitled as a judge of the Supreme Court of Judicature if this Act had not passed.

Power to make rules under 39 & 40 Vict. c. 59.

19. The power of making rules of court, conferred by section seventeen of the Appellate Jurisdiction Act, 1876, upon the several judges therein mentioned, shall henceforth be vested in and exercised by any five or more of the following persons, of whom the Lord Chancellor shall be one; namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the President of the Probate, Divorce, and Admiralty Division of the High Court of Judicature to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein.

Supreme Court of Judicature Act, 1884.

(47 & 48 Vict. c. 61.)

Precedence of President of Probate, &c., Division.

3. The President for the time being of the Probate, Divorce and Admiralty Division of the High Court of Justice shall have rank and precedence in the Court of Appeal next after all ordinary Judges of that Court appointed before the time at which he shall have become an ex-officio member thereof.

Execution of Instruments by order of the Court.

14. Where any person neglects or refuses to comply with a judgment or order directing him to execute any conveyance, contract, or other document, or to indorse any negotiable instrument, the court may, on such terms and conditions (if any) as may be just, order that such conveyance, contract, or other document shall be executed, or that such negotiable instrument shall be indorsed by such person as the Court may nominate for that purpose; and in such case the conveyance, contract, document, or instrument so executed or indorsed shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it.

Supreme Court of Judicature Act, 1890.

(53 & 54 Vict. c. 44.)

Motions for new trial.

1. From and after the commencement of this Act every motion for a new trial, or to set aside a verdict, finding, or judgment, in any cause or matter in the High Court in which there has been a trial thereof, or of any issue therein with a jury, shall be heard and determined by the Court of Appeal and not by a Divisional Court of the High Court: Provided always, that such motions shall be heard and determined before not less than three Judges of the Court of Appeal sitting together.....

Motions for judgment.

2. Every motion for judgment in any such cause or matter shall be heard and determined by the Judge before whom such trial with a jury took place, and not by a Divisional Court, unless it be impossible or inconvenient that such Judge should act, in which case such motion shall be heard and determined by some other Judge to be nominated by the President of the Division to which the cause or matter belongs.

Costs.

5. Subject to the Supreme Court of Judicature Acts, and the rules of Court made thereunder, and to the express provisions of any Statute, whether passed before or after the commencement of this Act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent such costs are to be paid.

Supreme Court of Judicature Act, 1891.

(54 & 55 Vict. c. 53.)

Ex-Lord Chancellor to be a judge of Court of Appeal.

1. Every person who has held the office of Lord Chancellor shall be an ex-officio judge of the Court of Appeal, but he shall not be required to sit and act as a judge of that court, unless upon the request of the Lord Chancellor he consents so to do, and while so sitting and acting he shall rank therein according to his precedence as a peer.

Supreme Court of Judicature (Procedure) Act, 1894.

(57 & 58 Vict. c. 16.)

Regulations as to appeals.

1. 1. No appeal shall lie—

- a) From an order allowing an extension of time for appealing from a judgment or order; nor
- b) Without the leave of the Judge, or of the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by a Judge, except in the following cases, namely:
 - I. Where the liberty of the subject or the custody of infants is concerned; and
 - II. Cases of granting or refusing an injunction or appointing a receiver; and

- III. Any decision determining the claim of any creditor or the liability of any contributory, or the liability of any director or other officer under the Companies Acts, 1862 to 1890, in respect of misfeasance or otherwise; and
 - IV. Any decree nisi in a matrimonial cause, and any judgment or order in an admiralty action determining liability; and
 - V. Any order on a special case stated under the Arbitration Act, 1889: and
 - VI. Such other cases, to be prescribed by rules of court, as may in the opinion of the authority for making such rules be of the nature of final decisions.
2. An order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order within the meaning of this section.
 3. No appeal shall lie from an order of a Judge giving unconditional leave to defend an action.
 4. In matters of practice and procedure every appeal from a Judge shall be to the Court of Appeal.
 5. In all cases where there is a right of appeal to the High Court from any court or person, the appeal shall be heard and determined by a Divisional Court constituted as may be prescribed by rules of court; and the determination thereof by the Divisional Court shall be final, unless leave to appeal is given by that Court or by the Court of Appeal.

Explanation of power to make rules.

3. It is hereby declared that the power to make rules conferred by the Judicature Acts, 1873 to 1891, includes power to make rules for regulating the means by which particular facts may be proved and the mode in which evidence thereof may be given:

- a) On any application in any matter or proceeding relating to the distribution of any fund or property, whether in court or not; and
- b) On any application upon summons for directions pursuant to such rules.

Amendment of provisions as to Rule Committee.

4. The persons in whom the power of making rules of court pursuant to section seventeen of the Appellate Jurisdiction Act, 1876, and section nineteen of the Supreme Court of Judicature Act, 1881, is vested, shall include the President of the Incorporated Law Society for the time being, and shall also include two persons (one of whom shall be a practising barrister) to be appointed for the purpose in the same manner as the four judges in the lastmentioned section referred to.

Vexatious Actions Act, 1896.

(59 & 60 Vict. c. 51.)

Power of court to prohibit institution of action without leave.

1. It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior court, and whether against the same person or against different persons, the court may, after hearing such person or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings shall be instituted by that person in the High Court or any other court, unless he obtains the leave of the High Court or some judge thereof, and satisfies the Court or judge that such legal proceeding is not an abuse of the process of the court, and that there is *prima facie* ground for such proceeding. A copy of such order shall be published in the London Gazette.

Extent and short title.

2. 1. This Act shall not extend to Scotland or Ireland.
2. This Act may be cited as the Vexatious Actions Act, 1896.

Arbitration Act, 1889.

(52 & 53 Vict. c. 49.)

Reference for inquiry and report.

13. 1. Subject to rules of Court and to any right to have particular cases tried by a jury, the Court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee.
2. The report of an official or special referee may be adopted wholly or partially by the Court or a judge, and if so adopted may be enforced as a judgment or order to the same effect.

Reference for trial.

14. In any cause or matter (other than a criminal proceeding by the Crown),
 - a) If all the parties interested who are not under disability consent: or;
 - b) If the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers: or;

- c) If the question in dispute consists wholly or in part of matters of account; — The Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the Court.

Powers and remuneration of referees and arbitrators.

15. 1. In all cases of reference to an official or special referee or arbitrator under an order of the Court or a judge in any cause or matter, the official or special referee or arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by rules of Court, and subject thereto as the Court or a judge may direct.
2. The report or award of any official or special referee or arbitrator, on any such reference shall, unless set aside by the Court or a judge, be equivalent to the verdict of a jury.
3. The remuneration to be paid to any special referee or arbitrator to whom any matter is referred under order of the Court or a judge shall be determined by the Court or a judge.

Power to compel attendance of witness in any part of the United Kingdom, and to order habeas corpus to issue.

18. (1.) The Court or a judge may order that a writ of subpoena ad testificandum or of subpoena duces tecum shall issue to compel the attendance before an official or special referee, of a witness wherever he may be within the United Kingdom.

Statement of case pending arbitration.

19. Any referee, may at any stage of the proceedings under a reference, and shall, if so directed by the Court or judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference.

Admiralty Court Act, 1840.

(3 & 4 Vict. c. 65.)

Jurisdiction.

4. The High Court of Admiralty shall have jurisdiction to decide all questions or to the title to or ownership of any ship or vessel (or the proceeds thereof remaining in the registry) arising in any cause of possession, salvage, damage, wages or bottomree, which shall be instituted in the said court after the passing of this act.

6. The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatever in the nature of salvage for services rendered to, or damage received by, any ship or sea-going vessel, or in the nature of towage, or for necessities supplied to any foreign ship a sea-going vessel, and to enforce the payment thereof whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered or damage received or necessities furnished, in respect of which such claim is made.

Admiralty Court Act, 1861.

(24 Vict. c. 10.)

Jurisdiction.

2. In the interpretation and for the purposes of this Act "ship" shall include any description of vessel used in navigation not propelled by oars.

4. The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are already under arrest of the Court.

5. The High Court of Admiralty shall have jurisdiction over any claim for necessities supplied to any ship elsewhere than in the port to which the ship belongs unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: provided always, that if in any such cause the plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in such Court.

6. The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of, or for any breach of duty or breach of contract on the part of the owner, master or crew of the ship [with similar provisions as to domicile and costs].

7. The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

8. The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or share to be sold, and may make such order in the premises as to it shall seem fit.

10. The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special

contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship [limit of costs to cases where £50 recovered].

11. The High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854, whether the ship or the proceeds thereof be under arrest of the said Court, or not.

Merchant Shipping Act, 1894.

(57 & 58 Vict. c. 60.)

Jurisdiction of Admiralty.

565. Subject to the provisions of this Act, the High Court, and in Scotland the Court of Session, shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed on the high seas or within the body of any county, and whether the wreck in respect of which salvage is claimed is found on the sea or on the land, or partly on the sea and partly on the land.

Debtors Act, 1869.

(32 & 33 Vict. c. 62.)

Imprisonment for Debt Abolished.

4. With the exceptions hereinafter mentioned, no person shall.....be arrested or imprisoned for making default in the payment of a sum of money. There shall be excepted from the operation of the above enactment.

1. Default in payment of a penalty, or sum in the nature of a penalty (other than a penalty in respect of any contract).
2. Default in payment of a sum recoverable summarily before a justice or justices of the peace [police magistrates].
3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control.
4. Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order.
5. Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order.
6. Default in payment of sums in respect of the payment of which, orders are in this act authorized to be made.

Provided (1) that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than one year.....

5. Subject to the provisions hereinafter mentioned....any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent [English] court: Provided.....

.....That such jurisdiction shall only be exercised when it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same. Proof of the means of the person making default may be given in such manner as the court thinks just; and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath, according to the prescribed rules..... For the purposes of this section the court may direct any debt due from any person in pursuance of any order or judgment....to be paid by instalments and may from time to time rescind or vary such order..... No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action or deprive any person of any right to take out execution against the lands, goods or chattels of the person imprisoned, in the same manner as if the imprisonment had not taken place. Any person imprisoned under this section shall be discharged out of custody upon a certificate.....that he has satisfied the debt or instalment of a debt in respect to which he was imprisoned, together with the prescribed costs (if any).

Commercial Causes Notice.

Notice.

The judges of the Queen's Bench Division desire to make, in accordance with the existing rules and orders, further provision for the despatch of commercial business as herein provided:

1. Commercial causes include causes arising out of the ordinary transactions of merchants and traders; amongst others, those relating to the construction of mercantile documents, export or import of merchandise, affreightment, insurance, banking, and mercantile agency and mercantile usages.

2. A separate list for summonses in commercial cases will be kept at chambers. A separate list will also be kept for the entry of such causes for trial, but no cause shall be

entered in such list which has not been dealt with by a judge charged with commercial business, upon application by either party for that purpose, or upon summons for directions or otherwise.

3. With respect to town commercial causes it is considered desirable, with a view to despatch and the saving of expense, that all applications shall be made direct to the judge charged with commercial business, and with respect to country commercial causes applications may by consent of the parties be made to him in like manner.

4. As to commercial causes already entered for trial, application may be made to such judge by either party to enter the same in the commercial cause list.

5. Applications in commercial causes under Order XIV. shall be made as heretofore, but where leave to defend has been given such causes may be dealt with like other commercial causes.

6. Application may be made to such judge under the provisions of the Judicature Act, 1894, and the rules thereunder, or by consent, to dispense with the technical rules of evidence, for the avoidance of expense and delay which might arise from commissions to take evidence and otherwise.

7. Application may also be made to such judge, after writ or originating summons, for his judgment on any point of law.

8. Such judge may at any time after appearance and without pleadings make such order as he thinks fit for the speedy determination, in accordance with existing rules, of the questions really in controversy between the parties.

9. Parties may, if they so desire, agree that the judgment or decision of such judge in any cause or matter shall be final.

10. Application may be made to such judge in urgent cases to fix an early day for the hearing of any cause or matter.

11. Summonses may be entered in the list of commercial summonses . . . ; these will be heard by Mr. Justice Mathew, who . . . will . . . as far as is practicable, continue to sit *de die in diem* for the despatch of commercial business. Where necessary, other judges of the Queen's [now King's] Bench Division will assist in the disposal of commercial business.

12. Country commercial causes will be tried as is usual at the assizes.

By Order.

Commercial Laws of England.

Title I. Companies.

By A. F. Topham, LL. M., Barrister-at-Law.

I. Introduction.

Limited liability was first introduced into English law in the middle of the 19th Century. However large might be the number of persons who were associated together for the purpose of trade, they together formed in the eye of the law merely a partnership or collection of individuals, all of whom were jointly liable for the debts incurred by any of them on behalf of the association or partnership. If, however, the association was incorporated by charter from the Crown, a complete immunity from all the debts of the association was obtained by the individual members. These associations, or corporations as they are called, have existed in England from early times. The corporation is considered as a distinct *persona* or legal entity with rights and liabilities distinct from those of the individual corporators.

Trading associations have also been incorporated from time to time by special Act of Parliament. The rights and liabilities of the individual members of these statutory corporations were regulated by the special Act of the legislature which created the corporation, and are now for the most part regulated by their own special Acts of Parliament, which usually incorporate the provisions of the Companies Clauses Consolidation Acts 1845 to 1889¹).

Trading associations not incorporated in either of these modes have frequently been formed and have in many cases purported to divide their capital into shares and to limit the liability of each member to the amount of his share. Such an arrangement might be valid as between the various members of the association, but creditors always had the right to render any member liable to the full amount for the debts of the association, leaving the corporators to adjust the ultimate liability between themselves.

Associations of this nature became very common in the early years of the 18th century and this led to the passing of the "Bubble Act"²) of 1719, which enacted that persons should be deemed to be public nuisances who "presumed to act as if they were corporate bodies" or "pretended to make their shares in stocks transferable without any legal authority by act of Parliament or Charter". This Act was repealed in 1835, but the law still continued to prohibit limited liability and transferable shares in associations not legally incorporated³).

Early in the 19th Century it became apparent that a royal charter or a special Act of the legislature was a cumbrous method of establishing trading associations, and the formation of such associations was partly encouraged and partly checked by various tentative and half-hearted legislative experiments, until the principle of limited liability was definitely and lastingly established by the Companies Act of 1862.

By an act of 1834⁴) the Crown was enabled to grant by letters patent to any body of persons associated together for trading or other purposes, although not incorporated by letters patent, any privileges which according to common law the Crown could grant by charter of incorporation. This was repealed by a somewhat similar statute, namely, the Chartered Companies Act, 1837⁵), by which the Crown was authorised in a similar way by letters patent to enable the association to sue and be sued in the name of one or two officers who were to be registered for that purpose and to provide that the members of the association should be individually liable in their persons and property for the debts of the association to such extent only per share as should be declared by the letters patent.

¹) 8 & 9 Vic. c. 16 and amending statutes.

²) 6 Geo. I. c. 18.

³) *Duvergier v. Fellows* (1828) 5 Bing. 248, 267.

⁴) 4 & 5 Will. IV. c. 94.

⁵) 7 Will. IV. & 1 Vic. c. 73.

As regards liability to creditors such companies were essentially partnerships; their members were liable to the last farthing for the debts of the companies; but before recourse for payment of such debts could be made against an individual member it was necessary for the creditors to show that they could not obtain payment from the company¹⁾.

By an Act of 1844²⁾ it was made illegal for any company of more than six persons to carry on the trade of bankers in England except by letters patent from the Crown. The holders of at least half the shares had to execute a deed of partnership and the association became a corporation, but the letters patent were for a term of not more than 20 years.

Another Act was passed in 1844³⁾ for the regulation of "Joint-stock Companies", which were defined to include "every partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the co-partners" and "every partnership which shall consist of more than 25 members" — except companies incorporated by statute or charter. When the company had been formed by means of a deed of settlement under this Act a certificate of complete registration could be obtained and then the company and its shareholders became incorporated, with power to sue and be sued in the registered name, and to hold land, provided the land was required for the purpose of being used as a place of business, and to issue share certificates. The Act did not limit the liability of members, and a judgment against the Company could be enforced by execution not only against the assets of the Company but also against the property of any shareholder who had not ceased to be a member of the company for three years. A shareholder against whom execution had been levied had a remedy against the company.

In 1855 was passed the first Limited Liability Act⁴⁾, by which any joint-stock company with a capital divided into shares of a nominal value of not less than £10 each, could obtain a certificate of registration with limited liability. The word "limited" had to be added as the last word in the name of the company and the members were not liable for any of the debts of the company except where execution against the company failed to realise sufficient, in which case execution could be levied against the shareholders, but to the extent only of the portions of their shares not then paid up.

This Act was repealed by the Joint-stock Companies Act 1856⁵⁾, which foreshadowed many of the provisions of the Act of 1862. It prohibited the carrying on in partnership by more than 20 persons of any trade or business having gain for its object, unless such persons were registered under the Act or incorporated by charter or statute. Seven or more persons could form themselves into a company with or without limited liability by signing a Memorandum of Association and complying with certain other requirements preliminary to registration. If the liability was limited, the word "limited" had to be the last word in the company's name, and on a winding-up the existing shareholders were liable to contribute to an amount sufficient to pay the debts of the company and the expenses of winding up, provided that no contribution could be required from any shareholder exceeding the amount, if any, unpaid on the shares held by him.

Banking companies were specially dealt with by two further acts. By an act of 1857⁶⁾ banking companies of seven or more persons having a share capital could register under the Act, but not with limited liability. By the Act of 1858⁷⁾ banks were allowed to be registered with limited liability, subject however to the provision that if they issued notes they were to be subject to unlimited liability in respect of the notes and the shareholders were to be liable for the whole amount of the note issue in addition to the sum for which they would be liable as shareholders in a limited company.

The Companies Act of 1862 provided the code which is still the basis of company law in England; for although it was frequently amended and extended and

1) Lindley on Companies p. 5.

2) 7 & 8. Vic. c. 113.

3) 7 & 8. Vic. c. 110.

4) 18 & 19 Vict. c. 133.

5) 19 & 20 Vict. c. 47.

6) 18 & 19 Vict. c. 133.

7) 21 & 22 Vict. c. 91.

finally repealed, the consolidating statute of 1908 has adopted with only verbal modifications the great bulk of its provisions, welding the Act of 1862 and its amending statutes into one logically arranged whole.

The English law relating to limited companies is now to be found almost entirely within the provisions of the Companies (Consolidation) Act 1908, explained and amplified by the law laid down by the courts in decided cases, which, though they were for the most part decided before the Act was passed, are still authoritative law so far as the particular provisions on which they were based have been incorporated into the new Act.

II. The Companies (Consolidation) Act, 1908.¹⁾

A company registered under this Act may be either a public company or a private company. The latter is a company which restricts the right to transfer its shares, limits the number of its members (exclusive of persons in the employment of the company) to fifty and prohibits any invitation to the public to subscribe for its shares or debentures²⁾.

A company may be registered with unlimited liability, in which case the liability of each member is much the same as that of a partner in a firm, or with the liability of its members limited to the extent of a fixed guarantee; or the company may be limited by shares, in which case each member is only liable to contribute to the capital of the company the nominal amount of his shares, and, if he has done this, is free from all further liability for the debts of the company and cannot be compelled directly or indirectly to provide further capital for the company or for payment of its debts.

Some part of the nominal amount of each share is usually paid by the shareholder when he acquires his shares and the rest is liable to be called up by the company when required, subject to any express agreement which may have been made as to the time and mode in which calls shall be made. When the whole nominal amount of the share has been called up and paid to the company, the shares are said to be fully paid.

The great majority of companies formed under the Companies Act are limited by shares; in fact unlimited companies and guarantee companies are comparatively rare. Consequently, the bulk of this article will be devoted to companies limited by shares, the special peculiarities of the other forms of company being separately dealt with.

A public company must have at least seven members and a private company must have at least two members. If the number of members of a company falls below seven or two, as the case may be, the company may be wound up by the court, and if the members, knowing that the numbers are so reduced, carry on business for more than six months, they become personally liable for the debts of the company³⁾. The court, however, seldom makes an order to wind up a company on the ground that its numbers have fallen below the minimum required, but will usually rely upon the members passing a resolution for voluntary winding-up in order to put an end to their personal liability.

No company or partnership for banking purposes must consist of more than ten persons and no company or partnership formed for the purpose of carrying on any other business must consist of more than twenty persons, unless it is registered under the Companies Act or unless it is a statutory company, such as a railway company incorporated by Act of Parliament or a corporation created by letters patent from the Crown, or a building society, friendly society or industrial society registered under the special statutes applicable to such societies⁴⁾.

A company is formed in the following manner — In the case of a public company seven persons, and in the case of a private company two persons, subscribe their names to a "Memorandum of Association". This document together with a statutory declaration that all the requirements of the Act have been complied with and certain other necessary papers are then produced to an officer called the Registrar of Joint-stock Companies (now referred to in the Act as the Registrar of Companies)

¹⁾ 8 Ed. VII. c. 69.

²⁾ Companies (Consolidation) Act 1908, Sect. 121.

³⁾ Ibid. S. 115.

⁴⁾ Ibid. Sect. 1.

who retains and registers the memorandum of association and grants a certificate that the company is incorporated and (in case of a limited company) limited¹⁾.

The subscribers of the memorandum together with any other persons who may by that time have acquired shares in and thus become members of the company thereupon become a corporate body. The corporate body thus formed has a special power to hold lands²⁾ in spite of the general law that lands cannot be granted to corporations.

If however the company is not formed for the purpose of gain it has not this special power.

A company which is in course of formation has no legal existence until it is actually registered; consequently no contracts can be made by it or by any person on its behalf so as to bind it in any way. Contracts are sometimes made by a person who purports to contract as the agent for a company not yet formed. Such contracts render the so-called agent personally liable³⁾, but do not bind the company or confer any rights of action on the company⁴⁾ and cannot even be ratified by the company after its formation. The company may, however, and usually does, make a new contract after its formation on the same terms as the preliminary contract, and the articles of association usually provide that the first duty of the directors shall be to enter into such a contract.

The contract itself usually provides that the liability of the so-called agent shall cease if the company adopts the agreement, or if it fails to do so within some fixed period such as six months.

III. The Memorandum of Association.

In the case of a company limited by shares, the memorandum must state:

- I. The name of the company, with "Limited" as the last word in its name;
- II. The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate;
- III. The objects of the company;
- IV. That the liability of the members is limited;
- V. The amount of share capital with which the company proposes to be registered and the division of the capital into shares of a fixed amount.

In the case of any company which has a share capital, each subscriber of the memorandum must take at least one share and must write opposite to his name the number of shares he takes.

A limited company must display the word "limited" as part of its name in all official documents, and if the word is omitted from any contract made on behalf of the company, the directors may incur personal liability⁵⁾ in respect of that contract.

Where however a company is formed for the purpose of promoting art, science, religion, charity or any other similar object which does not involve the acquisition of gain, and intends to apply its income solely in promoting the objects for which it is formed, it may with the licence of the Board of Trade omit the word "limited" from its name; this has been done for instance in the case of the Cyclists' Touring Club mentioned below. Such a company may not without the licence of the Board of Trade hold more than two acres of land⁶⁾.

If a person or body of persons who are not a limited company carry on business under a name the last word of which is "limited" they are liable to heavy fines⁷⁾.

Any defects in the memorandum of association are cured by the incorporation of the company; for the certificate of incorporation is absolutely conclusive evidence that all the necessary steps and formalities have been properly carried out and that the company is duly formed, in spite of any defect in such formalities which may afterwards be shown to have occurred⁸⁾. Thus, if it should afterwards appear that only six persons in fact signed the memorandum of association, the

¹⁾ Ibid. sects 15 and 16.

²⁾ Ibid. S. 16.

³⁾ *Kelner v. Baxter* (1867) L. R. 2 C. P. 174.

⁴⁾ *Natal Land Co. v. Pauline Syndicate. Ltd.* [1904] A. C. 120.

⁵⁾ *Atkins & Co. v. Wardle* (1889) 58 L. J. Q. B. 377.

⁶⁾ Companies (Consolidation) Act, 1908, ss. 19 and 20.

⁷⁾ Ibid. s. 282.

⁸⁾ Ibid. s. 17.

company would be effectually incorporated, but subject of course to the liability of being wound up if it did not forthwith increase the number of its members to seven at least.

The memorandum of association is the document which constitutes the company and defines its powers. A company has no powers except those which are expressly or impliedly given to it by its memorandum, and if it attempts to do any act or carry on any business outside these limited powers, all the acts so done are invalid as being *ultra vires*, and not even the express ratification of such acts by every member of the company can make them valid¹).

The memorandum of association is usually framed in very wide terms, apparently giving to the company express power to carry on every conceivable form of business as a separate and independent object; but the apparent omnipotence so given must be accepted with caution; for the Law Courts will as a rule determine from the name and general position of the company and even from the terms of the prospectus by which it invites subscriptions what its main object is, and will not allow it to carry on any business which is not fairly incidental to its real object²).

If the main object of the company afterwards fails the company may be ordered to be wound up, even though some of its members wish to continue business of another nature the power to carry on which is given by one of the subsidiary clauses of the memorandum³).

On the other hand a company formed for the purpose of carrying on business with a view to profit has an implied power to do any acts which are fairly incidental to its real business, even if such powers are not given to it by the memorandum. Thus it may buy or sell land⁴), borrow money on mortgage⁵) or reward its old employees by means of pensions⁶).

A company cannot alter its memorandum of association except for the purpose of changing its name, altering or extending its objects or increasing, reorganising or reducing its capital. In these cases the procedure provided by the Act must be followed.

The name may be altered in the following way. A company may not be registered with a name identical with the name of any existing company or firm⁷) or so closely resembling that name as to be calculated to deceive the public or the persons likely to deal with the older company or firm. If a company has inadvertently infringed this rule, it may change its name with the sanction of the Registrar of Companies⁸). In any other case a company may change its name by a special resolution⁹) with the approval in writing of the Board of Trade. The new name is then entered in the register. The change of name does not affect any of the rights of the company or any legal proceedings which have been taken by or against the company¹⁰).

The provisions of the memorandum relating to the objects or powers of the company may be altered by special resolution⁹), confirmed by the court¹¹), so far as may be required to enable the company to carry on its business more economically or efficiently, to attain its main object by new or improved means, to enlarge or change the local area of its operations, to carry on some other business which can conveniently be combined with its own business, or to restrict or abandon any of its objects.

The court will before confirming the resolution consider whether the interests of any persons will be affected by the change¹²). Thus the court refused to sanction an extension of the objects of the Cyclists Touring Club so as to include motorists,

¹) *Ashbury Railway Carriage Co. v. Riche* (1875), L. R. 7 H. L. 653.

²) *Re Crown Bank* (1889) 44 Ch. D. 634.

³) *Re Amalgamated Syndicate* [1897] 2 Ch. 600.

⁴) *Kingsbury Collieries Ltd* [1907] 2 Ch. 259.

⁵) *General Auction Co. v. Smith* [1891] 3 Ch. 432.

⁶) *Cyclist Touring Club v. Hopkinson* [1910] 1 Ch. 179.

⁷) *Société Panhard et Levassor v. Panhard Levassor Motor Co. Ltd.* [1901] 2 Ch. 513.

⁸) Companies (Consolidation) Act 1908, Sect. 8.

⁹) A special resolution must be passed by a three fourths majority of the members present at a meeting of the Company and confirmed at a subsequent meeting; see. p. 110 post.

¹⁰) Companies (Consolidation) Act 1908, Sect. 8 (5).

¹¹) The court is in practice one of the judges of the Chancery Division of the High Court: *Re Essex and Suffolk Insurance Society* [1909] W. N. 102.

¹²) Companies (Consolidation) Act, 1908, Sect. 9.

on the ground that the real object of the club was to protect cyclists and that motors constituted one of the dangers against which cyclists needed protection¹).

Where it is desired that special privileges shall be irrevocably attached to certain classes of shares, these special privileges are often defined in the memorandum of association. If this is done, they cannot be changed by any majority of the shareholders or by any alteration of the articles²), unless the memorandum itself provides that they may be changed in some special manner³). In the absence of any such special provision in the memorandum, the rights attached to any class of shares by the memorandum can only be altered by a special resolution confirmed by the court, and this must be preceded by a resolution passed by a majority in number of the shareholders of that class holding three fourths of the share capital of that class and confirmed at a meeting of shareholders of that class in the same way as a special resolution⁴). Any substantial difference between the rights of the holders of different shares will make them separate classes for the purposes of these meetings, as for instance if some shares have been fully paid and some only partly paid⁵).

Any alteration in the amount of the share capital or the number and nominal value of the shares into which it is divided also involves an alteration of the memorandum of association. Where such an alteration does not involve a reduction of the amount of the issued capital, it may be made without the sanction of the court. Thus the company may increase its share capital by the issue of new shares of such amount as it thinks expedient or may consolidate its shares by dividing its original capital into fewer shares of larger amount⁶). Either of these alterations may be effected by an ordinary resolution or by any other method prescribed by the articles. Thus the articles may provide that the company may delegate its power to increase its capital to the directors⁷).

The company can in the same way convert its fully paid shares into "Stock". This does not involve any very material change in the rights of the holders, the change being made for the purpose of convenience. After the conversion of shares into stock the register of members shows the amount or nominal value of stock held by each member instead of a specified number of shares identified by denoting numbers, and the stockholders are enabled to deal with their interests in fragments or irregular amounts even involving shillings and pence, unless the articles contain any restriction as to the minimum amount which may be dealt with. In other respects the rights of stockholders are practically the same as those of shareholders. Thus a bequest by will of shares in a company will pass stock in that company⁸). But a power to invest in shares does not authorise an investment in stock⁹). Shares may also be sub-divided into a greater number of shares of smaller amounts. This requires a special resolution¹⁰).

Share capital which has not been taken up and therefore remains unissued may be cancelled by the company by an ordinary resolution; but any reduction of the amount of the issued capital of the company is jealously guarded and can only be accomplished by special resolution subject to the sanction of the court¹¹).

The most usual ways of reducing capital are by extinguishing or reducing the liability on shares which are not fully paid, or by cancelling paid up capital which has been lost or is unrepresented by available assets, or by repaying capital which is in excess of the wants of the company. A company may also with the sanction of the court reduce its capital in any other way, provided the reduction does not prejudice its creditors and is fair to the different classes of shareholders¹²). Whatever be the alleged reasons for the reduction they must be proved to the satisfaction of the court before the resolution will be sanctioned¹²); but if there are no creditors

¹) *Re Cyclists' Touring Club* [1907] 1 Ch. 269.

²) *Ashbury v. Watson* (1885) 28 Ch. D. 56.

³) *Welsbach Incandescent Co.* [1904] 1 Ch. 87.

⁴) Companies (Consolidation) Act, 1908, Sect. 45.

⁵) *United Provident Co.* [1910] 2 Ch. 477.

⁶) Companies (Consolidation) Act, 1908, Sect. 41.

⁷) *Mosely v. Koffyfontein Mines* [1910] 2 Ch. 382; [1911] 1 Ch. 73.

⁸) *Morrice v. Aylmer* (1874) L. R. 10 Ch. 148.

⁹) *Eve. J. Times Newspaper* 1911. June 15.

¹⁰) Companies (Consolidation) Act, 1908, S. 41 (2).

¹¹) *Ibid.* Sect. 46.

¹²) *Poole v. National Bank of China* [1907] A. C. 229.

of the company, the court may dispense with such evidence¹). The reduction may be effected by reducing one class of shares more than another, or even by writing off the whole of the loss from one class of shares, provided the scheme of reduction is in the circumstances fair to all classes of shareholders²).

When a company has passed a resolution to reduce its capital the words "and reduced" must be added to its name for such period as the court may fix. Where however the proposed reduction does not involve the reduction of the liability of the shareholders or the return of any capital to them, the court may dispense with the addition of these words if it thinks fit, and this is frequently done if the company is carrying on business in foreign countries where the addition of the words "and reduced" would be likely to be misunderstood and damage the credit of the company³). The mere fact, however, that a company is carrying on business abroad is not of itself necessarily sufficient to induce the court to dispense with the words in question⁴).

If the proposed reduction of capital involves any diminution of the liability of members or any repayment of capital, the creditors of the company are entitled to object to the reduction, and the court will not confirm the reduction unless the objecting creditors are paid off or their claims properly provided for⁵).

When the reduction has been confirmed, a minute showing the reduction is registered with the Registrar and takes the place of the corresponding part of the memorandum of association of the company⁶).

IV. Articles of Association.

A company limited by shares may, in addition to its memorandum of association, register articles of association signed by the persons who signed the memorandum.

The articles of association contain regulations for the internal management of the company and the conduct of its business. They usually deal with the following matters: — the manner in which shares of the company are to be issued and allotted, the issue of share certificates to the members, provisions regulating calls in respect of shares not fully paid and for forfeiture of the shares if the calls are not paid, transfers of shares, increase and reduction of the company's capital, meetings of members, the election, retirement, powers and proceedings of the directors or other managing body of the company, payment of dividends, the keeping and auditing of accounts, the manner in which notices are to be served on the members and special provisions applicable in case of the winding up of the company.

If no articles are adopted a form of articles set out in the first schedule to the Companies Act and known as Table A will apply to the company. And even if other articles are adopted by the company the provisions of Table A will apply in so far as it is not excluded expressly or by implication. It is usual in practice to exclude Table A altogether and adopt articles which provide rather more detailed regulations for the management of the company. Sometimes however Table A is adopted with certain specified modifications. This may save expense in the preparation of the articles, but is most inconvenient and usually causes confusion and further expense in the working of the company.

The articles of association, unlike the memorandum, are freely alterable by the company. And the company cannot deprive itself of this power. The articles can be altered to any extent by special resolution, and any alteration so made is as valid as if originally contained in the articles⁷). The whole character of the internal arrangements of the company and the rights of its members (except so far as they are fixed in the memorandum) can be altered in this way, and individual shareholders may suffer considerable loss by the change⁸), provided that the provisions of the Act are not infringed and that the proposed change is made in the interests of the company as a whole.

¹) *Re Louisiana Co.* [1909] 2 Ch. 552.

²) *Re Quebrada Copper Co.* (1889) 40 Ch. D. 363.

³) *Sumatra Tobacco Co.* [1898] W. N. 80.

⁴) *Re Lindner & Co.* [1911] W. N. 66.

⁵) Companies (Consolidation) Act, 1908, Sect. 49 and 50.

⁶) *Ibid.* Sect. 52.

⁷) *Ibid.* Sect. 13.

⁸) *Andrews v. Gas Meter Co.* [1897] 1 Ch. 361.

The power to alter the articles is however subject to the following restrictions. The majority of shareholders must not perpetrate a fraud on the minority by passing resolutions which unfairly deprive some of the shareholders of their rights or which are passed in the interests of other competing persons or companies in which the majority are interested. Such resolutions may be upset by the dissenting minority¹). Again the articles are controlled by the memorandum and cannot be so changed as to authorise any dealings which are not authorised by the memorandum; and a company cannot by altering its articles alter its contractual relations with persons outside the company²).

The articles taken in conjunction with the memorandum of association contain the bargain which is made between the various shareholders and the company when the shares are issued; they bind the company and the members to the same extent as if they had been signed and sealed by every member and contained covenants by all the members to observe their provisions³).

The company is not directly bound by the articles, since the Act does not refer to any signature or covenants by or on behalf of the company; but the company is usually liable to the members to observe the terms of the articles by reason of an implied contract arising from the fact that the company has allotted shares on the basis of the articles⁴). There is however no such implied contract with regard to other persons, and consequently no person not a member of the company can claim to enforce the provisions of the articles against the company. Thus the fact that a certain person is appointed by the articles to be the solicitor of the company will not give him a right to be employed as such⁵).

Every person who acquires shares by transfer is bound by the memorandum and articles as if he had been an original member, and every person dealing with the company is deemed to have notice of their contents. A person who is not a member of the company is not however bound to inquire nor is he held to have any notice as to what has taken place in the internal management of the company. Thus, if the regulations in the memorandum and articles preclude the directors from borrowing money, a person who lends money to the company would have no remedy for the recovery of his loan; but if the regulations provide that the directors may borrow money "if authorised by special resolution", a lender is entitled to assume that the special resolution has been duly passed⁶).

Since the memorandum and articles are registered with the Registrar of Companies they are available for the inspection of any member of the public, and every member of the company is entitled to require a copy of them on payment of a sum not exceeding one shilling⁷).

V. Shareholders.

In the case of a company limited by shares the terms "shareholder" and "member" are practically synonymous. The only exception, which however makes very little practical difference, occurs when fully paid shares have been converted into stock⁸).

The persons who subscribe the memorandum of the company thereby become members and are deemed to be the holders of the number of shares set opposite their names in the memorandum, and their names should be entered on the register of members immediately upon registration of the company⁹). Any other person becomes a member by agreeing to become a member (that is, in the case of a company limited by shares, by agreeing to take shares) and by his name being entered on the register of members.

The register of members can if necessary be rectified; but until rectification the entry of the name of any person is the test of his membership¹⁰) (except in the

¹) *Menier and Hoopers' Telegraph Works* (1874), L. R. 9 Ch. 350.

²) *British Equitable Co. v. Bailey* [1906] A. C. 35.

³) Companies (Consolidation) Act, 1908, Sect. 14.

⁴) *New British-Iron Co.* [1898] 1 Ch. 324.

⁵) *Eley v. Positive Co.*, (1876) 1 Ex. D. 88.

⁶) *Royal British Bank v. Turquand* (1856) 6 E. & B. 327.

⁷) Companies (Consolidation) Act, 1908, Sect. 18.

⁸) As to which see *ante*.

⁹) Companies (Consolidation) Act, Sect. 24.

¹⁰) *Ibid.* Sect. 33.

case of the subscribers of the memorandum, for they become members independently of the entry of their names on the register), and even if he in fact holds the shares as agent or trustee for other persons or as the representative of a deceased member this fact will not appear on the register¹⁾, and the company will as a rule be entitled to treat the registered holder as the member for all purposes and will not be bound to take notice of any trust or agency affecting the shares. As between the registered holder and the person for whom he holds in trust, the trust can be enforced and the beneficiary is bound to indemnify the trustee against any loss or liability he may incur by reason of holding the shares, and this indemnity is not limited in extent to the value of the shares held in trust²⁾.

If the registered member be dead, his representatives when properly constituted can transfer his shares as if they were themselves members³⁾. They do not become members unless they apply to be put on the register, and consequently do not incur any personal liability. The estate of the deceased member remains liable for any calls that may be made in respect of the shares.

If the representatives get themselves registered as members, they become personally liable for calls and other liabilities attached to the shares, but can claim to be indemnified out of the deceased's estate so far as that estate is sufficient for the purpose.

If the company serves any notice on a deceased member at his registered address the notice is good, if the company has no knowledge of his death. But if the company has knowledge of the death, the notice should be given to the executors⁴⁾.

The register can be rectified by an order of the court if a person who is not or ought not to be a member is wrongly entered on the register. If for instance a person has been induced to take shares by fraud, or if registration is omitted or delayed in case of a person who ought to be entered on the register⁵⁾, the person aggrieved may apply to the court for rectification of the register.

The register will show the names and addresses of the members and the number of shares held by each⁶⁾ and the amount paid up on the shares. It must be kept at the registered office⁷⁾, and (subject to reasonable restrictions and a right to close the register for not more than 30 days in every year⁸⁾) must be open for the inspection of members free and of the public on payment of not more than one shilling. This enables any person by making the necessary inspection of the company's register to obtain information which is often of great use as to the composition of the company's membership. A supplementary share register may be kept in any colony⁹⁾.

One company can hold shares in and thus become a member of another company, if it is authorised so to do by its memorandum of association, and may in that case authorise one of its officers to attend meetings and vote on its behalf. But a company cannot be a member of itself¹⁰⁾.

If an infant takes shares in a company, he may repudiate his membership within a reasonable time after reaching 21, provided he has received no dividends and taken no other benefit by reason of his holding the shares¹¹⁾.

An individual shareholder is not entitled to sue the directors or any other person in respect of a wrong done to the company¹²⁾. His proper course is to requisition a general meeting of the company and, if he can obtain the support of a majority of the persons voting at the meeting, the action can then be commenced in the name of the company. If however the majority of the members are themselves taking part in the wrongful act and the act is ultra vires, a member of the dissentient minority can bring an action in his own name to restrain the directors from doing

1) Ibid. Sect. 27.

2) *Hardoon v. Belilios* [1901] A. C. 118.

3) Companies (Consolidation) Act, Sect. 29.

4) *James v. Buena Ventura Syndicate Ltd.* [1896] 1 Ch. 456.

5) Companies (Consolidation) Act, Sect. 32.

6) Ibid. Sect. 25.

7) Ibid. Sect. 30.

8) Ibid. Sect. 31.

9) Ibid. Sect. 34—36.

10) *Trevor v. Whitworth* (1887) 12 App. Cas 409.

11) *Hamilton v. Vaughan Sherrin Co.* [1894] 3 Ch. 589.

12) *Burland v. Earle* [1902] A. C. 83.

the act in question. If the company or the directors deprive him of any of his rights as a member of the company, he can sue the company in his own name, and if he chooses, may add the directors as defendants.

A shareholder who has participated in any wrongful acts cannot sue the directors for damages in respect of them: but he can apply for an injunction to restrain a repetition or continuance of the wrongful acts if they are *ultra vires*¹⁾.

VI. Share Capital.

The whole of the capital of every company limited by shares is divided into shares, which may be of equal or unequal amounts, and each share carries a right to participate to a certain fixed extent in the profits of the company and in its capital assets in case it be wound up.

Each share is not any particular portion of the actual property owned by the company; the property belongs to the company as a separate individual and the share is an incorporeal right, which confers on its owner such rights as the rules of the company give him as one of its members to join in the control of that property but no claim to a share of the property itself, except in the one case of the winding up of the company.

Consequently, though the company may own a considerable quantity of freehold land, which according to the terminology of English law is "real" property and is governed by special rules of inheritance and possesses other attributes which in most other codes of law are associated with the term "immovable", yet the shares in such a company are "personal" property and are consequently subject to the rules of succession and ownership which apply to movables²⁾.

The shares are deemed to be locally situate where the company has its head office³⁾.

Shares can be transferred, and unless the articles provide otherwise, the consent of the other members or of the board of directors is not required.

The form of transfer is governed by the articles, which usually provide that the transfer shall be in writing and signed both by the transferor and the transferee; but in case no form is provided by the articles a transfer in writing signed by the transferor is all that is required⁴⁾. In either case the transfer is completed by the entry of the name of the transferee in the register of members⁵⁾. If the registration is improperly delayed by the company, the transferee may on applying to the court be given the same rights as he would have had if the transfer had been duly registered⁶⁾.

Each share is identified by its appropriate number, which is entered in the register, and each holder is entitled to demand a certificate showing the denoting numbers of the shares held by him and usually stating how much has been paid up on the shares.

The company is bound to have the certificates ready for delivery within two months after any allotment or transfer of shares⁷⁾.

The certificate is usually under the seal of the company, and in that case is *prima facie* evidence of the title⁸⁾ of the holder to the shares comprised in it. It also binds the company in favour of the holder of the certificate by way of admission or estoppel to the truth of the statements contained in it; but only so far as the company is under any duty towards the person who relies on those statements. Consequently the company cannot be made liable in respect of such statements by a person who is not a member of the company, even though he deals with the shareholder on the faith of the statements in the certificate⁹⁾.

When a shareholder agrees to sell part only of the shares comprised in his certificate, it is customary for the company to certify the transfer, that is, to insert a note in the margin of the transfer to the effect that a certificate for the total

¹⁾ *Mosely v. Koffyfontein Mines* [1911] 1 Ch. 73.

²⁾ Companies (Consolidation) Act, Sect. 22.

³⁾ *Att-Gen. v. Higgins* (1857) 2 H. & N. 339 at p. 351.

⁴⁾ Judicature Act 1873 (36 & 37 Vic. c. 66) Sect. 25 (6).

⁵⁾ Companies (Consolidation) Act, Sect. 28.

⁶⁾ *Sussex Brick Co.* [1904] 1 Ch. 598.

⁷⁾ Companies (Consolidation) Act, Sect. 92.

⁸⁾ *Ibid.* Sect. 23.

⁹⁾ *Rainford v. James Keith Ltd.* [1905] 1 Ch. 296.

number of shares has been lodged with the company. This is accepted on the Stock Exchange as evidence that the shares will be delivered; but it imposes no liability on the company¹), and the company is not in any way estopped by the statement so indorsed on the transfer and is not liable if registration of the transfer is afterwards refused, even though the statement was due to carelessness on the part of the secretary or the officers of the company.

A transfer carries with it the right to all dividends declared in respect of the shares after the date of the agreement for sale unless otherwise agreed, and the transferee becomes liable to pay all subsequent calls and to indemnify the transferor against them.

A forged transfer has no effect at all, and if the supposed transferee is registered as holder of the shares the original holder can have the register rectified. The company may, however, be rendered liable to the person to whom the new certificate has been issued or his transferees under the doctrine of estoppel.

Shares may be mortgaged. This is usually effected by depositing the share certificate with the lender, and the deposit is sometimes accompanied by a transfer of the shares executed by the shareholder with the name of the transferee left in blank to be filled in by the lender in case he wishes to enforce his security. The lender may also sell the shares after giving reasonable notice to the borrower²).

In order to render such a mortgage indefeasible the lender should give notice to the company of a claim on the shares supported by affidavit under Order 46, rules 2, 4 of the Rules of the Supreme Court. If this is done, the company cannot register any transfer of the shares by the borrower without giving notice to the lender, thus giving him an opportunity to apply to the court for an injunction to restrain the threatened transfer. If this is not done, the borrower if he is fraudulent, can as a rule easily obtain a new certificate from the company by alleging that his original certificate has been lost or destroyed. If he then transfers his shares to a bona fide purchaser who thereupon registers his transfer, the original lender may lose all rights over the shares and, since the company has not issued any certificate to him, will have no remedy against the company, even if the certificate which was issued to the borrower and deposited with the lender states that no transfer will be registered without the production of the certificate³).

The deposit is sometimes accompanied by a written mortgage or charge over the shares: but this does not render the security any more perfect: it only serves to define the rights as between the borrower and the lender.

A company may issue to the members, in lieu of certificates, share warrants⁴), which may entitle the bearer of the warrant to be considered as a member in respect of the shares specified in the warrant.

The shares may then be transferred by mere delivery of the warrant, the name of the holder of the shares being struck out from the register of members as from the date when the warrant is issued, and the issue of the warrant being entered in the register. Share warrants can only be issued in respect of fully paid shares or stock, and the bearer can at any time insist upon being entered on the register as a registered holder of the shares provided he surrenders the warrant to the company. Where share warrants are issued, dividends are usually claimed and paid by means of coupons, and the holders are usually only entitled to vote at meetings of the company after they have proved their membership by depositing their share warrants with the company a few days before the meeting, or by any other sufficient means of proof which the company is prepared to accept.

The share capital of a company may be divided into different classes of shares, such as preference shares, ordinary shares and deferred shares. The holders of preference shares are usually entitled to payment of a fixed dividend before any dividend is payable on the ordinary shares. If no provision to the contrary is contained in the articles, any deficiency in the fixed dividend in one year must be made good out of the profits of subsequent years before the ordinary shareholders get any dividends⁵). The preference shares are then said to be cumulative. The articles may however provide that the shares shall be "non-cumulative", that is that the divi-

¹) *George Whitechurch Ltd. v. Cavanagh* [1902] A. C. 117.

²) *Stubbs v. Slater* [1910] 1 Ch. p. 632.

³) *Rainford v. James Keith Ltd.* [1905] 1 Ch. 296.

⁴) Companies (Consolidation) Act, Sect. 37.

⁵) *Foster v. Coles* [1906] W. N. 107.

dends of each year shall be divided without reference to deficiencies in previous years¹). Deferred shares as a rule do not carry any dividends unless dividends exceeding a fixed rate (say 10 per cent) have been paid on the ordinary shares and then they are entitled to a certain proportion of the profits.

When the assets of the company are distributed for the purposes of winding up, all classes of shares rank *pari passu* and the capital subscribed is paid up in such a manner that all shareholders share in equal proportions the loss or gain as the case may be²). The articles however frequently provide that the preference shares shall have a priority as to capital in a winding up, or that the "surplus assets", that is the assets which remain after payment of all debts and repayment of all the capital paid up on all the shares³) shall be divided in unequal proportions among the different classes of shares. Thus the promoters of a company often reserve to themselves deferred shares of one shilling each while dividing the bulk of the capital into a similar number of £1 shares and then provide that the surplus assets shall be divided into two equal portions, one to be divided among the holders of the deferred shares and the other among the holders of the rest of the shares.

A company can turn any part of its capital which has not been called up into reserve capital, by passing a special resolution that such capital shall not be called up except in the case of a winding-up⁴). Reserve capital created in this way cannot be charged or dealt with by the company⁵), and is not taken into consideration when the question of the solvency or insolvency of the company has to be determined for the purposes of a winding-up petition⁶).

VII. Calls.

A company is not bound to allot at once the whole of the share capital which is fixed as its nominal capital by the memorandum: in other words the issued capital may be less than the nominal capital. Again the company is not bound to call upon the members to pay at once the whole nominal value of their shares. Thus the paid up capital may be less than the issued capital.

Where the whole of the amount due on any share has not been paid up, the company may at any time make a call on the member for the whole or any part of the amount so due, subject only to the provisions of the articles as to the time and mode of making the call. Thus, if the articles provide that not more than a certain percentage of the nominal value of the share shall be called up at one time and that no call shall be made within a fixed time after a previous call, the directors cannot make calls which would infringe these restrictions. Such restrictions, however, cease to be binding if the company is wound up⁷).

The articles may provide that some members shall be liable to calls larger in amount or earlier in date than other members⁸). The directors however must exercise their power of making calls in a fair manner and not so as to benefit themselves at the expense of the other members⁹).

The company may also receive from the holder of any share not fully paid the whole or any part of the amount still unpaid without making calls on the other members, and the amount so paid in advance may either carry interest at an agreed rate or dividends in the same proportion as the other paid up capital¹⁰). This power must also be exercised fairly and for the benefit of the company as a whole; consequently, directors were held to have acted illegally who paid up in advance of calls the amount due from themselves in respect of their shares for the purpose of providing a fund out of which they paid themselves their remuneration for the year as directors, the company having made no profits out of which such remuneration could be paid¹¹).

¹) *Staples v. Eastman Photo Co.* [1896] 2 Ch. 303.

²) *Welton v. Saffery* [1897] A. C. 299.

³) *Re Ramel Syndicate Ltd.* [1911] 1 Ch. 749.

⁴) Companies (Consolidation) Act, Sect. 59.

⁵) *Barlett v. Mayfair Property Co.* [1898] 2 Ch. 28.

⁶) *Bristol Joint Stock Bank* (1890) 44 Ch. D. 703.

⁷) *Fowler v. Broad's Nightlight Co.* [1893] 1 Ch. 724.

⁸) Companies (Consolidation) Act, Sect. 39.

⁹) *Alexander v. Automatic Telephone Co. Ltd.* [1900] 2 Ch. 56.

¹⁰) Companies (Consolidation) Act, Sect. 39 (2) and (3).

¹¹) *Syke's Case* (1872) L. R. 13 Eq. 255.

The articles usually provide that if a member fails to pay the calls on his shares within a specified time, his shares may be forfeited.

This provision is valid, although the forfeiture may effect a reduction of the amount of the issued capital; and the courts will not relieve a shareholder against a forfeiture so incurred unless there has been some irregularity in the proceedings. The forfeited shares cannot be cancelled without leave of the court; but they may be sold by the company.

The forfeiture must only be declared bona fide for the benefit of the company when the amount of the calls cannot otherwise be obtained, and directors must not forfeit the shares of their friends in order to relieve them from liability for calls. Such a forfeiture would be void.

The articles usually also provide that the company shall have a lien or charge over the shares of a member for debts due from him to the company, and that the company may enforce the lien by sale of the shares.

The articles also as a rule give power to the directors to accept a surrender of shares. This may be done in any case where a forfeiture could be enforced, in order to avoid going through the necessary formalities; but it cannot be done for the purpose of relieving a friendly shareholder from liability in respect of his shares, and it cannot be done even for the benefit of the company in cases where it would involve a reduction of capital unless the leave of the court is obtained¹). Thus a surrender of even fully paid shares by way of gift to the company is only valid if the shares are held by the company as unissued or are re-issued²). They cannot be cancelled without leave of the court.

VIII. The Registered Office.

A company must have a registered office and must give notice to the Registrar of the situation of the office, and if the situation is changed, notice of the change must be given to the Registrar³). So far as a company can be said to reside anywhere, it is taken to be resident in the place where its registered office is, consequently the situation of the registered office fixes the domicile of the company.

All notices, writs or other process may be served on the company at its registered office. Thus, any person wishing to serve a notice on the company can do so effectively by ascertaining from the Registrar the situation of the registered office and by serving the company there. It is not in every case necessary to serve the company at its registered office; for it may be that the company has no registered office or has left it⁴), or has invited persons to serve notices in some other way⁵), and in these and similar cases service can be made in any manner which is really effectual, as for instance by serving the secretary or manager.

IX. Publication of Name.

Every limited company must affix its name in an easily legible manner to the outside of every office or place where it carries on business⁶), and must engrave its name on its seal, and must mention its name legibly on all notices, advertisements and other official publications of the company.

The name, as we have seen, must conclude with the word "limited" and presumably the full name must always be stated. In practice, particularly in advertisements, the name is frequently stated in a shortened and more popular form. This practice however is dangerous, as it exposes all the officers of the company who are responsible for it to liability by way of fine and also renders such officers personally liable on all bills of exchange or other documents involving a liability, if the liability is not met by the company⁷).

X. Meetings.

A newly formed company must hold a general meeting of its members, called a statutory meeting, not less than one month and not more than three months from

¹) *Bellerby v. Rowland Ltd.* [1902] 2 Ch. 14.

²) *Denver Hotel Co.* [1893] 1 Ch. 495.

³) Companies (Consolidation) Act, Sect. 62.

⁴) *Fortune Copper Mining Co.* (1870) L. R. 10 Eq. 390.

⁵) *Brwiley v. Rhodesia Consolidated Ltd.* [1910] 2 Ch. 95.

⁶) Companies (Consolidation) Act, Sect. 63.

⁷) *Ibid.* Sect. 63 (2) and (3).

the date at which the company becomes entitled to commence business¹). Seven days before the meeting the directors must send to all the members a report as to the general position of the company.

The report must show the number of shares allotted, the extent to which they have been paid up and the consideration for which they have been allotted, and the cash received on allotment; the report must also contain an abstract of receipts and payments, particulars of the balances remaining in hand, an account or estimate of the preliminary expenses, and the names and addresses of the directors auditors, managers and secretary. No contract mentioned in the prospectus can be altered without the consent of this statutory meeting²) and consequently the report must also show particulars of any contract which it is proposed to modify and of the proposed modification.

The report is certified by the auditors and filed with the Registrar, and a list of the members, showing the shares held by them, must be produced at the meeting. These provisions ensure that the members of the company shall have an early opportunity of ascertaining most of the material facts concerning the financial situation of the company and they are entitled at the meeting to discuss and move resolutions in respect of anything relating to the formation of the company. The holding of the statutory meeting can be enforced by means of a petition to wind up the company.

After the formation of the company an ordinary general meeting must be held at least once in every calendar year not more than 15 months after the last preceding general meeting³). If this is not done, the company and its officers become liable to penalties and any member can apply to the court to call or direct the calling of a general meeting.

In addition to the ordinary annual meeting, extraordinary meetings may be called⁴) at any time by the directors, and if a sufficient number of members desire to call a meeting they may do so by a requisition addressed to the directors. The holders of one tenth of the issued capital of the company on which all calls and other sums have been paid have a statutory right to requisition a meeting and the articles frequently provide that a smaller number of members shall be entitled to requisition a meeting. On the receipt of such a requisition the directors are bound to call a general meeting within 21 days, and in default the requisitionists may themselves convene a meeting. The requisition must state the objects for which the meeting is to be called.

Every member is entitled to notice of a general meeting unless the articles provide otherwise. The notice should specify the general nature of the business to be transacted but need not set it out in detail, provided the members have fair notice of the substance of the proposed transactions⁵). The length of notice and the voting rights of each member are usually fixed by the articles.

Minutes of all meetings must be kept in books and any minute signed by the chairman of a meeting, or of the next meeting, is evidence of the proceedings. Where minutes have been so signed the meeting is *prima facie* taken to have been duly convened and held⁶).

A company may be a member of another company, and, if so, can appoint a representative to attend meetings and vote on its behalf⁷). In other cases a member who wishes to take part in the meeting must as a rule either attend personally or appoint as his proxy another member of the company to vote on his behalf. A member who is going abroad or is residing in a foreign country should as a rule give a power of attorney to some person in England to vote or appoint proxies for him. The dates of the particular meetings at which he is to vote and the manner in which he is to do so can then be arranged on short notice by telegram or cable⁸).

The articles usually fix the number of members who shall form a quorum for a general meeting. If no number is fixed two members are sufficient. It is doubtful

¹) Ibid. Sect. 65.

²) Ibid. Sect. 83.

³) Ibid. Sect. 64.

⁴) Ibid. Sect. 66.

⁵) *Young v. South African Syndicate Ltd.* [1896] 2 Ch. 268.

⁶) Companies (Consolidation) Act, Sect. 71.

⁷) Ibid. Sect. 68.

⁸) *Sadgrove v. Bryden* [1907] 1 Ch. 318.

whether a member can be counted in a quorum if he is not entitled to vote at the meeting.

One person cannot as a rule constitute a meeting: but if all the shares of a particular class are held by one person, he can exercise some of the powers of a meeting of that class¹⁾.

All the powers of a company which are not required by the Companies Act or by the articles of the company to be exercised in any special manner and which are not delegated to the directors, can be exercised by an ordinary resolution passed by a simple majority of the members entitled to vote who are present at a general meeting of the company. Certain matters are however required to be done by an extraordinary resolution, e. g. a winding up of the company on the ground that its liabilities prevent it from continuing its business, or (sometimes) the removal of a director from office. Certain other matters can only be effected by a special resolution, e. g. an alteration of the articles or a winding up of the company for reasons other than the inability to pay its debts or the completion of the time or purpose for which it was constituted.

An extraordinary resolution²⁾ is one which is passed by a majority of not less than three fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a general meeting. Notice of the meeting must have been given specifying the intention to propose the resolution as an extraordinary resolution.

A special resolution must be passed in the manner required for passing an extraordinary resolution and must be confirmed by a simple majority of members present and entitled to vote at a subsequent meeting, held after an interval of not less than fourteen clear days and not more than one month from the date of the first meeting.

Votes are given at meetings in the first place by show of hands. In this case each member actually present and entitled to vote has one vote and votes given by proxy cannot be counted.

Usually, however, the articles provide that a certain minimum number of members shall be entitled to demand a poll. In this case votes can as a rule be given by proxy and the members are entitled to one vote for every share held by them unless the articles provide for some other arrangement of the voting power.

At a meeting where an extraordinary or special resolution is to be passed three persons entitled to vote are entitled by the Companies Act to demand a poll³⁾ and the articles cannot destroy this right, but may extend the number of persons required to demand a poll to five.

Copies of special resolutions and extraordinary resolutions must be sent to the Registrar to be recorded⁴⁾, and special resolutions when passed become part of the articles and should be annexed to every copy of the articles published after the confirmation of the resolution.

Where a resolution has been put forward as an extraordinary or special resolution the declaration of the chairman of the meeting that it has been passed by the required majority is conclusive, and there is no necessity to prove the number of members who voted for or against it⁵⁾; and even if it can afterwards be proved that the number of members who voted for the resolution was insufficient, the chairman's declaration is still conclusive in its favour⁶⁾. But this is subject to the qualification that if the chairman's declaration shows on the face of it that the resolution was not properly passed the resolution will not be valid. Thus, where the chairman declared that a resolution had been carried against the vote of the majority on a show of hands by counting a large number of votes which had been given by proxy and which ought not to have been counted on a vote by show of hands, the resolution was held to be void⁷⁾, and in any case if the chairman's declaration can be proved to have been fraudulent the resolution will be invalid.

¹⁾ *East v. Bennett* [1911] 1 Ch. 163.

²⁾ Companies (Consolidation) Act, Sect. 69.

³⁾ *Ibid.* Sect. 69 (4).

⁴⁾ *Ibid.* Sect. 70.

⁵⁾ *Ibid.* Sect. 69 (3).

⁶⁾ *Hadleigh Castle Mine* [1900] 2 Ch. 419.

⁷⁾ *Caratal New Mines Ltd.* [1902] 2 Ch. 498.

XI. Directors.

There is no legal necessity for a company to have directors: but usually a board of directors is appointed who become the agents of the company with power to conduct its business.

The first directors may be appointed by the articles, or in such manner as the articles provide. If no provision is made, they may be appointed at a meeting of the persons who subscribed the memorandum of association by a majority of such subscribers, or without a meeting by a document signed by all the subscribers. Usually the articles provide that a person shall not be capable of being appointed a director unless he holds a certain number of shares called his "qualification shares"; but there is no necessity for the company to fix any qualification.

No person can be appointed director by the articles or named as a director or proposed director in a prospectus or statement filed in lieu of a prospectus unless he has signed and filed with the Registrar a consent in writing to act as director¹⁾ and either signed the memorandum for his qualification shares (if any) or signed and filed with the Registrar a contract in writing to take his qualification shares (if any) from the company and to pay for them. There is authority for saying that he must pay for the qualification shares actually in cash²⁾. And if he takes them as a present from the promoters or holds shares which really belong to the promoters as trustee for them, he becomes liable to the company in damages, the amount of which is usually the nominal value of the shares, but may be more³⁾. Shares held by a director as trustee for persons not otherwise connected with the company are a sufficient qualification even if the articles provide that the qualification shares of a director must be held "in his own right".

Where a qualification is required, every director must obtain his qualification within two months after his appointment⁴⁾, and if he fails to do so, or if he subsequently ceases to hold the necessary shares to qualify him, he vacates his office and becomes liable to penalties if he acts as director, and cannot be re-elected until he has obtained his qualification. If however a director acts as such in the belief that he is duly appointed and qualified, and it afterwards appears that there was some defect in his appointment or qualification, his acts as director are valid⁵⁾, unless the defect was of such a substantial nature that he never had any substantial claim to the position of director⁶⁾. A company is bound to keep a register of its directors and send a copy of the register to the Registrar and also to notify to the Registrar any changes in the board⁷⁾.

Directors are to a certain extent trustees for the company; but they are not quite in the same position as ordinary trustees, such as trustees of a will or a marriage settlement.

Trustees of a will or a settlement are bound by English law to account with great strictness for all moneys received and for all benefits which may be derived by them from their position as trustees either directly or indirectly. Directors however are not bound to account with the same strictness and are not precluded to the same extent from making a profit out of their position.

They are managers of the company in the interests of themselves as well as of the other shareholders, and are entitled to consider their own interests as members of the company.

They must, however, exercise their powers as directors for the benefit of the company as a whole; thus they must not make calls, issue shares or accept surrenders of shares for the purpose of conferring some benefit on themselves or their friends to the disadvantage of the company⁸⁾.

They are not, however, in any position of trust towards any individual shareholder, nor towards persons outside the company. Thus, they are not prevented

¹⁾ Companies (Consolidations) Act, Sect. 72.

²⁾ Buckley. 9th ed. p. 168.

³⁾ *London and South Western Canal Co.* [1911] 1 Ch. 346.

⁴⁾ Companies (Consolidation) Act, Sect. 73.

⁵⁾ *Ibid.* Sect. 74.

⁶⁾ *Dawson v. African Consolidated Co.* [1898] 1 Ch. 6.

⁷⁾ Companies (Consolidation) Act, Sect. 75.

⁸⁾ *Alexander v. Automatic Telephone Co.* [1900] 2 Ch. 56.

from making a profit for themselves out of third parties, if the company does not object¹).

The articles usually fix a maximum and a minimum number of directors and also the number which shall form a quorum at a board meeting. If no quorum is fixed, the number of directors who usually act becomes the quorum. A director who is disqualified from voting on any question, as by reason of his being personally interested in it, cannot be counted in a quorum²).

The articles usually provide that a director may be removed by extraordinary resolution.

The remuneration of directors is usually fixed by the articles and must be disclosed in every prospectus. The amount due to directors for remuneration is a debt due to them from the company and may be paid out of capital if there are no profits. It is due to them in return for their services as directors and is not considered as a profit attached to the holding of the shares. Hence, if a director holds his qualification shares as a trustee for another person he will not be bound to pay over the remuneration which he receives to the person for whom he holds them.

Remuneration is generally made payable "at the rate of" a certain amount per annum. The object of this is to ensure that if a director retires after acting for a part of a year he shall be entitled to a proportionate part of his remuneration. If the articles merely provide that the remuneration shall be a fixed sum per annum, he will not get any remuneration in any year unless he acts for the whole year.

If all the directors agree with each other and with the company that they will waive their remuneration for a particular year, the agreement is legally binding and can be enforced by the company³).

The powers of the directors are usually fixed by the articles and they are usually given all the powers of the company except those which must be exercised in some special way, as by an extraordinary or special resolution of the company.

If the directors do some act which is beyond their powers but within the powers of the company, the shareholders in general meeting may ratify the act.

Directors cannot make contracts with the company, for by so doing they would be placing their private interests in direct conflict with their duty as directors to make the best possible contract for the company⁴). The articles, however, usually modify this rule and allow such contracts to be made provided the director in question discloses his interest and does not vote in respect of the contract.

The articles also frequently provide that the directors may delegate their powers to other persons to act for them. If there is no such provision directors cannot delegate their powers.

So long as directors act bona fide they cannot be made liable for errors of judgment. Their acts must be either ultra vires or must amount to gross negligence or fraud before they incur any liability to the company⁵).

They may however be liable to individual shareholders for misstatements in a prospectus, and may incur penalties if they omit to comply with the provisions of the Companies Act in certain particulars, if for instance they allot shares before the minimum subscription has been subscribed⁷) or omit to call a general meeting within the proper time⁶).

Where a director has been guilty of fraud or gross negligence, proceedings may be taken against him by the liquidator in the winding up of the company, and any one director may be sued alone and rendered responsible for the whole loss; for the Act provides that any person who has taken part in the promotion of a company or who has been a director or officer may be ordered to repay to the company any money which has been improperly retained or misapplied by him or may be ordered to contribute to the funds of the company in case of any misfeasance or breach of trust, and this may be done on the application of any creditor or contributory⁸). If a director or officer of the company has been guilty of any falsification of books

¹) *Bath v. Standard Land Co.* [1911] 1 Ch. 618.

²) *Re Greymouth Point Elizabeth Railway* [1904] 1 Ch. 32.

³) *West-Yorkshire Darracq Ld. v. Coleridge* [1911] 2 K. B. 327.

⁴) *Parker v. McKenna* (1875) L. R. 10 Ch. 118.

⁵) *Brazilian Rubber Co.* [1911] 1 Ch. 96.

⁶) Companies (Consolidation) Act, Sect. 86.

⁷) *Ibid.* Sect. 64.

⁸) *Ibid.* Sect. 215.

or other criminal offence the court may order the liquidator to prosecute him and to pay the costs of the prosecution out of the assets¹).

If one director has paid the whole of the loss occasioned by the wrongful acts of all the directors, he can get contribution from the others, except where he has made fraudulent representations and the other directors have not done so.

XII. Contracts by Companies.

Notwithstanding the general rule of English law that a corporation can only make contracts under seal, a company can contract in the same way as an individual²), except that contracts made in writing and signed, or made verbally, must be made or signed on behalf of the company by some person acting under its authority express or implied, since, of course, a company cannot itself make a verbal contract or sign a written one. Similarly a bill of exchange or promissory note is deemed to be properly made³), accepted or indorsed on behalf of a company if made, accepted or indorsed on behalf of the company by any person acting under its authority.

A company may contract with its members or with any class of its members or creditors, if every member of that class agrees. If not, any arrangement or compromise made between the company and any class of its members or creditors may be made effectual by order of the court if it is sanctioned at a meeting by a majority in number representing three quarters in value of the shares or debts of the class⁴).

A company carrying on business abroad may appoint persons to act as its attorneys by writing under its seal⁵), and if authorised to do so by its articles, may have a special seal for use in any foreign country⁶) and may authorise any person to affix such seal to documents executed in that foreign country.

The authority of this agent continues until notice of revocation has been given to the person dealing with him.

This seal should be a facsimile of the company's seal with the addition of the name of the foreign country in which it is to have effect, and will be as effectual in that country as the company's regular seal. A company may also by writing under its seal refer disputes to arbitration.

XIII. Prospectus.

The document by which promoters of a company endeavour to induce members of the public to invest money in their enterprise has been shown by experience to be a facile means of defrauding the public and is consequently now subjected to very special regulations. The danger arising from false statements of fact is met by the ordinary law of the land, which renders the persons responsible for any false statement liable in damages to any person who acts upon it and thereby suffers damage, if the statement is known to be false or is made in reckless disregard of what the true facts may be⁷). A similar liability to pay compensation to the persons deceived is extended by the Companies Act to statements made by directors or promoters in a prospectus if the statements are made without reasonable grounds for believing them to be true.

Where a prospectus invites persons to subscribe for shares or debentures of a company, every person who is a director at the time of the issue of the prospectus or who is, with his authority, named in the prospectus as a director or proposed director, and every promoter of the company, and every person who has authorised the issue of the prospectus, is liable to pay compensation to any person who subscribes for shares or debentures on the faith of the prospectus, for any loss sustained by reason of any untrue statements in the prospectus or in any reports referred to in it or attached to it, unless it is proved that he had reasonable ground to believe and did at the time of allotment in fact believe that the statement was true, or where the statement purports to be taken from a statement, report or valuation of an expert

¹) Ibid. Sect. 217.

²) Ibid. Sect. 76.

³) Ibid. Sect. 77.

⁴) Ibid. Sect. 120.

⁵) Ibid. Sect. 78.

⁶) Ibid. Sect. 79.

⁷) *Derry v. Peek* (1889) 14 App. Cas. 337.

or from an official document, that it fairly represented the statement or is a fair copy of the report or valuation or official document, unless, in the case of reliance on an expert, the person sought to be made liable had no reasonable ground for believing that the expert was competent¹).

This liability does not apply where the consent to act as director was withdrawn before the issue of the prospectus, or if the prospectus was issued without the knowledge or authority of the person sought to be made liable, provided he gives reasonable public notice that it was issued without his knowledge or consent.

The safest course for such a person to pursue is to bring an action claiming an injunction to restrain further publication of the prospectus.

A person who has consented to the issue of a prospectus can also escape liability if he withdraws his consent after becoming aware of the untruth of any statement in the prospectus and gives public notice of his withdrawal.

These provisions give some protection to the general public in case of untrue statements of fact in a prospectus.

The promoters, however, have the utmost freedom in making the most exaggerated and highly coloured statements as to anything which may fairly be called matter of opinion, as for instance the prospects of future success and the amount of the probable profits of the company, so long as they are not based upon and do not imply some false statement of fact.

It is also most material for the protection of the public that no facts should be concealed which relate to the constitution of the company or the property which it is to acquire, if a knowledge of such facts would materially assist an intending subscriber in deciding whether or not to apply for shares. The Companies Act consequently provides that certain specified information shall be given in every case. The outlines of these provisions are as follows :

Every prospectus must be dated and signed by every person who is named in it as a director or proposed director of the company²) and must be filed with the Registrar. The prospectus should state that it has been so filed.

It must also state the following matters³):

- a) The contents of the memorandum with the names, descriptions and addresses of the signatories and the number of shares subscribed for by them respectively (this is usually printed in the fold of the prospectus), and the number of founders or management or deferred shares, if any, and the nature and extent of the interest of the holders in the property and profits of the company; and
- b) The number of shares, if any, fixed by the articles as the qualification of a director and any provision in the articles as to the remuneration of the directors; and
- c) The names, descriptions and addresses of the directors or proposed directors; and
- d) The "minimum subscription". This is the amount fixed in the memorandum or articles as the minimum amount of share capital subscribed in cash on which the directors may proceed to allotment. If no minimum subscription is fixed, then the whole amount of the shares offered must be subscribed before any shares can be allotted⁴). The amount payable on application and allotment on each share must also be stated and, in the case of a second or subsequent offer of shares, the amount offered for subscription on each previous allotment made within the two preceding years, and the amount actually allotted, and the amount, if any, paid on the shares so allotted; and
- e) The number and amount of shares and debentures which within the two preceding years have been issued, or agreed to be issued, as fully or partly paid up otherwise than in cash, and in the latter case the extent to which they are paid up, and in either case the consideration for the issue;
- f) The names and addresses of the vendors of any property purchased or acquired by the company or proposed to be purchased or acquired, which is

¹) Companies (Consolidation) Act, Sect. 84.

²) Ibid. Sect. 80.

³) Ibid. Sect. 81.

⁴) Ibid. Sect. 85.

to be paid for wholly or partly out of the proceeds of the issue offered for subscription by the prospectus or the purchase or acquisition of which has not been completed at the date of issue and the amount payable in cash, shares, or debentures, to the vendor, and where there is more than one separate vendor, or the company is a subpurchaser, the amount so payable to each vendor. Where, however, the vendors are a firm, the members of the firm need not be treated as separate vendors; and

- g) The amount (if any) paid or payable as purchase money in cash, shares, or debentures, for any such property, specifying the amount (if any) payable for goodwill; and
- h) The amount (if any) paid within the two preceding years or the amount or rate payable as underwriting commission, that is to say, as commission for subscribing or agreeing to subscribe or procuring subscriptions, for any shares or debentures of the company. If however the original underwriters procure other persons to sub-underwrite part of the shares which they have agreed to underwrite it is not necessary to state the commission payable to the sub-underwriters; and
- i) The amount or estimated amount of preliminary expenses; and
- j) The amount paid within the two preceding years or intended to be paid to any promoter, and the consideration for any such payment; and
- k) The dates of and parties to every material contract, and a reasonable time and place at which any material contract or a copy thereof may be inspected. This requirement does not apply to a contract entered into in the ordinary course of the business carried on or intended to be carried on by the company, or to any contract entered into more than two years before the date of issue of the prospectus; but it seems to apply to any other contract the terms of which or the names of the parties to which could be fairly considered as being in any way material for an intending subscriber to know; and
- l) The names and addresses of the auditors (if any) of the company; and
- m) Full particulars of the nature and extent of the interest (if any) of every director in the promotion of, or in the property proposed to be acquired by, the company, or, where the interest of such a director consists in being a partner in a firm, the nature and extent of the interest of the firm, with a statement of all sums paid or agreed to be paid to him or to the firm in cash or shares or otherwise by any person either to induce him to become, or to qualify him as, a director, or otherwise for services rendered by him or by his firm in connexion with the promotion or formation of the company; and
- n) Where the company is a company having shares of more than one class, the right of voting at meetings of the company conferred by the several classes of shares respectively.

The term "vendor" is very comprehensive. For the purposes of these provisions every person is deemed to be a vendor who has entered into any contract for sale or for any option of purchase of any property to be acquired by the company¹), in any case where:

- a) The purchase-money is not fully paid at the date of issue of the prospectus; or
- b) The purchase-money is to be paid or satisfied wholly or in part out of the proceeds of the issue offered for subscription by the prospectus; or
- c) The contract depends for its validity or fulfilment on the result of that issue.

Provisions were at one time commonly inserted in prospectuses providing that the applicants for shares should not insist upon full disclosure of all matters required to be disclosed by the Act. These waiver clauses were however always held to be void if they were fraudulent or tricky, and now by the Companies Act any provision binding an applicant to waive compliance with any of the requirements of the Act is void.

Where a prospectus is published as a newspaper advertisement²) it is not necessary in the advertisement to specify the contents of the memorandum or the

¹) Ibid. Sect. 81 (2).

²) Ibid. Sect. 81 (5).

names of the signatories and the number of shares subscribed for by them. But it appears to be necessary to comply with all the other requirements, and this liability cannot probably be avoided by describing the advertisement as an "abridged" prospectus.

These provisions do not apply to a circular or notice inviting existing members or debenture holders of a company to subscribe either for shares or for debentures of the company.

The requirements as to the memorandum and the qualification, remuneration, and interest of directors and their names and addresses, and the amount of preliminary expenses, do not apply in the case of a prospectus issued more than one year after the date at which the company is entitled to commence business. All the other provisions however apply to such a prospectus.

The Act does not remove any liability imposed by the ordinary law¹). Thus a concealment of material facts which is so misleading as to amount to fraud would render the promoters responsible apart from the Act. And a person who has been induced to take shares by misrepresentations of fact can rescind his contract and recover the amount paid by him, even though the misrepresentations were made innocently.

The mere fact that some of the matters which are required by the Act to be stated have been omitted will not of itself entitle a person who has applied for shares to claim damages from the directors responsible for the prospectus. He must show that if the matters in question had been fully stated he would not have applied for the shares²). And an omission of the details required by the Act does not in any case give rise to a right of rescission³), except an omission to state the amount of the minimum subscription. Such an omission entitles a subscriber to rescind his contract, if he applies within one month after the holding of the statutory meeting⁴).

If a company does not issue a prospectus on its formation, it must disclose practically all the matters which it would have been bound to disclose in the prospectus by filing with the Registrar a "statement in lieu of prospectus" in the form set out in the 2nd Schedule to the Companies Act, and the company cannot allot any shares or debentures until it has filed such a statement⁵).

Thus in all cases (except on the formation of a private company) the Act requires full information to be placed at the disposal of intending applicants for shares. At one time promoters attempted to minimise the disclosure as far as possible, but of recent years it has been found more politic to make full disclosures, and especially to give full opportunities to investors to inspect all the material documents, more especially as it is found that investors scarcely ever avail themselves of the opportunity.

XIV. Allotment of Shares.

Allotment of shares takes place when the company accepts the offer of a person to take shares and notifies him that it has accepted his offer. Usually the person offering to take shares signs a form of application sent with the prospectus, and after the subscription lists are closed the company sends him an allotment letter stating the number of shares in respect of which his offer is accepted.

The contract to take the shares is complete as soon as the allotment letter is posted⁶), notwithstanding that it may be delayed or even lost in the post.

A company cannot allot any of its shares which have been offered to the public for subscription unless the number of shares fixed in the prospectus as the minimum subscription has been subscribed⁷), and the sums payable on application (which must not be less than 5% of the nominal amount of each share) have been paid to the company.

If this has not been done within 40 days after the first issue of the prospectus, the money received from applicants for shares must be returned (but without interest) and if it is not paid within 8 days thereafter interest will run at the rate of

¹) Companies (Consolidation) Act, Sect. 81 (9).

²) *Nash v. Calthorpe* [1905] 2 Ch. 237.

³) *South of England Gas Co.* [1911] 1 Ch. 573.

⁴) Companies (Consolidation) Act, Sect. 86.

⁵) *Ibid.* Sect. 82.

⁶) *Household Insurance Co. v. Grant* (1878) 4 Ex. D. 216.

⁷) Companies (Consolidation) Act, Sect. 85.

5%. These provisions cannot be waived by any applicant; but (except that the amount payable on application must never be less than 5%) they do not apply to any allotment of shares after the first allotment of shares offered to the public for subscription.

If an allotment is made in a manner not authorised by these provisions the allotment is voidable¹⁾ and will become void if the applicant takes steps to upset it within one month after the statutory meeting.

The company must within one month after any allotment of its shares file with the Registrar a return of the allotments²⁾ showing the numbers of the shares and the amounts paid and payable on them and the names of the allottees.

If shares are issued for cash they are subject to the liability of payment of the whole nominal value in cash, and they cannot be issued as a gift or at a discount³⁾.

But shares may be issued as the purchase price of property sold to the company or in consideration of services rendered, and in this case, so long as the property acquired or the services rendered are not absolutely valueless or of a value which is obviously on the face of it of a less money value than the nominal value of the shares, it has been held⁴⁾ that the court will not inquire into the actual value of the property given in exchange for the shares; but it would not be advisable to carry this doctrine too far, as the probable tendency of the Court at the present day would be to curtail rather than extend the freedom apparently accorded by this decision.

When shares are allotted for a consideration other than cash, a certain amount of publicity is required by the Act; for there must be filed with the Registrar within one month after any such allotment a contract in writing⁵⁾, being the contract under which the allottee became entitled to the shares in question, and also any contract showing the consideration for which the allotment was made⁶⁾.

If there is no contract in writing, particulars of the contract may be filed instead. Default in complying with these provisions does not now render the allotment void or the allottee liable for calls on his shares, but merely exposes the persons responsible for the default to liability for penalties.

XV. Stamps on Contracts of Sale.

The contract or the particulars must be duly stamped before being filed. The expense of this may be heavy, as in some cases the contract requires to be stamped *ad valorem* at the rate of 10 shillings for every £50 of the purchase price, or approximately 1%⁷⁾. This provision does not apply to a contract for the sale of the full legal interest in property situate abroad, which will therefore require only a 10 shilling stamp. Thus an agreement for sale of the goodwill of a business carried on abroad will not require an *ad valorem* stamp⁸⁾. But the full stamp duty will be required in the case of a contract for the sale of any equitable interest in any property wherever situate, and in the case of a contract for the sale of any property which is not situated abroad. Thus the sale of the benefit of an agreement relating to property abroad will require the *ad valorem* stamp as the agreement itself is the property to be sold and it is not locally situated abroad⁹⁾.

And since 1909 these requirements cannot be evaded by executing the agreement abroad¹⁰⁾.

It is sometimes a matter of some difficulty to determine whether the real consideration for an allotment of shares has been cash or some consideration other than cash. In order that there may be a payment in cash it is not absolutely necessary that money should be paid over either in notes and coin or by means of a cheque. Provided there is a bona fide debt due from the company and immediately payable in cash, the creditor may agree to subscribe for shares and to pay for them by releas-

¹⁾ Ibid. Sect. 86.

²⁾ Ibid. Sect. 88.

³⁾ *Weldon v. Saffery* [1897] A. C. 299.

⁴⁾ *Re Wragg Ltd.* [1899] 1 Ch. 796.

⁵⁾ Companies (Consolidation) Act, Sect. 88 (1) (b).

⁶⁾ Ibid. Sect. 88.

⁷⁾ Stamp Act, 1891 (54 & 55 Vict. c. 39) Sect. 59 (1).

⁸⁾ *I. R. Commissioners v. Muller & Co. Margarine Ltd.* [1901] A. C. 217.

⁹⁾ *Danubian Sugar Factories v. Commissioners* [1901] 1 K. B. 245.

¹⁰⁾ Revenue Act, 1909 (9 Ed. VII. c. 43), Sect. 7.

ing a corresponding portion of his debt. It is not necessary that a cheque should be handed to him by the company and then handed back by him¹⁾).

On the other hand, the mere passing to and fro of cheques will not make a transaction a payment in cash, if the whole transaction taken together is really an arrangement for the allotment of shares in return for services or for property purchased. And even if the contract under which the payment is due and the agreement for the allotment of shares are in form quite independent of each other, there will be no payment in cash if the performance of the one contract was in fact conditional upon the performance of the other.

XVI. Commencement of business.

A company cannot commence business or borrow money unless shares payable in cash not less in number than the minimum subscription have been allotted, and every director has paid the same amount as is payable by the public on application and allotment for all the shares which he has agreed to take up for cash²⁾. A declaration must also be filed with the Registrar to the effect that this has been done, and if there is no prospectus a statement in lieu of prospectus must be filed before any business may be commenced. When these provisions have been complied with, the Registrar gives a certificate to the effect that the company may commence business, and this certificate is conclusive. The company may make contracts before it is entitled to commence business, but such contracts are provisional only, and do not bind the company until it is entitled to commence business. They do, however, apparently bind the other parties to the contract immediately they are made unless express provision is made to the contrary. Debentures may be offered for subscription together with shares and the company may receive the sums payable on application for the debentures before it is ready to commence business, but the debentures should not be actually issued until after a certificate has been obtained to the effect that the company is entitled to commence business.

XVII. Underwriting.

Although the rule against issuing shares at a discount is very strict, so that where shares are issued for cash, the company cannot release the subscriber from his liability to pay the whole nominal amount of the shares in full, yet the Companies Act authorises a company to make certain payments for brokerage and underwriting, although the result will be to reduce the amount actually receivable in respect of the shares to something below par.

A small percentage may be paid to brokers on the introduction of subscribers³⁾. The amount which can be lawfully so paid is not fixed, but must be reasonable and is not usually more than about $2\frac{1}{2}$ per cent⁴⁾.

The amount which may be paid by way of underwriting commission is unlimited, provided the proper means are taken to authorise it, and the provisions of the Act are so wide that they appear at first sight to authorise the issue of shares at a discount, or in other words to allow shares to be issued to a person on the terms that he shall deduct a certain amount from the sum payable by him.

The Act however only authorises the payment of a "commission"⁵⁾ and it appears probable therefore that the deduction can only be made in cases where the subscriber has rendered some sort of service to the company besides the mere application for the shares to be allotted to him, as for instance by agreeing to take a certain number of shares in any case, although the company is left free to offer those shares to other persons if it thinks fit.

The rule is as follows⁶⁾:

A company may pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, if the payment of the commission

¹⁾ *Larocque v. Beauchemin* [1899] A. C. 358.

²⁾ Companies (Consolidation) Act, Sect. 87.

³⁾ *Ibid.* Sect. 89 (3).

⁴⁾ *Metropolitan Coal Association v. Scrimgeour* [1895] 2 Q. B. 604.

⁵⁾ *Keatinge v. Parnagar Mines* [1902] W. N. 15.

⁶⁾ Companies (Consolidation) Act, Sect. 89.

is authorised by the articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorised, and if the amount or rate per cent. of the commission paid or agreed to be paid is disclosed in the prospectus, if the shares are offered to the public for subscription, or in other cases, disclosed in the statement in lieu of prospectus and in any circular or notice inviting subscription for the shares.

If these particulars are not complied with, a company may not apply any of its shares or capital money either directly or indirectly in payment of any commission, discount or allowance to any person in consideration of his subscribing or agreeing to subscribe whether absolutely or conditionally for any shares of the company, or procuring or agreeing to procure subscriptions whether absolute or conditional, for any shares in the company.

Thus it appears that a commission may be paid to a person for agreeing to subscribe for shares even though he takes them absolutely and not subject to any condition; but on the other hand if a person agrees to take a £1 share and the company agrees to pay him 5 shillings for doing so, and there is no other consideration for the transaction, the payment is probably a discount and not a commission and would be illegal. The usual terms of underwriting are that each underwriter shall take up a certain number of shares, but that the subscriptions for shares by the public shall reduce proportionately the number of shares which each underwriter is bound to take up.

Compliance with the requirements of the Act cannot be avoided by nominally adding the amount of the underwriting commission to the purchase price of any property bought by the company or to the contract price for any work done, and although the commission may lawfully be paid out of the money or shares paid or allotted to any vendor or promoter, this can only be done if the payment could lawfully have been made by the company¹).

The amount of any commissions paid for underwriting must be shown in the company's balance sheets until it has been written off²).

Debentures can be issued at a discount and may be underwritten, and the amount of any discount or commission allowed need not be expressly authorised in the articles, but any commission paid or agreed to be paid must be disclosed in the prospectus in the manner stated above and any commission or discount paid or allowed must appear in the balance sheet until written off²).

Debentures which have been issued at a discount cannot be issued on the terms that they may be exchanged for fully paid shares.

The requirements as to underwriting commission and the prohibition against issuing shares at a discount do not prevent a company from paying a reasonable commission to brokers for placing shares; but if the amount is excessive or unreasonable, the payment will probably be illegal and render the directors liable to refund the amount paid. Underwriting commissions cannot be protected from the necessity of disclosure merely by calling the payments "brokerage"³).

If an option to take up shares at par within a fixed time is given by way of consideration for underwriting shares, this is not a commission or discount within the meaning of these provisions and the power to give such an option need not be expressly provided by the articles of the company⁴).

Such options are now frequently given by way of commission and the company sometimes issues option certificates in respect of the shares subject to the option.

An option must be exercised strictly within the time fixed. The value of such an option may be greatly diminished if the company should increase its capital and issue further shares; but the option holder has no legal right to object.

XVIII. Dividends.

A trading company has power to distribute its profits by way of dividend although no express power to do so is provided by the memorandum, and it may divide its profits in any way it pleases subject to the rule that dividends must not be paid out of capital.

¹) Ibid. Sect. 89 (3).

²) Ibid. Sect. 90.

³) *Metropolitan Association v. Scrimgeour* [1895] 2 Q. B. 604.

⁴) *Hilder v. Dexter* [1902] A. C. 474.

This rule gives rise to some difficulty in its practical application, for though capital may not be used for paying dividends, a company is not always bound to make good every loss on capital account before it can pay dividends. Losses of "circulating capital", (that is the stock in trade or other property in which the company deals) must always be taken into account before payment of dividends, but losses on account of its permanent property such as leasehold houses, concessions and investments may usually be written off gradually or even sometimes entirely neglected¹⁾ while additions to the value of the capital may usually be treated as profit and distributed²⁾. The standard applied should be the standard of a reasonable man of business³⁾.

Directors who have paid away dividends out of capital can be made to refund the amounts so paid, but not by shareholders who have themselves taken part in or knowingly received part of the illegal payment.

There is an exception to the general rule in the case of shares issued for the purpose of raising money to pay for works or buildings, or plant which cannot be rendered profitable for a considerable time⁴⁾. In this case the company may pay interest not exceeding 4% per annum out of capital on the amount so paid, provided the payment is authorised by the articles or by a special resolution and sanctioned by the Board of Trade.

The articles usually provide that dividends shall be paid on the ordinary shares in proportion to the amounts paid up on the shares. In the absence of such a provision dividends would be payable in proportion to the amount of the nominal value of the shares irrespective of the amounts paid up on them⁵⁾.

Shareholders have no right to insist on the whole profits being divided as dividend if the directors consider that some of the profits should be carried to a reserve fund. But profits carried to a reserve fund remain profits and can be distributed as dividend notwithstanding subsequent losses of capital⁶⁾. So soon as a dividend has been declared it becomes a debt due from the company to the shareholder payable in cash, unless otherwise agreed⁷⁾, and is probably a "specialty" debt or debt evidenced by a document under seal, namely the share certificate, so that the claim of the shareholder cannot be barred by the lapse of less than 20 years⁸⁾.

The articles usually provide that the amount of the dividends shall in the first place be recommended by the directors, and that the amount so recommended or any less amount may be declared by the company in general meeting. The meeting has not as a rule any power to increase the amount of dividend recommended by the directors.

If a certain minimum dividend on the shares of a company is guaranteed by some person outside the company, the money received under such guarantee may be payable to the shareholders in priority to payment of the creditors of the company⁹⁾.

XIX. Mortgages and Charges.

Every company which carries on business with a view to profit has power to borrow money and secure its re-payment by mortgaging or charging its property, even though no such power is expressly given by its memorandum¹⁰⁾. But a person lending money to a company should take care to see that its power to borrow is not expressly restricted by its memorandum and articles; for if a company borrows beyond the limits so fixed, the security for the loan is void and the company cannot be sued for the money lent. The lender may however have a right of action against the directors, if they have by their conduct led him to believe that the company

1) *Verner v. General Commercial Trust* [1894] 2 Ch. 239.

2) *Spanish Prospecting Co.* [1911] 1 Ch. 92.

3) *National Bank of Wales* [1899] 2 Ch. 629.

4) Companies (Consolidation) Act, s. 91.

5) *Oakbank Oil Co. v. Crum.* (1883) 8 App. Cas. 65.

6) *Re Hoare & Co. Ltd.* [1904] 2 Ch. 208.

7) *Re Severn & Wye Rail Co.* [1896] 1 Ch. 559.

8) *Re Drogheda Steam Packet Co.* [1903] 1 I. R. 512.

9) *Ex. p. Jegon* (1879) 12 Ch. D. 503.

10) *General Auction Co. v. Smith* [1891] 3 Ch. 432.

had power to borrow the money¹). And if the money is used to pay off existing debts, he may stand in the place of the creditors who have been paid off.

The most usual forms of mortgage made by individuals are 1. A legal mortgage of specific land, by conveying the land itself to the mortgagee subject to a proviso for re-conveyance on payment of the amount lent with interest: 2. An equitable mortgage or charge created by depositing the title deeds of lands with the lender; 3. A bill of sale, being a mortgage of specific movable property, which is void unless it is registered as a bill of sale.

In the case of land a legal mortgage is the most satisfactory form of charge, as the possession of the legal estate carries with it special rights of priority over any other form of charge even if prior in point of time, unless the legal mortgagee has or ought to have acquired notice of the earlier charge.

In the case of mortgages of movable property companies are specially favoured: for a mortgage of movables by a company does not require to be in the form of a bill of sale and consequently a very common form of charge is a debenture or document charging a certain sum with interest on all the property of the company movable or immovable.

This is generally charged in such a way that the company is left at liberty to deal with all its property in the ordinary course of business until some specified event happens, which under the conditions of issue of the debenture makes the money secured immediately payable, such as the non-payment of interest on the debenture, seizure of the company's goods by creditors or cessation of the company's business. So soon as the principal money becomes payable the holder of the debenture has a right to make his charge actively effectual by taking possession of the then existing property of the company. This form of charge is called a floating charge. The most usual course adopted for the purpose of rendering such a charge actively effectual is the appointment of a receiver to take charge of the property, and the result of so doing is to attach the charge specifically to the then existing assets of the company. A mere demand by the debenture holder for payment does not attach his charge to the assets in this manner²); such a result can only be achieved by active steps being taken to enforce the security.

A debenture which creates only a floating charge is liable to be postponed if a landlord distrains for rent, or if a creditor gets a "garnishee" order attaching a debt due to the company, or if a judgment creditor seizes and sells goods under a writ of execution, provided that these things take place before the debenture holder has taken steps to enforce his security.

There are also certain payments which have preferential rights in a winding up, such as the wages of clerks, servants and workmen and rates and taxes and these prevail over a debenture which creates merely a floating charge³), and must be paid in the first instance by any person who is appointed a receiver of the property charged by the debentures.

An express power to the debenture holders to appoint a receiver is usually provided by the debentures to be exercisable on the happening of any event which makes the principal money payable. In any case the debenture holder has also a right to apply to the court to appoint a receiver if his capital money is overdue and unpaid or interest is in arrear or the property is in danger of loss or destruction, as for instance by a cessation of work⁴). A receiver appointed by the court is an officer of the court. Any interference with him may be punished by commitment to prison for contempt of court. He is personally responsible for his acts and for all contracts made by him as receiver, but has a right to be indemnified out of the assets of the company so far as they will go, in respect of any liabilities and expenses properly incurred by him.

A receiver appointed by the debenture-holder under an express power to do so contained in the debenture is the agent of the debenture-holder, who thus becomes liable for his acts and defaults; but the debenture frequently contains a provision (either directly or by reference to sections 21 to 24 of the Conveyancing act 1881) that the receiver though appointed by the debenture holder shall be deemed to be

¹) *Weeks v. Propert* (1878) L. R. 8 C. P. 427.

²) *Evans v. Rival Granite Quarries Ltd.* [1910] 2 K. B. 979.

³) See Companies (Consolidation) Act, Sect. 209 *post*.

⁴) *McMahon v. North Kent Iron Works* [1891] 2 Ch. 148.

the agent of the company. In this case neither the debenture holder nor the receiver incurs any liability, since the receiver is acting as agent for the company.

In cases where it becomes necessary for the business to be carried on temporarily with a view to selling it as a going concern, the court will on the application of a debenture holder appoint a manager of the business, but usually directs that he is not to act for more than three months.

If it becomes necessary to borrow moneys for the purpose of paying wages or other pressing claims in order to keep the business going with a view to its sale, the court will authorise the receiver to borrow money for this purpose and to charge it on the assets in priority to the debentures.

The court will not, however, authorise such borrowing where the continuance of the business would be merely speculative and would be at all likely to end in further loss¹). And if the receiver borrows without the authority of the court or borrows more than is authorised by the court, he will be personally liable for the amount, without any right of indemnity out of the assets, unless the necessity for borrowing was very urgent and it was difficult or impossible to apply to the court before contracting the loan²).

Sometimes the debentures are further secured by a specific legal mortgage of some of the lands of the company. In this case the land is conveyed by a trust deed to trustees, who thus obtain the legal estate and the special priority attached to it. Sometimes the debt takes the form of debenture stock, created by the company covenanting to pay a certain sum to the trustees. In this case the stock can be divided into holdings of irregular amounts, and each debenture-stock holder receives a debenture stock certificate for the total amount of stock held by him, whereas debentures are usually issued in a series, each debenture being for a round sum such as £100, and each debenture holder holds a separate debenture for each £100 held by him. In either case it is usually provided that the debentures or the debenture stock of the series shall rank as a charge *pari passu*, so that no holder shall have priority over any other. In the absence of such a provision the debentures would rank in order of date, and if several were made on the same day, then in the order of the denoting number on each debenture. It is also usually provided that the company shall not give any other mortgage or charge in priority to or on an equality with the charge created by the debentures. This clause however is liable to be defeated if the company borrows money on a legal mortgage from a lender who has no notice of the clause in the debenture; for the latter will get priority by reason of his legal estate. Debentures or debenture stock can also be issued to bearer, in which case they are negotiable and pass by delivery of the debenture or the debenture stock certificate³).

The reason why a company has special exemption from the requirements of the Bills of Sale Acts is that mortgages and charges of a company fall under very special regulations with regard to registration.

The Companies Act provides as follows:

Every mortgage or charge created by a company, for the purpose of securing any issue of debentures, or being a charge on uncalled share capital of the company, or created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale, or a mortgage or charge on any land, wherever situate, or any interest therein, or any book debts of the company, or being a floating charge on the undertaking or property of the company, is void so far as any security on the company's property or undertaking is thereby conferred as against the liquidator and any creditor of the company, unless particulars of the charge, with the instrument of charge, are delivered to the Registrar for registration within twenty-one days after the date of its creation⁴). The contract for repayment of the money is not however rendered void, and when the charge becomes void, the money secured immediately becomes payable.

In the case of a charge created out of the United Kingdom, comprising solely property situate outside the United Kingdom, a copy of the instrument of charge properly verified must be delivered to the Registrar within twenty-one days after

¹) *Securities Investment Corp v. Brighton Alhambra* (1893) 68 L. T. 249.

²) *Re British Power Co. Ltd.* [1906] 1 Ch. 497.

³) *Edelstein v. Schuler* [1902] 2 K. B. 144.

⁴) Companies (Consolidation) Act, Sect. 93.

the date on which the instrument or copy could, in due course of post, and if dispatched with due diligence, have been received in the United Kingdom.

Where the charge is created in the United Kingdom, but comprises property outside the United Kingdom, the instrument of charge may be sent for registration notwithstanding that further proceedings may be necessary to make the mortgage or charge valid according to the law of the country in which the property is situate.

Where a negotiable instrument has been given to secure the payment of any book debts of a company, the deposit of the instrument for the purpose of securing an advance to the company is not treated as a mortgage or charge on those book debts.

The Registrar keeps a public register of all the mortgages and charges created by each company requiring registration under these provisions, and enters in the register the date of creation, the amount secured, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge.

Where a series of debentures is created it is sufficient to register the total amount secured by the whole series, the dates of the resolutions authorising the issue of the series and the date of the trust deed, if any, a general description of the property charged and the names of the trustees, if any, for the debenture holders, together with the trust deed, or, if there is none, one of the debentures of the series. If parts of the series are issued at a later date, the dates and amounts of the further issues should be registered; but an omission to do this does not invalidate the debentures.

Any underwriting commission paid on the issue of the debentures should also appear on the register.

The Registrar gives a certificate of registration, and a copy of this certificate must be endorsed on every debenture or certificate of debenture stock.

It is the duty of the company to send these particulars to the Registrar, but if the company omits to do so any person interested may effect the registration.

The register kept by the Registrar in this manner is open to inspection by any person on payment of a sum not exceeding one shilling for each inspection.

An agreement to issue debentures creates immediately an equitable charge over the company's assets: such an agreement should therefore be registered, as the equitable charge which would otherwise result from the agreement will be void unless it is registered within 21 days after the date of the agreement.

Any order appointing a receiver must also be registered and also the receiver's account¹).

If the registration of any charge is omitted by inadvertence, the court has power to extend the time for registration²); but the same result is obtained by issuing a new charge in the place of the former one and registering the new charge within the proper time. Penalties however are incurred in case of non-registration, besides the avoidance of the charge.

For the purpose of assisting searches the registrar keeps a chronological index of registered charges.

In addition to this public register of mortgages each company must keep at its office a copy of every instrument of charge registered with the Registrar, or, in the case of a series of debentures, a copy of one of the debentures, and also a separate register of charges specifically affecting any of its property³), with a description of the property, the amount secured by the charge and the name of the person entitled to the charge. These copies and the register kept by the company must be open to the inspection of creditors and members of the company without fee and the register must be open to any one on payment of not more than⁴) one shilling.

A company usually keeps also a register of the holders of debentures (unless the sums secured by the debentures are payable to bearer). If such a register is kept it must be open to the inspection of the debenture-holders and shareholders, but subject to any reasonable restrictions which may be imposed by the company and subject to the power of the company to close the register for not more than 30 days in each year⁵). Debenture-holders may also demand a copy of

¹) Companies (Consolidation) Act, Sects. 94, 95.

²) Ibid. Sect. 96.

³) Ibid. Sect. 100.

⁴) Ibid. Sect. 101.

⁵) Ibid. Sect. 102.

the whole or part of the register on payment of 6^d per 100 words, and a copy of the trust deed (if any) at the same rate, or if it is printed at the price of one shilling.

Debentures are usually made payable at some fixed future date, but they may be issued without any fixed date for re-payment and may even be perpetual or irredeemable or redeemable only on the happening of some particular contingency¹). Debentures which have been paid off may be re-issued by the company²) and the new debentures will be part of the original series, unless the debentures were originally issued upon conditions which prevented the company from re-issuing them, or unless they were redeemed under some provision which required the company to redeem a certain number of the debentures for the purpose of gradually reducing the amount of the issue. Apparently the necessity for registration of the debenture can in some cases be avoided by cancelling and re-issuing the debenture every 14 days³). A re-issue of a debenture requires payment of the same stamp duty as an original issue.

A contract by a company to issue debentures or a contract by a person to take up debentures in a company can be enforced by an order of the court for specific performance, although as a rule a contract to lend money cannot be specifically enforced⁴).

Debentures, unlike shares, may be freely issued at a discount; but if they are, any provision enabling the debenture holder to exchange his debentures for fully paid shares would be void as an indirect means of issuing shares at a discount⁵).

A company cannot issue a new series of debentures after the commencement of a winding up; but it can issue any debentures of an existing series which have not yet been issued.

A debenture holder can enforce his security by sale of the assets of the company if a power of sale is expressly provided in the debenture. Otherwise he must adopt the usual course of applying to the court for a receiver and for the usual order in a debenture-holders' action.

This comprises an order for accounts and inquiries as to the amount owing on the debentures, as to the available assets of the company, and as to the other charges (if any) which have priority to the debentures, and an order for sale of the assets.

If all the debenture holders are before the court they can apply for an order for foreclosure, that is an order that the assets shall be vested in them free from all rights of the company if the debenture debt and interest is not paid within a time fixed in the order.

On a winding up, a debenture holder may rely on his security and will be paid his debt with interest and costs in full if the security is sufficient. If his charge does not comprise all the assets of the company and is not sufficient for payment of his debt in full, he may value his security and prove in the winding up for the balance of his debt. He cannot however prove in the winding up for interest falling due after the date of the winding up order⁶).

Any one debenture holder may commence an action to enforce his security on behalf of himself and all other debenture holders of the same series, and he will be entitled to his costs of the action out of the assets comprised in the debentures before anything is distributed among the debenture holders.

XX. Audit of Accounts.

A company is bound to keep accounts and to have them audited in every year in such a way as to ensure as far as possible that the shareholders shall have full opportunity to ascertain the real financial position of the company.

At least one auditor must be appointed at every annual general meeting of the company⁷). He must not be a director or other officer of the company. If no auditor is appointed by the company, the Board of Trade can appoint an auditor on the application of any member of the company.

¹) Ibid. Sect. 103.

²) Ibid. Sect. 104.

³) *Re Renshaw & Co.* [1908] W. N. 210.

⁴) Companies (Consolidation) Act, Sect. 105.

⁵) *Mosely v. Koffyfontein Mines Ltd.* [1904] 2 Ch. 108.

⁶) *Quartermaine's Case* [1892] 1 Ch. 639.

⁷) Companies (Consolidation) Act, Sect. 112.

The directors may appoint the first auditors to hold office until the first annual meeting and may afterwards fill up any vacancies which occur in the office of auditor.

The duty of the auditors is to investigate the accounts and report to the shareholders on the accounts and on any balance sheet laid before the company in general meeting¹). The report must state whether or not the auditors have obtained all the information and explanations they have required and whether in their opinion the balance sheet is properly drawn up so as to show a correct view of the state of the company's affairs according to the best of their information and the explanations given to them and as shown by the books of the company. The balance sheet must be signed by two directors and the auditor's report must be attached to it or referred to in it. The report must be read at the annual general meeting and must be open to the inspection of any member, and he can claim a copy of the report and balance sheet at the price of 6^d per 100 words. The articles often provide that a print of the balance sheet and report shall be sent to all the members, but the company is not bound to give special facilities for inspecting the books and accounts. Whatever rights in this respect are given to ordinary shareholders must also be accorded to holders of preference shares and debentures²).

As a result of these provisions any comments made by the auditors in their report are brought to the notice of any of the shareholders who take a sufficiently active interest in the affairs of the company. The auditors are bound to look carefully into the accounts, check the figures and investigate fully anything which raises a suspicion that the balance sheet does not show the true financial position of the company; but they are not employed as valuers and are not liable if they act on the information of the managers and directors of the company as to the value of the stock and assets of the company³). It may be doubted, however, whether an auditor can safely pass without comment a balance sheet which (as is often the case) sets out as assets the exact cost of the property and plant without any deduction for depreciation, and includes as assets the amount of the preliminary expenses of the company and other expenditure of the company which is not directly represented by available assets. If there has in fact been a loss of capital, the loss should be shown on the balance sheet and should not be veiled by an artificial balancing of the accounts.

XXI. Winding Up.

The dissolution of a company is effected by a winding up, which may be either voluntary or compulsory under an order of the court or may take an intermediate form of a voluntary liquidation under the supervision of the court.

The cause of the dissolution may be that the object for which the company was established is complete or that its business has been so successful that a reconstruction, or the transfer of its undertaking and property to a larger company, becomes advisable, or that its business has exhausted its available capital without for the time being producing any obvious success, in which case a similar reconstruction may be the best means of obtaining further capital. In these and similar cases the members of the company usually bring about the dissolution by their own accord, and a voluntary winding up results.

If however the company becomes insolvent, it cannot be made bankrupt, but it can be wound up either voluntarily by resolutions of its members or by the court on the application of the company's creditors or sometimes of one or more of its members. In this case, the rules applicable in the bankruptcy of an individual apply to the company so far as relates to the rights of secured and unsecured creditors, debts provable in the winding up, and the valuation of future and contingent liabilities⁴). Those however of the bankruptcy rules which relate to the inclusion amongst a debtor's assets of property left in his possession by the true owner in such circumstances that he is the reputed owner, do not apply to the winding up of a company⁵).

¹) Ibid. Sect. 113.

²) Ibid. Sect. 114.

³) *Re Kingston Cotton Mill* (No. 2) [1896] 2 Ch. 279.

⁴) Companies (Consolidation) Act, Sect. 207.

⁵) *Gorringe v. Irwell Works* (1886) 34 Ch. D. 129.

Contributories.

It is on the winding up of a company that the full result of the limitation of liability becomes apparent. A member whose position during the life of the company was measured chiefly by his right to receive profits has now to consider his position as a "contributory", that is, as a person who is or may be alleged to be liable to contribute to the funds¹⁾ which must be used to pay the company's creditors and the costs of the winding up, and subject thereto must be divided amongst all the members in accordance with their rights.

Shares in companies are so often fully paid, that ordinarily one is apt to consider a liability to contribute an exceptional circumstance due to the fact that shares happen to be held with a liability still attached to them.

The basis of the law, however, is that every person who is or has been a member of the company is considered as being liable to provide for the payment of its debts unless he can bring himself within one of a list of exceptions reducing or entirely avoiding his liability as a contributory.

These exceptions are as follows²⁾:

A past member is not liable to contribute if he has ceased to be a member for one year or more before the commencement of the winding up, and is not in any case liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member. Again a past member is not liable to contribute unless it appears to the court that the existing members are unable to satisfy the contributions required to be made by them. Consequently a past member is only liable to contribute if he has ceased to be a member within the year and the other members fail to pay the debts incurred while he was a member. Such members are included in a list called the "B list", present members being on the "A list".

In the case of a company limited by shares, no contribution can be required from any member exceeding the amount, if any, unpaid on the shares in respect of which he is liable.

In the case of a company limited by guarantee, no contribution can be required from any member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, together with the amount, if any, unpaid on any shares held by him.

The liability of a contributory is considered as a debt due from him payable when the amount due is called up³⁾. It is a "specialty debt", that is, it has the attributes of a debt incurred by instrument under seal. The chief effect of this is that the prescriptive period is 20 years instead of the usual six years.

Debts due from a company to one of its members cannot be set off against his liability as a contributory; but he can prove as a debtor in respect of his debt, except that where the debt is due to him as a member, as for arrears of dividends, he cannot claim payment as against other creditors but only out of the surplus assets as against the other members⁴⁾.

If a member dies, his personal representatives are liable to contribute in the due course of administration of his estate⁵⁾ so far as the assets allow, and payment may be enforced by an order for administration of the estate. The personal representatives may be placed on the list of contributories, and apparently persons who acquire land situate abroad as heirs or devisees of the deceased member may also, if necessary, be placed on the list⁶⁾.

If the member becomes bankrupt, his liability for calls may be proved against his estate in the bankruptcy, even if the calls had not in fact been made when he became bankrupt⁷⁾.

The husband of a woman member may also be liable for calls due from her, if she was married before the Married Women's Property Act 1882, but not otherwise⁸⁾.

¹⁾ Companies (Consolidation) Act, Sect. 124.

²⁾ Ibid. Sect. 123.

³⁾ Ibid. Sect. 125.

⁴⁾ Ibid. Sect. 123 (1) (vii).

⁵⁾ Ibid. Sect. 126.

⁶⁾ Ibid. Sect. 126 (2).

⁷⁾ Ibid. Sect. 127.

⁸⁾ Ibid. Sect. 128.

Winding up by the Court.

A company may be wound up by the court¹), if it has by special resolution resolved that it be wound up by the court, if default is made in filing the statutory report or in holding the statutory meeting, if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year, if the number of members is reduced, in the case of a private company, below two or, in the case of any other company, below seven, if the company is unable to pay its debts, or if the court is of opinion that it is just and equitable for any other reason that the company should be wound up.

The most usual ground for an application to wind up a company is its inability to pay its debts. By the provisions of the Companies Act a company is considered to be unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding fifty pounds then due, has served on the company a demand under his hand requiring the company to pay the sum due, and the company has for three weeks neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor; or if execution or other process issued on a judgment of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or if it is proved to the satisfaction of the court by any other means that the company is unable to pay its debts. Proof that a bill of exchange accepted by the company has been dishonoured may be sufficient evidence for this purpose²).

For the purpose of determining whether a company is able to pay its debts the court takes into account the contingent and prospective liabilities of the company.

If it cannot be proved that a company is unable to pay its debts, the court has jurisdiction to wind it up for any reason whatever which in the opinion of the court makes it just and equitable that the company should be wound up.

Fraud is the most usual ground upon which it is claimed that it is just and equitable that a company should be wound up by the court.

General charges of fraud or proofs of fraud towards the outside public are not generally sufficient to procure a winding up order³). Even specific acts whereby the members of the company have been defrauded by those in charge are not necessarily grounds for a winding up order, unless they have produced insolvency; but if those responsible for the fraud have the controlling vote in the company or if the whole basis of the company is founded on fraud⁴), the court will usually make a winding up order.

The court however is not bound by any hard and fast rules and can make a winding up order for any reason which it considers sufficient⁵), and will generally do so where there appear to be suspicious circumstances which require investigation, provided any useful purpose can be served by the investigation.

The jurisdiction to wind up a company registered in England is vested in the High Court of Justice and is now exercised by one of two judges of the Chancery Division of the High Court⁶). Where, however, the capital of the company does not exceed £10,000 the County Court has jurisdiction.

Winding up proceedings are commenced by a petition, which may be presented by the company itself or by a contributory or creditor⁷).

A contributory (except where the number of members of the company is below the minimum number required) cannot present a petition unless he has held his shares for six months during the previous eighteen months or has acquired them by reason of the death of a former member.

A creditor can petition even though he is only a contingent or prospective creditor, as for instance a policy holder in an insurance company whose policy has not matured, but in this case he must give security for the costs of the proceedings and must make out a *prima facie* case for winding up before the court will hear the pe-

¹) Ibid. Sect. 129.

²) *Globe Steel Co.* (1875) L. R. 20 Eq. 337.

³) *Re Medical Battery Co.* [1894] 1 Ch. 444.

⁴) *Re T. E. Brinsmead & Sons* [1897] 1 Ch. 45, 406.

⁵) *Consolidated Rand Mines Ltd.* [1909] 1 Ch. 491.

⁶) Companies (Consolidation) Act, Sect. 131.

⁷) Ibid. Sect. 137.

tition. If there is a substantial dispute as to the validity of the petitioner's debt, the court will not make a winding up order until the debt has been established¹⁾ unless the dispute is a pure question of law, in which case the court will sometimes decide it forthwith.

It is not strictly necessary that the creditor should be entitled to a debt of any specified amount; but as a matter of practice the court will not as a rule make a compulsory order unless the amount owing to the petitioning creditor, or to several petitioning creditors together, amounts to at least £50. This rule may however be departed from under special circumstances²⁾. Subject to this, when a creditor has proved one or more of the facts which amount to valid grounds for winding up the company, he has a right, subject however to the general discretion of the court, to have a winding up order made; but if, even after he has presented his petition, a voluntary winding up is commenced, he cannot get a winding up order, unless he can show special reasons for supposing that he will be prejudiced by a voluntary winding up, as for instance that the officers of the company have been guilty of fraud and that the liquidator is a mere nominee of the directors. If the court refuses to make the order on the ground that a voluntary winding up has commenced the petitioner is usually ordered to pay the costs of the petition, and even if the voluntary winding up was not commenced until after the presentation of his petition the petition will probably be dismissed without costs, that is to say, the petitioner will have to pay his own costs.

The court has power on hearing the petition either to make a winding up order, or to adjourn the hearing³⁾ with a view to giving opportunities for payment off of the creditors, or sometimes for the purpose of considering a scheme for voluntary winding up and reconstruction; or the court may dismiss the petition with or without ordering the petitioner to pay the costs. In this and in all other matters relating to the winding up the court must have regard to the wishes of the majority of the creditors and of the contributories⁴⁾ although it is not bound to follow their wishes; and it is therefor, usual for the petitioner to obtain the support of as many creditors and contributories as possible. These usually appear by counsel to support the petition, while the creditors and contributories who support the company appear by counsel and oppose the petition. One set of costs may be allowed by the court to the creditors who support or to those who oppose the petition according to the result of the proceedings.

The order, if made, operates in favour of all the creditors and the contributories in accordance with their respective rights, whether the petition is presented by a creditor or by a contributory⁵⁾, and the winding up is taken to have commenced at the date of presentation of the petition⁶⁾.

After a winding up order no proceedings can be commenced against the company except by leave of the court⁷⁾, and any proceedings already pending against the company may be stayed on the application of the company or any creditor or contributory⁸⁾. If after the winding up order has been made the business of the company turns out to be in a better position than was supposed, or if for any other reason it appears to be better not to wind it up, the winding up proceedings may be stayed by the court⁹⁾; and if after the company has been dissolved and has ceased to exist any good reason should occur for reviving it, the court may, at any time within two years after the winding up order, make an order to the effect that the dissolution was void¹⁰⁾. The mere fact, however, that some of its property has been overlooked does not necessitate the revival of the company, as the Crown can consent to its being distributed among the persons who would be entitled in a winding up¹¹⁾.

1) *Niger Merchants Co. v. Capper* (1881) 18 Ch. D. 557.

2) *Re Industrial Insurance Assoc.* [1910] W. N. 245.

3) Companies (Consolidation) Act, 1908, Sect. 141.

4) *Ibid.* Sect. 145.

5) *Ibid.* Sect. 138.

6) *Ibid.* Sect. 139.

7) *Ibid.* Sect. 142.

8) *Ibid.* Sect. 140.

9) *Ibid.* Sect. 144.

10) *Ibid.* Sect. 223.

11) *Re Henderson's Nigel Ltd.* [1911] W. N. 159.

The Official Receiver.

The official receiver is an officer attached to the Bankruptcy Court, in whom the property of bankrupts vests on the receiving order being made, until the appointment of a trustee in bankruptcy, and also during any vacancy in the office of such trustee. He occupies a somewhat similar position in the case of a company ordered to be wound up; for he exercises a general supervision and becomes provisional liquidator of the company on the winding up order being made until some other person is appointed liquidator. After the appointment of a liquidator the official receiver has powers of general supervision and the liquidator must give the official receiver all necessary information and facilities to enable him to fulfil his duties.

When the winding up order has been made, one or more of the directors or the secretary or some other officer of the company must make out and submit to the official receiver, with a verifying affidavit, a statement of the company's affairs¹⁾, showing particulars of its assets and liabilities, the names of its creditors and the securities held by them, and all persons who claim to be creditors or contributories are entitled, on payment of a fee, to inspect this statement and obtain copies of it.

After receipt of this statement the official receiver submits to the court a preliminary report²⁾ showing the amount of capital issued and the amount subscribed and paid up, an estimate of the assets and liabilities and a statement of the causes of the company's failure. He also states whether he considers that further inquiry into the formation and conduct of the company is desirable, and he may supplement his first report with further reports dealing with any fraud which in his opinion has taken place and any other matters which he thinks ought to be laid before the court.

He must also summon meetings of contributories and creditors to determine whether or not to apply to the court for the appointment of a liquidator and a committee of inspection to assist him³⁾.

The committee of inspection is a committee composed of creditors and contributories who meet at least once a month, and have power to sanction certain acts of the liquidator⁴⁾.

When the official receiver is acting as liquidator, he may, if he thinks the interests of the creditors or contributories so require, apply to the court for the appointment of a special manager⁵⁾. The official receiver may also be appointed by the court to be a receiver on behalf of debenture holders⁶⁾.

Liquidators.

The winding up of a company is conducted by one or more liquidators. The liquidator differs from the trustee in bankruptcy chiefly in this, that the property of the company does not vest in the liquidator: it remains vested in the company until its dissolution and then, if any property by accident remains undisposed of, in case of freehold land, it reverts to the grantor⁷⁾, leases lapse⁷⁾ and movables become *bona vacantia* and belong to the Crown.

In the case of an order to wind up, the liquidator is appointed by the court⁸⁾. The court will in the choice of a liquidator have regard to the wishes of the creditors⁹⁾. If his appointment is defective, acts done by him are nevertheless valid¹⁰⁾. A provisional liquidator may be appointed after presentation of the petition and before the order is made. The official receiver may be so appointed. Any other person must notify his appointment to the Registrar and give security before he can act.

A liquidator, when so appointed, may resign, or the court may, on proper cause being shown, remove him on the application of a creditor or contributory, but not

¹⁾ Companies (Consolidation) Act, 1908, Sect. 147.

²⁾ Ibid. Sect. 148.

³⁾ Ibid. Sect. 152.

⁴⁾ Ibid. Sect. 160.

⁵⁾ Ibid. Sect. 161.

⁶⁾ Ibid. Sect. 162.

⁷⁾ *Hastings Corporation v. Letton* [1908] 1 K. B. 378.

⁸⁾ Companies (Consolidation) Act, 1908, Sect. 149.

⁹⁾ *Association of Land Financiers* (1879) 10 Ch. D. 269.

¹⁰⁾ Ibid. Sect. 149 (10).

of an outsider¹). If a liquidator is removed, the court will appoint a new liquidator, and, during any vacancy, the official receiver will be the liquidator.

The court also fixes the remuneration of the liquidators. The liquidator should take into his custody or control all property which appears to belong to the company²).

The liquidator's powers are very wide, but throughout he must act under the control of the court, and any contributory or creditor may apply to the court for directions in respect of any act which he has done or proposes to do as liquidator.

Subject to these safeguards he may³) take or defend legal proceedings in the name of the company; carry on the business of the company so far as may be necessary for its beneficial winding up, and employ solicitors or other agents to take any proceedings or do any business which the liquidator is unable to take or do himself. These powers can only be exercised with the sanction of the court or of the committee of inspection. Without any such sanction the liquidator can sell the property of the company by public auction or private contract, with power to transfer the whole property to any person or company and to do all necessary acts and to execute, in the name and on behalf of the company, all necessary deeds and documents and he may use the company's seal for that purpose; he may prove in the bankruptcy of any contributory for any balance against his estate, he may draw, accept, make, and indorse bills of exchange or promissory notes in the name and on behalf of the company with the same effect as if this had been done by the company in the course of its business; he may raise any necessary money on the security of the assets of the company, take out, in his official name, letters of administration to any deceased contributory and do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate, which cannot be conveniently done in the name of the company.

The liquidator has also special powers to effect compromises with creditors or contributories with the sanction of the court or of a meeting of the company as the case may be⁴); and generally he may do all such things as may be necessary for winding up the affairs of the company and distributing its assets.

A liquidator has no power to make contracts for the purpose of continuing the business of the company or to save it from the necessity of liquidation, however beneficial such contracts may appear to be⁵).

If he commences or continues proceedings in the name of the company, the costs are payable as one of the first payments out of the assets of the company⁶), and the liquidator incurs no personal liability. If however he commences proceedings in his own name he becomes personally liable for the costs, with a right of indemnity out of the assets.

The liquidator must pay moneys received by him into the Companies Liquidation Account at the Bank of England⁷), unless the Board of Trade at the request of the committee of inspection authorises him to pay any particular amounts into some other bank. He must on no account pay any moneys received into his private banking account.

He must send to the Board of Trade at least twice in every year an account of his receipts and payments⁸). This account is filed and audited and a copy or extract is sent to every creditor and contributory. He must also keep a minute book of proceedings at meetings and this is also open to inspection⁹).

The liquidator may summon meetings of creditors and contributories, and must do so on the request of one tenth in value of either creditors or contributories, and must have regard to any directions given by them or by the committee of inspection. In case of doubt the liquidator may apply to the court by summons in the winding up proceedings for directions, and any person aggrieved by anything done by the liquidator may apply to the court in the same way¹⁰).

¹) *New de Kaap Ltd.* [1908] 1 Ch. 589.

²) Companies (Consolidation) Act, 1908, Sect. 150.

³) Ibid. Sect. 151.

⁴) Ibid. Sect. 214.

⁵) *Re Wreck Recovery Co.* (1880) 15 Ch. D. 353.

⁶) *Re Wenborn & Co.* [1905] 1 Ch. 413.

⁷) Companies (Consolidation) Act, 1908, Sect. 154.

⁸) Ibid. Sect. 155.

⁹) Ibid. Sect. 156.

¹⁰) Ibid. Sect. 158.

The Board of Trade exercises a general supervision over the liquidator and may require him to answer any inquiries or may direct an investigation of his books and vouchers.

A liquidator may be liable to the company for gross negligence in the performance of his duty; but he cannot be made personally liable by any individual contributory or creditor unless by his negligence he has allowed the company to be wound up finally without meeting their just claims¹).

When the liquidator has completed the liquidation or has resigned, the Board of Trade may grant him a release, after considering any objections raised by creditors or contributories, and the release discharges him from all liabilities in respect of his acts as liquidator unless it is revoked on the ground of fraud²).

Proceedings in the Winding Up.

After the winding up order has been made the court settles the list of contributories³) and may make calls on them, whether or not the sufficiency of the assets is known, and may call up more than is actually necessary so as to allow a margin for failures to pay the call⁴). Even if all the debts have been paid, the court may make a call for the purpose of adjusting or equalising the position of the various contributories. The court may also order a contributory to pay to the liquidator or to the Bank of England any other moneys due from the contributory to the company, and may order him to deliver up any other property or papers which *prima facie* belong to the company.

The court fixes a time within which creditors are to prove their debts or to be excluded, and, after providing for the costs of the liquidation, adjusts the rights of those creditors who have proved their debts, and distributes any surplus among the contributories according to their rights.

The court has power to summon before it any person who has any property of the company or is able or likely to be able to give any useful information⁵) and examine him on oath and make him produce any material papers.

If the official receiver reports that there has been fraud, the court may order any person concerned in the formation of the company or any officer of the company to be publicly examined on oath. The official receiver takes part in this examination and may employ solicitors and counsel, and the person ordered to be examined may also employ solicitor and counsel and may be allowed the cost of so doing if he is exculpated from any charges made against him⁶).

The court may even arrest a contributory or seize his papers, if it believes that he is about to leave the country or abscond for the purpose of avoiding payment of calls or of removing the company's property or evading examination⁷).

The details of winding up practice relating to the proof of debts, settling lists of contributories, making calls and distributing the assets are dealt with in the Winding Up Rules, which are a set of rules made under the provisions of the Companies Act. By these rules many of the powers of the court are delegated to the liquidator, and a Registrar appointed under the rules is authorised to determine questions arising in the winding up. An appeal lies from the decision of this Registrar to the Court and from the Court to the Court of Appeal and finally to the House of Lords.

The liquidation is brought to an end by the company being dissolved. This can be done, after the affairs of the company have been fully wound up, by an order of the court that the company be dissolved. The company thereupon ceases to exist and the liquidator communicates the fact of its dissolution to the Registrar, who enters a minute of the dissolution in the register.

Voluntary Winding Up.

When the period (if any) fixed for the duration of the company by the articles has expired or the event (if any) has occurred on the occurrence of which the articles provide that the company is to be dissolved, the company may be wound up vol-

¹) *Pulsford v. Devenish* [1903] 2 Ch. 625.

²) Companies (Consolidation) Act, 1908, Sect. 157.

³) Ibid. Sect. 163.

⁴) Ibid. Sect. 166.

⁵) Ibid. Sect. 174.

⁶) Ibid. Sect. 175.

⁷) Ibid. Sect. 176.

untarily by passing in general meeting an ordinary resolution requiring the company to be wound up; or the company may resolve by special resolution for any reason that the company shall be wound up voluntarily, or it may resolve by extraordinary resolution that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.

In the last mentioned case the extraordinary resolution is not valid unless the notice of the meeting expressly states that the resolution for winding up will be based upon the inability of the company to pay its debts¹). Winding up by an ordinary resolution is very rare.

The commencement of a voluntary winding up dates from the date of the passing of the resolution²), which in case of a special resolution means the passing of the second or confirmatory resolution.

When, after a voluntary winding up has commenced, the court makes a winding up order, the winding up dates from the presentation of the petition and not from the date of the resolution³).

On the commencement of a voluntary winding up the company ceases to carry on its business except so far as is required for the beneficial winding up of the company⁴), but its corporate state and corporate powers continue until it is dissolved.

The powers of the directors also cease on the appointment of a liquidator, except so far as they are expressly continued by the liquidator or by the company in general meeting.

The property of the company is applied in satisfaction of its liabilities *pari passu* and subject thereto, unless the articles otherwise provide, is distributed among the members according to their rights and interests in the company⁵). The company in general meeting appoints one or more liquidators for the purpose of winding up its affairs and distributing its assets. The liquidator may, without the sanction of the court, exercise all powers of a liquidator in a winding up by the court and may also exercise the powers of the court of settling a list of contributories and of making calls; he must also pay the debts of the company and adjust the rights of the contributories among themselves.

If there is no liquidator acting, the court may, on the application of a contributory appoint a liquidator, and the court may remove a liquidator and appoint another liquidator.

The liquidator must within seven days from his appointment send notice by post to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held not less than 14 nor more than 21 days after his appointment⁶). At this meeting the creditors determine whether an application shall be made to the court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, and the court may make an order either for the removal of the liquidator appointed by the company and for the appointment of some other person to act as liquidator jointly with the liquidator appointed by the company or for the appointment of a committee of inspection.

If a vacancy occurs in the office of liquidator, the company in general meeting may, subject to any arrangement with its creditors, fill the vacancy, and a general meeting may be convened for that purpose by any contributory⁷).

The company may by extraordinary resolution delegate to its creditors or to any committee of them the power of appointing liquidators⁸) and any arrangement entered into between a company being wound up voluntarily and its creditors is binding on the company if sanctioned by an extraordinary resolution and on the creditors if acceded to by three fourths in number and value of the creditors⁹).

Any creditor or contributory may, however, within three weeks from the completion of the arrangement appeal to the court against it.

¹) *Re Silkstone Fall Colliery Co.* (1875) 1 Ch. D. 38.

²) Companies (Consolidation) Act, 1908, Sect. 183.

³) *Russell Record Co.* [1910] 2 Ch. 78.

⁴) Companies (Consolidation) Act, 1908, Sect. 184.

⁵) *Ibid.* Sect. 186.

⁶) *Ibid.* Sect. 188.

⁷) *Ibid.* Sect. 189.

⁸) *Ibid.* Sect. 190.

⁹) *Ibid.* Sect. 191.

The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up or to exercise any of the powers which the court might exercise if the company were being wound up by the court¹). Consequently there is seldom any necessity to apply to the court that the liquidation shall be continued subject to the supervision of the court.

The liquidator may summon general meetings of the company for the purpose of obtaining the sanction of the company to any particular proposal by special or extraordinary resolution or for any other purposes²), and in the event of the winding up continuing for more than one year the liquidator must summon a general meeting of the company at the end of the first year and of each succeeding year and lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year. As soon as the affairs of the company are fully wound up, the liquidator must make up an account of the winding up, showing how the winding up has been conducted and the property of the company has been disposed of, and then call a general meeting of the company for the purpose of laying the account before it and giving any explanations of the account which may be necessary³). Within one week after the meeting the liquidator makes a return to the Registrar of Companies of the holding of the meeting and of its date, and the Registrar on receiving the return forthwith registers it and on the expiration of three months from the registration of the return the company is deemed to be dissolved.

The court may, however, on the application of the liquidator or of any other person who appears to the court to be interested, make an order deferring the date at which the dissolution of the company is to take effect for such time as the court thinks fit.

All costs, charges and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidator, are payable out of the assets of the company in priority to all other claims⁴).

The voluntary winding up of a company does not bar the right of any creditor or contributory to have it wound up by the court if the court is of opinion that the rights will be prejudiced by a voluntary winding up⁵).

The creditor or contributory must, however, prove some special circumstances, such as the probability of fraudulent preferences being given, or that the liquidator is merely a nominee of fraudulent directors, before he can succeed in obtaining a compulsory order after a voluntary winding up has commenced.

This risk must be borne in mind by a creditor who proposes to present a winding up petition for the purpose of enforcing payment of his debt: for the presentation of his petition will probably be followed almost immediately by a resolution for voluntary winding up, and he will then find that he has either to prove some special reasons for requiring a winding up order, or must submit to have his petition dismissed, usually without any order as to costs.

If a compulsory order is made after a voluntary winding up has commenced, the court may adopt all or any of the proceedings in the voluntary winding up⁶). In this case the commencement of the winding up dates from the presentation of the petition⁷).

Winding up subject to Supervision of the Court.

When a company has resolved to wind up voluntarily the court may make an order that the voluntary winding up shall continue, but subject to the supervision of the court⁸), on such terms and conditions as the court thinks just. The supervision may be so slight as to hardly interfere with the voluntary winding up, or may be so strict as almost to turn the liquidation into a winding up by the court⁹). The court may, in all matters relating to the winding up subject to supervision, have

¹) Ibid. Sect. 193.

²) Ibid. Sect. 194.

³) Ibid. Sect. 195.

⁴) Ibid. Sect. 196.

⁵) Ibid. Sect. 197.

⁶) Ibid. Sect. 198.

⁷) *Russell Hunting Record Co.* [1910] 2 Ch. 78.

⁸) Companies (Consolidation) Act, 1908, Sect. 199.

⁹) *Re Watson & Sons* [1891] 2 Ch. 55.

regard to the wishes of the creditors or contributories. These wishes may be proved to the court by any sufficient evidence¹⁾, but are usually ascertained by means of calling meetings of the creditors and contributories.

Where an order is made for a winding up subject to supervision, the court may appoint an additional liquidator, who has the same powers and stands in the same position as if he had been appointed by the company²⁾.

In so far as the restrictions imposed by the court do not expressly fetter the powers of the liquidator, he may exercise all his powers without the sanction or intervention of the court in the same manner as if the company were being wound up voluntarily³⁾.

In other respects an order for winding up under supervision has the same effect as an order for winding up by the court, except that certain provisions of the Act relating to the appointment of liquidators and the supervision of their acts and accounts do not apply.

Reconstruction.

When a company has exhausted its available working capital, it frequently happens that the only practicable way of continuing the business is to transfer the whole undertaking and property of the company to a new company in such a way that the holders of shares in the old company shall be entitled to a corresponding number of shares in the new company, but subject to payment of some further assessments or calls in respect of the new shares. That is to say, the shares in the new company are issued as partly paid.

The Companies Act provides a method by which such a transfer can be made by the liquidator in a voluntary winding up: but at one time it was usual to carry out such reconstructions independently of the statutory provisions, by inserting in the memorandum of association of the company an express power to sell its whole undertaking for shares in another company, and by carrying out the reconstruction scheme under this supposed power. Such schemes usually put pressure on the members of the old company by providing that if they elected not to take up shares in the new company, their shares should be sold for what they would fetch and that they should forfeit all their rights in the old company.

Some schemes provided that the proceeds of any shares so sold should belong to the new company; but such a provision was very soon held to vitiate the whole scheme. Other schemes provided for a rateable distribution among the dissentient shareholders of the proceeds of sale of all shares which were not taken up, and these were for many years thought to be valid.

The statutory provisions are as follows :

Where a company is proposed to be or is in course of being wound up voluntarily⁴⁾ and the whole or part of its business or property is proposed to be transferred or sold to another company, the liquidator of the first named or "transferor" company may with the sanction of a special resolution of that company receive, in compensation or part compensation for the transfer or sale, shares, policies or other like interests in the transferee company for distribution among the members of the transferor company or may enter into any other arrangement whereby the members of the transferor company may, instead of receiving cash, shares, policies or other like interests or in addition thereto participate in the profits of or receive any other benefit from the transferee company, and any such sale or arrangement is binding on the members of the transferor company. But if any member of the transferor company, who did not vote in favour of the special resolution at either of the meetings at which the resolution was passed and approved, expresses his dissent in writing addressed to the liquidator and left at the registered office of the company within seven days after the confirmation of the resolution, he may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or, in default of agreement, by arbitration.

If the liquidator elects to purchase the member's interest, the purchase money must be paid before the company is dissolved. If an order is made within a year

¹⁾ Companies (Consolidation) Act, 1908, Sect. 201.

²⁾ Ibid. Sect. 202.

³⁾ Ibid. Sect. 203.

⁴⁾ Ibid. Sect. 192.

for winding up the company by the court or subject to the supervision of the court, the special resolution ceases to be valid unless sanctioned by the court.

Thus it will be seen that the statutory provisions carefully protect the rights of any dissentient member; for if he takes the proper steps he can either stop the reconstruction or insist that his interest in the old company shall be purchased at a valuation. The value of this interest is not simply the market value of his shares, but the actual value of his proportion of the total assets (including undertaking and goodwill) of the old company to be ascertained if necessary by valuation.

If any considerable number of shareholders should dissent from the scheme and claim their rights under the Act, the scheme is almost bound to fail, and it was for this reason that attempts were so frequently made to deprive dissentient shareholders of their statutory rights.

It was long ago decided that any provisions in the articles of association of a company which attempted to deprive the members of their right to dissent from such reconstruction schemes were void¹) and it has now been recently decided by the Court of Appeal that no scheme for the sale of a company's whole undertaking to another company with a view to reconstruction can be carried out under powers contained in the memorandum, nor in any other manner except under the statutory provisions above-mentioned²); so that dissentient shareholders cannot now be deprived of their statutory right to dissent from any such scheme and to claim the value of their share of the assets of the old company.

Any shareholder who wishes to dissent should, however, immediately seek legal advice in order to ensure that his notice of dissent is given within the proper time and in the proper manner. Thus the notice must claim exactly what the statute gives the dissentient a right to claim, and must be served at the company's office within the proper time³). If however the company purports to accept the notice without raising any objection to its form until after the statutory time has expired, it may be held to have waived the informality and to be bound to give effect to the notice⁴).

Effect of Winding Up.

After the commencement of a voluntary winding up all transfers of shares are void except transfers made to or with the sanction of the liquidator, and every alteration in the status of the members of the company is void⁵). Thus a shareholder who acquired his shares by transfer when an infant, and consequently by reason of his status had a right which he could repudiate, cannot ratify the transfer after the winding up has commenced⁶). But shares may be validly transferred between the date of the meeting at which a special resolution is passed and the date of the meeting at which the resolution is confirmed, and debentures may be transferred after the winding up has commenced.

In the case of a winding up by the court or subject to the supervision of the court, every disposition of the property of the company and every transfer of shares or alteration in the status of its members made after the commencement of the winding up, is void unless the court otherwise orders.

After the commencement of a voluntary winding up, the court may, if it thinks fit, stay any proceedings which have been taken against the company, and the same rule applies after the presentation of a winding up petition. But when a winding up order has been made by the court, all proceedings against the company must cease. Thus after a winding up order a landlord cannot distrain for rent, and a judgment creditor cannot levy execution. But if rent has become payable in respect of land or buildings which have been used after the date of the order for the purposes of winding up, the landlord can distrain; and a creditor who has levied execution by seizing goods before the winding up commenced, can sell the goods after the order has been made; and he will have the same right if he was prevented from levying execution by a trick on the part of the officers of the company⁷).

¹) *Payne v. Cork Co.* [1900] 1 Ch. 308.

²) *Bisgood v. Henderson's Transvaal Ld.* [1908] 1 Ch. 743.

³) *Union Bank of Kingston* (1880) 13 Ch. D. 808.

⁴) *Bratley v. Rhodesia Consolidated Ld.* [1910] 2 Ch. 95.

⁵) Companies (Consolidation) Act, 1908, Sect. 205.

⁶) *Costello's Case* (1869) L. R. 8 Eq. 504.

⁷) *Armorduct Co. Ld.* [1911] 2 K. B. 143.

A winding up order by the court is a discharge of all the servants of the company¹⁾, but a voluntary winding up does not have this effect²⁾.

In every winding up, whether voluntary or compulsory, the rules as to what debts are provable are the same, viz: all debts, including debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or being unascertained claims for damages³⁾.

Creditors must prove for their debts within the time fixed by the liquidator; otherwise they can only claim to be paid out of any assets still remaining in his hands when their claim is made.

In the winding up of an insolvent company the same rules prevail with regard to the respective rights of secured and unsecured creditors and to debts provable and to the valuation of annuities and future and contingent liabilities as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt⁴⁾, and all persons who in any such case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up.

The following debts are payable in priority to all other debts⁵⁾:

- a) Rates which have become due within twelve months, and taxes not exceeding one year's assessment;
- b) Wages or salary of any clerk or servant in respect of services rendered to the company during four months, not exceeding fifty pounds;
- c) Wages of any workman or labourer not exceeding twenty-five pounds, in respect of services rendered to the company during the previous two months; and
- d) Amounts (not exceeding in any individual case one hundred pounds) due in respect of compensation under the Workmen's Compensation Act, 1906.

All these debts rank equally among themselves and are paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions, and they have priority over the claims of holders of debentures under any floating charge created by the company, and in case a landlord has distrained on any goods of the company within three months before the date of a winding up order, these debts are a first charge on the goods distrained or the proceeds of the sale.

The date up to which these payments are calculated is in the case of a company ordered to be wound up compulsorily, which had not previously commenced to be wound up voluntarily, the date of the winding up order, and in any other case the date of the commencement of the winding up.

A floating charge on the undertaking or property of the company created within three months before the commencement of a winding up is void⁶⁾ unless it is proved that the company immediately after the creation of the charge was solvent. But it is valid to the extent of any cash paid to the company at the time of or subsequently to the creation of and in consideration for the charge, together with interest on that amount at the rate of 5 per cent. per annum. This will include money paid a few days before the charge was given in reliance on a promise to give the charge⁷⁾, but will not include any payment which does not increase the funds of the company available for the payment of its creditors; thus a payment made to clear off a debt, the payment of which had been for some time guaranteed by the persons taking the charge, has been held not to make the charge valid⁸⁾.

Any act which, if done by or against an individual, would be deemed in his bankruptcy a fraudulent preference is deemed a fraudulent preference of the creditors of a company if it is wound up⁹⁾. For this purpose the presentation of the petition or the resolution for winding up, as the case may be, is deemed to correspond with the act of bankruptcy in the case of an individual.

A conveyance by a company of all its property to trustees for the benefit of all its creditors is void, and where a company is being wound up by or subject to the

¹⁾ *Measures Bros. Ltd. v. Measures* [1910] 1 Ch. 336.

²⁾ *Midland Counties Bank v. Attwood* [1905] 1 Ch. 357.

³⁾ Companies (Consolidation) Act, 1908, Sect. 206.

⁴⁾ *Ibid.* Sect. 207.

⁵⁾ *Ibid.* Sect. 209.

⁶⁾ *Ibid.* Sect. 212.

⁷⁾ *Columbian Fireproofing Co.* [1910] 2 Ch. 120.

⁸⁾ *Orleans Motor Co.* [1911] 2 Ch. 40.

⁹⁾ *Cf. re Goldburg* [1912] W. N. 8.

supervision of the court any attachment, sequestration, distress or execution put in force against the effects of the company after the commencement of the winding up is also void.

The books and papers of a company are *prima facie* evidence in a winding up of the facts stated in them, as between the contributories and the company, and the court may make such orders as it thinks fit¹) for the inspection of books and papers by creditors or contributories. When the company is dissolved, the books are disposed of as the court directs, or in the case of a voluntary winding up as the company by extraordinary resolution directs, and after 5 years no person is responsible for not being able to produce them.

XXII. Special forms of Companies other than Public Companies Limited by Shares.

1. Private Companies.

Small businesses are often conducted by private companies, in which there are few members and the shares are nearly all controlled by one or two persons, and which enjoy certain exemptions from the requirements of the Companies Act.

A company cannot claim the advantages accorded to a private company unless its articles are so framed as to restrict the right to transfer its shares, limit the number of its members (exclusive of persons who are in the employ of the company) to fifty, and prohibit any invitation to the public to subscribe for shares or debentures of the company.

Probably any restriction on the right of transfer is sufficient for this purpose if it enables the directors to keep the number of members down to fifty.

A distribution of a few copies of a prospectus marked "private" among friends of the directors is not an invitation to the public, but if a considerable number are distributed, the prospectus will probably be held to amount to an application to the public, especially if the circulation is not confined to personal friends of the directors²).

A private company is a distinct person in law from the members who compose it, even though it is a "one-man company", the whole of the shares, except one or two, being held by one person, who also conducts the whole management of the company³).

The privileges of a private company are that it need not have more than two members and need not include any balance sheet in its annual summary, nor give equal rights to all shareholders of inspecting balance sheets etc., nor send out any report before the statutory meeting. The directors may act without filing any consent and shares may be allotted before the minimum subscription has been taken up. No statement in lieu of a prospectus need be filed and there is no restriction on the commencement of business.

A private company may turn itself into a public company by a special resolution and by filing a statement in lieu of prospectus and a statutory declaration. Probably also a public company can form itself into a private company if it so alters its articles as to comply with the requirements of a private company.

2. Unlimited Companies.

Since there is no limitation at all of the liabilities of the members of an unlimited company, the memorandum of association differs somewhat in form from that of a limited company.

The memorandum must state:

1. The name of the company.
2. The part of the United Kingdom, whether England, Scotland, or Ireland, in which the registered office of the company is to be situate.
3. The objects of the company. It is silent as to any limitation of liability and fixes no amount as the capital of the company.

The shareholders of an unlimited liability company are liable to the full extent of their means for all the debts of the company, and a shareholder who holds shares

¹) Companies (Consolidation) Act, 1908, Sect. 220.

²) *South of England Natural Gas Co.* [1911] 1 Ch. 573.

³) *Salomon v. Salomon & Co. Ltd.* [1897] A. C. 22.

as a trustee for another cannot limit his liability to the extent of the trust estate by registering himself as a trustee shareholder.

A limited company can be a member of an unlimited company and will be liable in the same way to the extent of its assets.

An unlimited company may exist without any share capital at all, and may reduce its capital (if it has any) to any extent authorised by its memorandum and articles without the sanction of the court. If it has no capital, the High Court is the only court which has jurisdiction to wind it up.

An unlimited company may convert itself into a limited company provided the word "limited" is added to its name and the necessary formalities are observed¹⁾; but the change does not affect the liability of the company in respect of any debt incurred or contract made before the date of its registration as a limited company.

3. Companies limited by guarantee.

Companies limited by guarantee need not have a share capital. If they have none, no person who is not a member of the company can share in the profits²⁾; but every provision which divides up the undertaking of the company between several persons is treated as creating a share capital, and the provisions of the Companies Act relating to share capital will then apply to the company³⁾.

The memorandum of association differs slightly in form from that of a company limited by shares. It must state

1. The name of the company with the word "limited" as the last word of its name.
2. The part of the United Kingdom, whether England, Scotland or Ireland, in which the registered office of the company is to be situate.
3. The objects of the company.
4. That the liability of the members is limited.
5. That each member undertakes to contribute to the assets of the company in the event of its being wound up while he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before he ceases to be a member, and of the costs, charges, and expenses of winding up, and for adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

If the company has a share capital, the memorandum must also state the amount of share capital with which the company proposes to be registered and the division of the capital into shares of fixed amount.

A member is not liable on his guarantee after he has ceased to be a member for more than one year⁴⁾, and, consequently, if the company has no share capital, persons dealing with the company should hesitate to give it credit. If the company has a share capital, the holders of shares are liable to contribute to the extent of the amount unpaid on their shares in addition to the amount for which they are liable under their guarantee⁵⁾.

4. Assurance Companies.

Assurance companies are generally formed as limited companies under the Companies (Consolidation) Act. They are however subject to special regulations.

Every company which carries on within the United Kingdom the business of life assurance, fire insurance, accident insurance, employers' liability insurance or bond investment must deposit £20 000 in court in respect of every class of insurance business which it carries on⁶⁾. The Registrar of Joint Stock Companies cannot issue a certificate of incorporation until this has been done⁶⁾. The deposit can be made by the subscribers to the memorandum of association before the company has been formed. The deposit when made is invested and forms part of the separate assurance fund in respect of which it has to be deposited⁷⁾.

¹⁾ Ibid. Sects. 249, 258, 259.

²⁾ Ibid. Sect. 21.

³⁾ Ibid. Sect. 56.

⁴⁾ Ibid. Sect. 123.

⁵⁾ Ibid. Sect. 123 (3).

⁶⁾ Assurance Companies Act, 1909 (9 Ed. 7. c. 49), Sects. 1 and 2.

⁷⁾ Ibid. Sect. 2 (4).

A company which carries on other business besides assurance business or carries on several classes of assurance business must keep separate accounts of its receipts in respect of each class of assurance and carry them to separate assurance funds, subject however to the exceptions mentioned below in the case of fire and accident assurance.

These separate funds form an absolute security for the policy holders of that class of assurance as if the company were carrying on no other business, and are not liable for any contracts of the company incurred otherwise than in respect of its assurance business of that class¹⁾.

Every assurance company (subject to exceptions which limit this provision almost exclusively to life assurance) must at the end of every financial year prepare a revenue account and balance sheet for the year in the forms set out in the Assurance Companies Act, 1909²⁾; and must also once in five years at least have an investigation into its financial condition made by an actuary, and make an abstract of the actuary's report³⁾, and a statement of its assurance business in the form required by the Act⁴⁾. The abstract and statement must be printed and signed by the chairman and two directors and the managing director or other principal officer of the company, and prints must be deposited with the Board of Trade⁵⁾ and must be forwarded on application to every shareholder and policy holder of the company⁶⁾.

An assurance company not registered under the Companies Act must keep a shareholders' address book and keep printed copies of its deed of settlement and forward a copy to any shareholder on his application on payment of one shilling.

Amalgamation of two or more assurance companies or two or more classes of assurance business requires the sanction of the court⁷⁾, and full particulars of the proposed amalgamation must be sent to every policy holder before the sanction can be obtained.

Particulars of the amalgamation must also be sent to the Board of Trade⁸⁾.

Ten or more policy holders owning policies of an aggregate value of not less than £10000 can petition for winding up an assurance company, but such a petition can only be presented by leave of the court, and the court will not give leave until a *prima facie* case has been made out and the petitioners have given security for costs. On the winding up of an assurance company policies are valued in the special manner provided by the Assurance Companies Act, 1909⁹⁾.

If an assurance company is insolvent the court may reduce the amount of its contracts instead of making a winding up order¹⁰⁾.

This will be done if the company has considerable assets but not sufficient on an actuarial basis to pay the policies in full as they fall due, and the effect will be to leave policy holders still assured by the company but for reduced amounts, instead of paying them forthwith the present value of their policies.

If a company has transferred part of its business to a subsidiary company and the principal company is ordered to be wound up, the court can order the subsidiary company to be wound up with the principal company, if it can be shown that it is really subsidiary to the principal company, and that it is just and equitable that it should be wound up¹¹⁾.

In the case of a life assurance company¹²⁾ the deposit cannot be withdrawn by the company during the continuance of its business.

Before 1909 the deposit could be withdrawn when the life assurance fund reached £40000, but now, if it has been so withdrawn, it must be made anew under the act of 1909.

¹⁾ Ibid. Sect. 3.

²⁾ Ibid. Sect. 4.

³⁾ Ibid. Sect. 5.

⁴⁾ Ibid. Sect. 6.

⁵⁾ Ibid. Sect. 7.

⁶⁾ Ibid. Sect. 8.

⁷⁾ Ibid. Sect. 13.

⁸⁾ Ibid. Sect. 14.

⁹⁾ Ibid. Sect. 16.

¹⁰⁾ Ibid. Sect. 18.

¹¹⁾ Ibid. Sect. 16. And see *re Lancashire Plate Glass etc. Co.* [1912] 1 Ch. 35.

¹²⁾ Ibid. Sect. 30.

If on an amalgamation of life assurance companies policy holders representing one tenth of the total amount assured dissent from the amalgamation, the court cannot assent to it.

Fire insurance companies and accident insurance companies¹⁾ are exempt from the requirements as to statements of affairs (accident insurance companies being bound to prepare statements on a different footing) and need not make a deposit if the company commenced to carry on fire or accident insurance business before the act of 1909, or if the business is solely mutual fire insurance, or if the company has made a deposit in respect of any other insurance business.

Such companies need not keep separate assurance funds.

The provisions relating to amalgamation do not apply to an amalgamation of two companies both carrying on fire or accident insurance business, or one carrying on fire and the other accident insurance business.

Employers' liability insurance companies²⁾ are exempt from the provisions of the act if they carry on merely mutual business, or only carry on accident insurance in connection with marine insurance business. They need not make a deposit if the business of employers' liability insurance was carried on before the 28th August 1907. If the employers' liability fund reaches £40000 the deposit may be returned, if a deposit still remains in respect of other insurance business carried on by the company.

Bond investment companies³⁾ need not make a deposit if they carried on that business before the act of 1909, and the deposit may be returned in the same circumstances as in the case of employers' liability companies.

Industrial assurance companies and collecting societies, which are companies or societies receiving premiums through collectors more than 10 miles from their principal office at a less interval than two months, come within the special provisions of the Collecting Societies and Industrial Assurance Companies Act 1896⁴⁾ as amended by the Assurance Companies Act 1909⁵⁾, which requires that all members shall have copies of the rules of the society, that no forfeiture shall be enforced without special notice and that collectors may not be officers of the company or take part in its meetings.

5. Banking Companies.

Banking cannot be carried on by a partnership or association of more than ten persons unless the association is registered as a company under the Companies Act⁶⁾.

Every limited banking company before it commences business and subsequently twice in every year, must publish a statement showing the state of the capital, the amount of calls made and paid and the liabilities and assets of the company. A copy of this statement must be shown at the registered office and at every branch office of the company and all creditors and members are entitled to have copies on demand⁷⁾.

Banking companies are subject to special regulations with regard to their balance sheets⁸⁾. They must, for instance, be signed by three directors (if there are three) and by the secretary or manager (if any).

A banking company which issues notes is not entitled to any limitation of liability in respect of its notes⁹⁾ and the members are liable on the notes to the same extent as if the company had been unlimited, and if on a winding up the assets are not sufficient to pay both note-holders and general creditors in full, the members must contribute towards payment of the general creditors any amount which may have been received by the note-holders out of the assets available for payment of the general creditors.

¹⁾ Ibid. Sects. 31 and 32.

²⁾ Ibid. Sect. 33.

³⁾ Ibid. Sect. 34.

⁴⁾ 59 & 60 Vict. c. 26.

⁵⁾ 9 Ed. VII c. 49, Sect. 36.

⁶⁾ Companies (Consolidation) Act, 1908, Sect. 1.

⁷⁾ Ibid. Sect. 108.

⁸⁾ Ibid. Sect. 113 (5).

⁹⁾ Ibid. Sect. 251.

An existing banking company which intends to register as a limited company must give notice to all its customers and persons having accounts with it of its intention so to do¹⁾).

Agreements for the sale of shares in banking companies are void unless the distinguishing numbers of the shares are set out in the agreement²⁾. The object of this provision is to prevent speculative dealings in bank shares. There is however a custom on the London Stock Exchange, as between the members, to treat such contracts as binding, and a member of the public may be bound to indemnify his broker against loss occasioned by the breach of this custom, if he knew of the custom³⁾, but not otherwise⁴⁾.

6. Foreign Companies.

Companies incorporated outside the United Kingdom can freely carry on business in England, but subject to the following regulations.

If such a company has a place of business in the United Kingdom, it must file with the Registrar a copy of its charter or statute or other document which constitutes it, with a translation, if it is in a foreign language, and also a list of its directors and the name and address of some person on whom process and notices may be served. Service on the person so named is effective for all purposes. Notice of any alteration in these respects must be duly given.

It must also file a statement in the form of a balance sheet in the same form as the statement which an English company has to set out in its annual summary.

If the name of the company contains the word "limited" it must state in any prospectus which it issues the country where it is incorporated, and must exhibit its name and the name of the country in which it is incorporated on every place where it carries on business and also on its bill-heads and letter paper etc.

The officers of the company are liable to fines in case of default.

A foreign company registered abroad cannot hold lands in England unless it is incorporated in a British possession⁵⁾.

The exclusive right of a foreign company to the use of its own name is protected in the English courts, and no company can be lawfully registered in England with a name closely resembling that of an existing foreign company without its consent⁶⁾.

A foreign company which carries on business in England can be served with writs and process either in the manner mentioned above or by service on any manager or agent at the place where it carries on business, even though the business is only of a temporary character, as for instance a stand at an exhibition⁷⁾.

The English courts will not interfere in the internal disputes of foreign companies⁸⁾. An Englishman who holds shares in a foreign company may be held to have submitted to the jurisdiction of the foreign courts if the articles of association or similar document of the foreign company provide that the members shall submit their disputes with the company to the local courts⁹⁾.

The contract between the preference and ordinary shareholders of a company is governed by the law of the place where the company is domiciled¹⁰⁾. And if by the law of the company's domicile the shareholders are individually liable for its debts, and judgment is obtained against them in the courts of that country, the English courts will enforce the judgment¹¹⁾. But if the company is registered in England, the individual shareholders will not be held liable in England even though by the law of the place where a particular piece of business is transacted all the shareholders are liable for the debts of the company¹²⁾.

1) Ibid. Sect. 256.

2) 30 Vic. c. 29.

3) *Seymour v. Bridge* (1885) 14 Q. B. D. 460.

4) *Perry v. Barnett* (1885) 14 Q. B. D. 467.

5) Companies (Consolidation) Act, 1908, Sect. 275.

6) *Société Panhard et Levassor v. Panhard Levassor Motor Co. Ltd.* [1901] 2 Ch. 513.

7) *Dunlop Pneumatic Tyre Co. v. Oudell & Co.* [1902] 1 K. B. 342.

8) *Sudlow v. Dutch Rhenish Ry. Co.* (1856) 21 Beav. 43.

9) *Copin v. Adamson* (1876) 1 Ex. D. 17.

10) *Spiller v. Turner* [1897] 1 Ch. 911.

11) *Bank of Australasia v. Harding* (1850) 9 C. B. 661.

12) *Risdon Iron Works v. Furness* [1906] 1 K. B. 49.

A foreign company can be wound up in England if its management is conducted in England¹⁾, although it is registered abroad.

And a company registered in England may be wound up in England although the whole of its business is carried on abroad. But a company registered abroad which has no part of its management in England cannot be wound up in England²⁾, even though it carries on business through agents in England.

The assets of an English company cannot be sold to a foreign company by way of reconstruction under the Companies Act³⁾. This course was frequently adopted before the act of 1908, the new company continuing to carry on the same business in England but having its registered office abroad, but this device did not prevent the shareholders of the company from seeking relief in proper cases in the English courts⁴⁾.

The profits of a company which carries on any part of its business in England are assessable for the purposes of English income tax⁵⁾; but only such profits as arise from the business carried on in England, unless the central controlling body of the company resides in England, in which case the whole of its profits are assessable for income tax⁶⁾.

Defunct Companies.

The Registrar may, after giving certain notices, strike off the register any company which has ceased to carry on business, or the winding up of which appears to have come to an end.

Any person aggrieved can however apply to the court to have such a company restored to the register⁷⁾.

XXIII. Societies with Limited Liability not under the Companies Act.

1. Friendly Societies.

Societies registered as friendly societies need not be registered under the Companies Act, and have certain privileges, the chief of which is exemption from stamp duties.

Such societies may only be formed for certain specified purposes, namely, the relief or maintenance of the members of the society or of their husbands, wives, children and near relations during sickness, infirmity or old age, the relief and maintenance of orphan children during minority, insuring money to be paid on the birth of a member's child or the death of a member or for funeral expenses, relief during travel in search of employment or in case of shipwreck or loss of boats or nets, the endowment of members or their nominees at any age and the insurance of tools or implements not exceeding £15 in value⁸⁾.

Only such societies as carry on business within these limits can be registered under the Friendly Societies Act. If so registered, they have no power to carry on business beyond the particular classes of insurance specified in the Act, and they have no power to contract for the assurance of annuities of over £50 per annum or of gross sums exceeding £200. If a society wishes to do business outside strict friendly society business it must turn itself into a limited company⁹⁾ under the Companies Act and can then increase its powers¹⁰⁾ with leave of the court.

A friendly society must have rules, which must contain certain specified particulars, and copies of which must be sent to the Registrar of Friendly Societies¹¹⁾, and to the members on demand.

Trustees must be appointed and all the property of the society vests in them.

¹⁾ *Re Commercial Bank of India*. (1868) L. R. 6 Eq. 517.

²⁾ *Lloyd Generale Italiano* (1885) 29 Ch. D. 219.

³⁾ *Thomas v. United Butter Co.* [1909] 2 Ch. 484.

⁴⁾ *Brailey v. Rhodesia Consolidated Co.* [1910] 2 Ch. 95.

⁵⁾ *London Bank of Mexico v. Aphorpe* [1891] 1 Q. B. 383.

⁶⁾ *De Beers Mines v. Howe* [1906] A. C. 455.

⁷⁾ Companies (Consolidation) Act, 1908, Sect. 242.

⁸⁾ Friendly Societies Act, 1896, Sect. 8.

⁹⁾ *Ibid.* Sect. 71.

¹⁰⁾ Companies (Converted Societies) Act, 1910 (10 Ed. VII & 1. Geo. V., c. 23.)

¹¹⁾ Friendly Societies Act, 1896, Sect. 9.

The accounts must be audited annually and annual returns must be sent to the Registrar of Friendly Societies. There must also be a quinquennial valuation of the society's assets and liabilities.

A society which is prepared to limit its objects as mentioned above and to comply with the necessary formalities can obtain special privileges. Thus policies and certain other documents are exempt from stamp duty, the claims of the society against its officers have priority over any other claims, and minors may be members and execute all necessary instruments at the age of 16, and a member may by writing signed and sent to the registered office nominate any person to receive all moneys not exceeding £100 due to him on his death.

This nomination is in the nature of a testamentary disposition.

Friendly societies can be wound up under the Companies Act¹⁾, in much the same way as a limited company.

2. Building Societies.

Another form of society which is not a limited company but may carry on business with an unlimited number of members is a building society registered under the Building Societies Act, 1874. A society so registered is a corporation.

Building societies may be formed for the purpose of raising out of the subscriptions of members a fund for making advances to members secured by mortgage of freehold, leasehold or copyhold estates in land.

They may issue shares and hold land, but must sell any land which they hold absolutely, as soon as conveniently practicable. They may also receive money on deposit from members within certain limits.

The liability of members is limited to the amount of their shares and any advances which may have been made to them, but the society need not use the word "limited" as part of its name.

The society must have rules, and if it complies with the Act, has certain advantages.

Thus on the death of a member intestate any sum not exceeding £50 may be paid out to his next of kin without letters of administration, infants may become members, and the society enjoys certain exemptions from stamp duties.

Another convenient privilege enjoyed by these societies is that, on re-payment of a loan secured by mortgage, the society need not re-convey the land to the borrower, the receipt of the society being made sufficient of itself to re-vest the land in the person entitled to it.

A building society has no power to carry on business outside the special forms of business authorised by the Building Societies Acts.

3. Industrial and Provident Societies.

Societies with an unlimited number of members may also be registered under the Industrial and Provident Societies Act 1893³⁾. Such a society may carry on any industries or trades specified in the rules of the society, provided that no member may hold any interest in the shares of the society exceeding £200. These societies are under special rules as to making annual returns and allowing inspection of their books and providing copies of their rules when required.

The privileges of such a society include registration as a corporate body with limited liability⁴⁾, and without the use of the word "limited" as part of its name, exemption from income tax if it sells only to its own members⁵⁾, and a power for members over 16 years of age to nominate persons to succeed to their interests in case of death for any sum not exceeding £100⁶⁾.

¹⁾ *Re 20th Century Friendly Soc.* [1910] W. N. 236.

²⁾ 37 & 38 Vict. c. 42. Amended by 57 & 58 Vict. c. 47.

³⁾ 56 & 57 Vict. c. 39.

⁴⁾ *Ibid.* Sect. 21.

⁵⁾ *Ibid.* Sect. 24.

⁶⁾ *Ibid.* Sect. 25.

Title II. Partnership.

By Aubrey J. Spencer, M. A., Barrister-at-Law.

I. Historical.

The law of Partnership in England is based on the law of contract, and originally, until the Partnership Act 1890 was passed, it was solely to be found in legal decisions of the Courts, and in the legal text books relating to the subject. A partnership was held to be formed by a voluntary contractual association between persons carrying on business in common with a view to profit, and involving a community of profit and loss. From that association, established by express or implied contract, various rights and obligations arose, affecting the partners *inter se* and their relations to other parties with whom they carried on business. Partnership was distinguished from mere co-ownership, where persons own property jointly or in common, because co-ownership is not necessarily, as partnership is, the result of agreement¹⁾, and this distinction still obtains. The co-owners may have acquired their property by gift or descent. Further, co-ownership does not, like partnership, necessarily involve community of profit and loss. Moreover a co-owner may, without the consent of the other co-owners, transfer his interest to a stranger, putting him in the same position as the transferor. This a partner cannot do from the nature of the partnership contract. If, however, co-owners employ the common property with a view to profit, and divide the profit obtained by its employment, an agreement for partnership may be inferred from which the usual rights and obligations of partners will flow. Whether such an agreement is to be inferred or not is often an extremely difficult question.

Partnership as a legal relationship is very similar to the "*Societas*" of Roman law²⁾, but being based on English Common Law, it would be unsound to attempt to apply the principles of the Roman Law to the determination of any question arising under an English partnership, which must be governed by the principles of English law.

There is one remarkable exception to the statement made above that the law of partnership previously to the Partnership Act 1890 is to be found in legal decisions and text books. In 1775, De Grey, C. J. laid down the proposition that "every man who has a share of the profits of a trade, ought also to bear his share of the loss"³⁾. This doctrine was followed and approved in *Waugh v. Carver*⁴⁾, and it was thus established that all persons sharing the profits of a business incurred the liabilities of partners therein, so as to be liable for losses, although no contract of partnership between themselves might have been established. In the latter case two ship agents carrying on business at different ports agreed to allow each other certain portions of each other's commissions and profits, but it was expressly agreed between them that neither of them should be prejudiced or affected by the losses of the other or be answerable for the acts of the other, but only for his own losses and acts. Although this was admitted to create no partnership between them it was nevertheless held that both parties were liable for the business debts of either, and a creditor suing both for goods supplied to one obtained judgment against both. This was treated as settled law, until the celebrated case of *Cox v. Hickman*⁵⁾ in the House of Lords, which departed to some extent from the rule previously laid down. There two partners becoming embarrassed assigned the partnership property by deed to trustees, who were empowered to carry on the business under the name of the "*Stanton Iron Co*", and to divide the net income amongst the creditors in rateable proportions, and after the debts had been discharged the property was to be re-transferred to the partners. Two of the creditors were named among the trustees. The trustees continued to carry on the business, and becoming indebted to H. in the course thereof, gave him bills of exchange accepted by themselves "*Per proc. the Stanton Iron Co*". It was held that the deed created no partnership and that individual creditors, although

¹⁾ Lindley on Partnership, p. 27.

²⁾ Justinian's Institutes, Lib. III, Tit. XXV.

³⁾ *Grace v. Smith* (1775), 2 W. Bl. 998.

⁴⁾ (1795), 2 H. Bl. 235.

⁵⁾ (1860), 8 H. L. C. 268.

receiving shares of the income in respect of their debts, were not liable on the bills as partners. Shortly after this decision an Act of Parliament commonly called "Bovill's Act"¹⁾, was passed to amend the law of partnership, which enacted:

1. That the advance of money by way of loan to a person engaged in any trade upon a contract in writing with such person that the lender should receive a rate of interest varying with the profits or should receive a share of the profits should not of itself constitute the lender a partner with the person or persons carrying on such trade or render him responsible as such;
2. That no contract for remuneration of a servant or agent of any person engaged in any trade by a share of the profits of such trade should render such servant or agent responsible as a partner;
3. That no person being the widow or child of the deceased partner of a trader and receiving by way of annuity a portion of the profits made by such trader in his business should, by reason only of such receipt, be deemed to be a partner or to be subject to any liabilities incurred by such trader;
4. That no person receiving by way of annuity or otherwise a portion of the profits of any business in consideration of the sale by him of the goodwill of the business should, by reason only of such receipt, be deemed to be a partner or to be subject to the liabilities of the person carrying on such business;
5. That in the case of the bankruptcy or insolvency of any such trader the lender of any such loan as aforesaid should not be entitled to recover any portion of his principal or of the profits or interest thereon, nor should any such vendor of a goodwill as aforesaid be entitled to recover any such profits as aforesaid, until the claims of the other creditors of the trader had been satisfied.

This Act is now repealed, but its provisions are re-enacted by the Partnership Act 1890, sections 2 and 3.

The Partnership Act 1890 is a codification of the existing law of partnership with some alteration and amendment, though it does not form quite a complete code. It omits provisions as to the goodwill of a partnership and as to the administering the assets of the firm in case of bankruptcy or death. So far as this Act deals with any point it must be looked to as the authoritative guide on the question, and it is not now legitimate to quote previous decisions to be followed in preference to the express enactments of the Act, though such previous decisions may sometimes be used for aiding in the construction of its provisions²⁾. So far however as any point is not dealt with by the Act the rules of equity and of common law applicable to partnership continue in force³⁾.

II. Ordinary Partnerships.

1. The Contract of Partnership.

Partnership is now defined by the Partnership Act, 1890, as "the relation which subsists between persons carrying on a business in common with a view of profit"⁴⁾. The partners comprising it are commonly spoken of as "the firm", and any collective name under which they trade is called "the firm name". The above definition excludes from the term "partnership" associations, societies, and clubs which are not formed with a view of profit. But an association formed with a view to profit will *prima facie* constitute a partnership. Thus in *Strong v. Hare*⁵⁾ a syndicate formed for starting a weekly journal on the terms that subscribers were not to be liable for more than the amount of their subscriptions and that they should be repaid their subscriptions with a bonus on the formation of a company to carry on the journal, was held to constitute the subscribers partners, and liable as such for the price of paper supplied to the syndicate for the journal. But certain associations which may be formed with a view to profit are excluded from the term "Partnership" by the Act. These are any company or association which is:

- a) Registered as a company under the Companies Act 1862 or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies; or

¹⁾ (1865), 28 & 29 Vict. c. 86.

²⁾ See per Lord Herschell L. C. [1891] A. C. pp. 144, 145.

³⁾ P. A. 1890, s. 46.

⁴⁾ P. A. 1890, s. 1, subs. 1,

⁵⁾ (1899), 15 T. L. R. 334.

- b) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or
- c) A company engaged in working mines within and subject to the jurisdiction of the Stannaries¹).

In this connection it may be mentioned that under the Companies (Consolidation) Act, 1908 (8 Edw. 7 c. 69), no company, association or partnership consisting of more than ten persons may be formed for the purpose of carrying on the business of banking, unless it is registered as a company under the Act, or is formed in pursuance of some other Act of Parliament, or of letters patent; and there is a similar prohibition against the formation of any other company, association, or partnership, consisting of more than twenty persons for the purpose of carrying on any other business that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered as aforesaid or formed in pursuance of some other Act of Parliament, or of letters patent, or is a company engaged in working mines within the stannaries and subject to the jurisdiction of the Court exercising the stannaries jurisdiction²). It follows therefore that associations of more than ten persons for the purpose of banking or of more than twenty persons for the purpose of carrying on any other business having the acquisition of gain as its object cannot be legal partnerships.

As already pointed out, mere co-ownership has been held not to constitute partnership and this distinction has been recognised by the Act of 1890³). Receipt of a share of the profits of a business is *prima facie* evidence of partnership, but the receipt of such a share or of a payment contingent on or varying with the profits of a business does not of itself make the person receiving the same a partner in the business. The Act further particularises circumstances which do not by themselves make the recipient a partner⁴). They are as follows:

- a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business;
- b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business;
- c) The receipt by way of annuity by a person being the widow or child of a deceased partner of a portion of the profits made in the business in which the deceased person was a partner;
- d) The advance of money by way of loan to a person engaged or about to engage in a business on a contract with that person, that the lender shall receive a rate of interest varying with the profits or shall receive a share of the profits arising from carrying on the business, provided that the contract is in writing and signed by or on behalf of the parties thereto;
- e) The receipt by a person by way of annuity or otherwise of a portion of the profits of a business in consideration of the sale by him of the goodwill of the business.

The main rule in determining the existence of a partnership is that regard must be paid to the true contract and intention of the parties, to be ascertained where the agreement is in writing from its construction, and if there is no agreement in writing from their words and conduct. Partnership *prima facie* involves community of loss as well as of profit, but a partnership may exist where the liability of the partners in respect of losses is limited as between themselves⁵). The contract of partnership is usually contained in a written agreement or deed signed by the partners termed "Articles of Partnership" but there is nothing to prevent the contract being merely verbal. Like all other contracts in English Law, the contract in order to be binding must be founded on some consideration. Any contribution in the shape of capital or labour or any act which may result in liability to third parties is a sufficient consideration⁶). Any persons may enter into a partnership who are competent to contract, i. e. who are not under the disability of infancy or unsoundness of mind and are not convicts⁷). The disability of infancy is not total, for an infant may be

¹) P. A. 1890, s. 1, subs. 2.

²) Companies (Consolidation) Act, 1908, s. 1.

³) P. A. 1890, s. 2, subs. 1.

⁴) P. A. 1890, s. 2, subs. 3.

⁵) Lindley on Partnership, p. 50.

⁶) Lindley on Partnership, p. 83.

⁷) Forfeiture Act, 1870, (33 & 34 Vict. c. 23), s. 8.

a partner, but he incurs no liability and is not responsible for the debts of the firm during infancy. He may further avoid the contract of partnership before or within a reasonable time after coming of age¹). A partnership may be illegal if formed for a purpose forbidden by law, morality, religion or public policy, as in the case of *Everet v. Williams*²) between two highwaymen for sharing the gain made by robbing travellers. In the case of such partnerships the law will not lend its aid to enforce any claim by one partner against the other in respect of partnership dealings and transactions³). In *Saffery v. Mayer*⁴), it was held that an action to recover money paid by one partner to another as a contribution to a partnership fund to be used for betting on horses for the joint benefit of the two partners, profits and losses to be shared equally, was not maintainable, the money being paid in respect of a contract null and void by the Gaming Act 1845.

A partnership may be entered into for any period that may be agreed upon, and if no fixed term is agreed to, either partner may dissolve the partnership at any time upon giving notice of his intention to do so to all the other partners⁵).

If a person has been induced through the fraud of another to enter into partnership with him, the person defrauded has the option of affirming or rescinding the contract of partnership, and whether he affirms or disaffirms he may sue for damages for the loss caused by the fraud⁶). The fraud must consist in some untrue statement of fact or some concealment of fact, and relate to some material matter, and be relied on by the person seeking to set the contract aside. An action for damages for misrepresentation will not lie, unless the untrue statement was false to the knowledge of the person making it⁷); but a contract of partnership may be rescinded on account of a misrepresentation although it may not have been known to be untrue by the person making it⁸).

2. Rights and Obligations of Partners inter se.

All property and rights and interests in property originally brought into the partnership stock, or acquired by purchase or otherwise on account of the firm, or for the purpose, or in the course of the partnership business, must be held and applied by the partners exclusively for the purpose of the partnership, and in accordance with the partnership agreement⁹).

The agreement of partnership usually determines in what proportions profits and losses are to be divided and borne by the partners. In the absence of and subject to any such agreement all the partners are entitled to share equally in the profits of the business, and must contribute equally towards the losses sustained by the firm¹⁰). Each partner is entitled to be indemnified by the firm, in respect of payments made and personal liabilities incurred by him in the ordinary and proper conduct of the business of the firm, or in or about anything necessarily done for the preservation of the business or property of the firm¹¹).

The capital of the firm may be furnished by the several partners in such shares as may be agreed upon, or may be found by one partner exclusively; and subject to any agreement between the partners, any payment or advance made by a partner beyond the amount of capital which he has agreed to subscribe is treated as a loan to the firm, and the partner making it is entitled to interest at 5 per cent. thereon from the date of the advance, but a partner is not entitled before the ascertainment of profits to interest on the capital subscribed by him¹²).

Subject to any agreement to the contrary each partner may take part in the management of the partnership business¹³). Any difference arising as to ordinary

1) Lindley on Partnership, pp. 91, 92.

2) *Ibid.* p. 113.

3) *Sykes v. Beadon* (1879), 11 Ch. D. 170.

4) [1901] 1. K. B. 11.

5) P. A. 1890, s. 26, subs. 1.

6) Lindley, p. 55.

7) *Derry v. Peek* (1889), 14 App. Cas. 337.

8) *Redgrave v. Hurd* (1881), 20 Ch. D. 1.

9) P. A. 1890, s. 20.

10) P. A. 1890, s. 24, subs. 1.

11) P. A. 1890, s. 24, subs. 2.

12) P. A. 1890, s. 24, subs. 3 & 4.

13) P. A. 1890, s. 24, subs. 5.

matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all the existing partners¹).

The utmost good faith is required from each member of a partnership towards the other partners in accordance with the principle *In societatis contractibus fides exuberet*²). Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives³). Partnership books must be kept at the principal place of business of the partnership and any partner may have access to and inspect and copy any of them⁴). This right may be exercised not only by the partner personally but by an agent authorised on his behalf⁵). In a sale by one partner to another of a share in the partnership business there is a duty resting on the purchaser, who knows and is aware that he knows more about the partnership accounts than the vendor, to put the vendor in possession of all material facts with reference to the partnership assets and not to conceal what he alone knows. Unless such information has been furnished the sale is voidable⁶).

No partner may obtain a private advantage at the expense of the firm, and each partner must account to the firm for any benefit derived by him without the consent of the other partners from any transactions concerning the partnership or from any use by him of the partnership name or business connexion⁷). But a partner who on his own account makes a purchase of a property or business, which is not within the scope of the partnership and is neither in rivalry nor in any way connected with the partnership, and who acts on information not acquired by reason of his position as partner, is not liable to account to his co-partners⁸).

A partner carrying on any business of the same nature as and competing with that of the firm without the consent of the other partners must account and pay over to the firm all profits made by him in such business⁹).

When part of the partnership property is land, it must unless a contrary intention appears be treated as between the partners as personal or movable and not real estate¹⁰).

Before the P. A. 1890, difficulties frequently arose when a partner had incurred separate debts and a creditor had obtained judgment against him. In such a case the judgment creditor could levy execution not only against the debtor's separate property, but also against the property of any firm of which the debtor was a partner. It is now provided¹¹) that a writ of execution shall not issue against any partnership property except upon a judgment against the firm. The interest of the judgment debtor in the property and profits of a partnership of which he is a member, may be charged by an order of the Court on the application of a judgment creditor, with payment of the judgment debt and interest thereon, and by the same or a subsequent order a receiver may be appointed of that partner's share of the profits and of any other money coming to him in respect of the partnership¹²). The other partner or partners will be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same¹³).

A contract of partnership is assumed to rest on the mutual confidence which the members of it have in one another and which is personal to themselves. It follows that it is a fundamental principle of a partnership that no new member shall be introduced into it without the consent of all the existing partners¹⁴). If a partner dies his representative will have no right to take his place in the partnership without the consent of the remaining partners, and an assignment by a partner of his share

¹) P. A. 1890, s. 24, subs. 8.

²) Cod. Lib. IV. Tit. 37, § 3.

³) P. A. 1890, s. 28.

⁴) P. A. 1890, s. 24, subs. 9.

⁵) *Bevan v. Webb* [1901] 2 Ch. 59.

⁶) *Law v. Law* [1905] 1 Ch. 140.

⁷) P. A. 1890, s. 29.

⁸) *Trimble v. Goldberg* [1906] A. C. 494.

⁹) P. A. 1890, s. 30.

¹⁰) P. A. 1890, s. 22.

¹¹) P. A. 1890, s. 23.

¹²) P. A. 1890, s. 23, subs. 2.

¹³) P. A. 1890, s. 23, subs. 3.

¹⁴) P. A. 1890, s. 24, subs. 4.

without the consent of the other partners will not entitle the assignee to take the assignor's place in the firm. The assignee will not be entitled during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions or to inspect the partnership books¹⁾. The assignment is however not wholly void, and will entitle the assignee to receive the share of profits to which the assigning partner would otherwise be entitled, but the assignee will be bound to accept the account of profits agreed to by the partners²⁾, and a contract will be implied on his part to indemnify the assignor against the liabilities of the partnership, although the contract is silent on the point³⁾. There is however nothing to prevent the partners from consenting to the admission of a new partner into the firm or to the assignment of his share by a partner in such a way as to place the assignee in the same position as the assigning partner. The admission of a new member is frequently sanctioned by the partnership articles, which sometimes permit a partner to introduce his son into the partnership either as an additional partner or in substitution for himself.

The rights of an assignee of a partner's share on the dissolution of the firm will be considered subsequently.

A majority of the partners cannot expel any partner from the firm unless power has been conferred upon them to do so by express agreement between the partners⁴⁾; but serious misconduct of a partner may be a ground for dissolution of the partnership, as will appear when the subject of dissolution is presently dealt with.

It has already been stated that partnership losses must be borne by the partners equally in the absence of any agreement to the contrary. It follows from this that the firm is bound to indemnify individual partners in respect of payments made and liabilities incurred in relation to the business of the firm, and it is so expressly provided⁵⁾; but the payments made or liability incurred must be in the ordinary and proper conduct of the business of the firm or in or about something necessarily done for the preservation of the business or property of the firm.

The duration of a partnership is generally fixed by the partnership articles, and is frequently for a definite term of years. If no fixed term has been agreed upon for the duration of a partnership, the partnership is deemed to be a partnership at will, and any partner may determine it at any time on giving notice of his intention to all the other partners⁶⁾. If a partnership for a definite term is continued after the expiration of the term without any express new agreement, a partnership at will will be constituted, the rights and duties of the partners remaining in other respects the same as at the expiration of the partnership term, so far as is consistent with a partnership at will⁷⁾.

Formerly the Court was averse to interfering in disputes arising between partners unless it was proposed to dissolve the partnership or, if it was already dissolved, with a view to winding up its affairs. It still refuses to interfere to settle all partnership squabbles, expecting from each partner a certain amount of forbearance and good feeling towards his co-partners⁸⁾. And the Court has refused to take upon itself the enforcement of every covenant in partnership articles while the partnership is still continuing⁹⁾. Any flagrant breach of the partnership agreement will however be restrained by an injunction granted by the Court, as, for instance, using the firm name in a business carried on by a partner on his own account¹⁰⁾, or carrying on a branch of the co-partnership business against the will of a co-partner¹¹⁾. The Court will also in certain cases protect the partnership assets and business by the appointment of a receiver or a receiver and manager. A receiver may be appointed in an action not seeking the dissolution of the partnership, as when a wrongful applica-

1) P. A. 1890, s. 31, subs. 1.

2) P. A. 1890, s. 31, subs. 2.

3) *Dodson v. Downey* [1901] 2 Ch. 620.

4) P. A. 1890, s. 25.

5) P. A. 1890, s. 24, subs. 2.

6) P. A. 1890, s. 26, subs. 1.

7) P. A. 1890, s. 27.

8) *Lindley on Partnership*, pp. 539—540.

9) *Marshall v. Coleman* (1820), 1 Jac. & W. 266, *Smith v. Jeyes* (1841), 4 Beav. 503.

10) *Aas v. Benham* [1891] 2 Ch. 244.

11) *Clements v. Norris* (1878), 8 Ch. D. 129.

tion of the profits is proposed contrary to the wishes of one partner¹). But a receiver and manager to carry on the business under the direction of the Court will not be appointed when it is not the object of the suit to obtain dissolution of the partnership but on the contrary to continue it; cases may however arise in which the conduct of the defendant being such as to endanger the existence of the partnership concern, the Court will appoint an interim receiver and manager²).

An account may also be directed to be taken at the suit of a partner against his co-partner, although no dissolution is asked for, when there has been an improper refusal to deliver an account of the partnership dealings and transactions³).

3. Rights and Obligations of Partners as regards Third Persons.

The law affecting partnership as regards dealings with persons who are not partners is founded on the law of agency. Each partner is an agent of the firm and of his co-partners for the purpose of the partnership business, and has authority for such purpose to bind his co-partners. The only exception is where the partner has in fact no authority to act for the firm in the particular matter and the person with whom he is dealing knows that he has no authority or does not know or believe him to be a partner⁴). No liability is however imposed on the firm where the partner is acting and is dealt with as acting on his own behalf and not on behalf of the firm⁵).

It follows from the rule above stated that a firm will be liable for an act of one of its members, although in point of fact it was not authorised by the other partners⁶). But an act done by one partner ostensibly on behalf of the firm will not bind the firm, if it was not done for carrying on the ordinary business of the firm, for instance, if a bill of exchange is accepted on behalf of a firm whose business is not one of traders involving the acceptance of negotiable instruments⁷).

Any act or instrument relating to the business of the firm and done or executed in the firm name or in any other manner showing an intention to bind the firm by any partner or other person thereto authorised is binding on the firm and all its partners⁸). A partner has however no authority to pledge the credit of the firm for his own private purposes, and if the purpose of the act or instrument is not apparently connected with the firm's ordinary business, the firm will not be liable unless the partner is in fact specially authorised by the other partners. He may however be personally liable in respect of such a transaction⁹).

If the firm has placed a restriction on the power of any one partner to bind the firm, no act done in contravention of the restriction will bind the firm with respect to persons having notice of the restriction¹⁰).

Every partner is liable jointly with the other partners for all debts and obligations of the firm incurred whilst he is a partner; and after his death his estate remains liable for such debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of his separate debts¹¹). This liability extends to a dormant partner (unless protected by the Limited Partnership Act 1907, see *post*), i.e. one not taking an active part in the business of the firm, or one not known to be a partner by the person contracting with the firm¹²).

The liability of a partnership for the acts of its members in the course of the partnership business is not confined to obligations *ex contractu*, but extends to torts. When by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm or with the authority of his co-partners loss or injury is occasioned to any person not being a partner of the firm, or any penalty is incurred, the firm is liable therefor¹³). Thus where a partner by illegitimate means

¹) *Court v. Harris* (1824), T. & R. 496.

²) *Hall v. Hall* (1850), 3 Mac. & G. 79.

³) *Fairthorne v. Weston* (1844), 3 Ha. 387.

⁴) P. A. 1890, s. 5.

⁵) *British Homes Assurance Corporation v. Paterson* [1902] 2 Ch. 404.

⁶) *Re Briggs & Co., ex parte Wright* [1906] 2 K. B. 209.

⁷) *Wheatley v. Smithers* [1906] 2 K. B. 321, [1907] 2 K. B. 684.

⁸) P. A. 1890, s. 6.

⁹) P. A. 1890, s. 7; *Ex parte Darlington District Joint Stock Banking Co., Re Riches* (1865), 4 De G. J. & S. 581.

¹⁰) P. A. 1890, s. 8.

¹¹) P. A. 1890, s. 9.

¹²) *Beckham v. Drake* (1841), 9 M. & W. 79.

¹³) P. A. 1890, s. 10.

obtained information as to the business of a rival trader, it appearing that it was in the course of the business of the firm to obtain by legitimate means information in regard to the business of competing firms, it was held that the firm was liable for the wrongful acts of the partner in obtaining information¹). But a firm has been held not liable for the fraud of a partner committed by him outside his duties in relation to the partnership business²).

A firm is liable to make good the loss:

- a) Where one partner acting within the scope of his apparent authority receives and misapplies the money or property of a third person, and
- b) Where a firm in the course of its business receives the money or property of a third person, and the money or property so received is misapplied by one of the partners while in the custody of the firm³).

In accordance with these principles a firm of solicitors has been held liable for the misappropriation by one partner of the property of a client entrusted to him as a member of the firm⁴).

As has already been stated, the liability of the partners of a firm for debts and obligations incurred by the firm is joint, but their liability for torts and the misapplication of money or property entrusted to the firm or to a partner thereof is more extensive, it being expressly provided that in such cases every partner is liable jointly with his co-partners, and also severally⁵).

If however a partner is in his private capacity a trustee, and improperly employs trust property in the business or on account of the partnership, he will not thereby render any other partner liable for the trust property to the persons beneficially interested therein, unless such other partner has incurred liability by reason of his having notice of the breach of trust; but trust money may be followed and recovered from the firm if still in its possession or under its control⁶).

The liability of a firm to persons with whom they have dealings extends as has already been mentioned to dormant or secret partners. It also extends further under what is known as the doctrine of "holding out", so as to render a person not a partner liable as if he were one to persons towards whom he so conducts himself as to lead to the supposition that he is in fact a partner with another person or persons. This principle was laid down in the well known case of *Waugh v. Carver*⁷), where Chief Justice Eyre said: "Now a case may be stated, in which it is the clear sense of the parties, to the contract, that they shall not be partners; that A is to contribute neither labour nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom without the others, they would have lent nothing". This principle is now embodied in the Partnership Act 1890, which provides that every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made⁸). The holding out is a question of fact in each case, and it must be proved that the alleged act of holding out was done with the knowledge of the person sought to be made liable, and that it was known to the person seeking to take advantage of it⁹). If a person retires from a partnership and the business is continued under the same name, he will be liable to all customers who continue to deal with the firm on the

¹) *Hamlyn v. Houston* [1903] 1 K. B. 81.

²) *Tendring Hundred Waterworks Co. v. Jones* [1903] 2 Ch. 615.

³) P. A. 1890, s. 11.

⁴) *Rhodes v. Moules* [1895] 1 Ch. 236.

⁵) P. A. 1890, s. 12.

⁶) P. A. 1890, s. 13, and see *Mara v. Browne* [1896] 1 Ch. 199.

⁷) (1795), 2 H. Bl. 235.

⁸) P. A. 1890, s. 14, subs. 1.

⁹) *Edmundson v. Thompson* (1861), 2 F. & F. 564.

faith that he is still a member¹). A person dealing with a firm after a change in its constitution is entitled to treat all apparent members of the old firm (e.g. those whose names appear in the style of the partnership) as still being members until he has notice of the change²). To avoid such liability the retiring partner must advertise the fact in the London Gazette, if the principal place of business of the firm is in England or Wales, and it is provided that such advertisement shall be treated as sufficient notice to persons who had not dealings with the firm before the date of the change in the constitution of the firm³). In the case of those who had dealings with the firm before the change, express notice should be given in order to avoid liability⁴).

If a partner dies and the surviving partners continue the business in the old name, this will not have the effect of rendering the deceased partner's estate liable for acts of the continuing partners after his death, even to old customers of the firm⁵).

The doctrine of "holding out" has no application to cases of tort committed by a firm, so as to render a person not a member liable as if he were so⁶).

Notice to any partner habitually acting in the partnership of any matter relating to partnership affairs operates as notice to the firm, except in the case of fraud on the firm committed by or with that partner's consent⁷).

Subject to the prolongation of liability under the doctrine of "holding out" the liability of a partner for future liabilities of the partnership ceases on his retirement. His liability for debts and obligations incurred before his retirement however will continue⁸), unless he is discharged in some way. Similarly an incoming partner admitted into an existing firm does not thereby become liable to creditors of the firm for any thing done before he became a partner⁹). But an incoming partner, if he chooses to do so, can make himself liable for debts and obligations incurred before his admission. To render him so liable to the creditors of the old firm, some agreement, express or tacit, between himself and the creditors founded on consideration must be shown¹⁰). When however after the admission of a new partner a person deals solely with the old partners and refuses to deal with the new firm, he cannot make the new partner liable¹¹).

A retiring partner may be discharged from liabilities existing before his retirement by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and such an agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted¹²). An agreement of this kind, whereby the liability of the firm as newly constituted is substituted for the liability of the old firm, is called a "novation". There have been many decided cases showing in what circumstances novation will be inferred, and it is only possible to state the effect of some of these. Where a new partner has not been introduced into the firm to take the place of a retiring partner, the mere fact that the creditor treats the continuing partners as his debtors will not by itself operate to discharge the retiring partner¹³). Nor will the retiring partner be discharged by the creditors taking a new security for a debt due to them¹⁴). Where a new partner is introduced, and there is an express agreement by the new and continuing partners to discharge the existing debts of the firm, the retiring partner will still remain liable to creditors who have not agreed to release him from liability¹⁵). But if a creditor, knowing of the retirement of one of the firm, draws for part of his balance and sends in more goods; or if knowing of the retirement

¹) *Scarfe v. Jardine* (1882), 7 App. Cas. 345.

²) P. A. 1890, s. 36, subs. 1.

³) P. A. 1890, s. 36, subs. 2.

⁴) *Farrar v. Deffen* (1844), 1 Car & K. 580.

⁵) P. A. 1890, s. 14, subs. 2.

⁶) Lindley on Partnership, p. 82.

⁷) P. A. 1890, s. 16.

⁸) P. A. 1890, s. 17, subs. 2.

⁹) P. A. 1890, s. 17, subs. 1.

¹⁰) Lindley, p. 252.

¹¹) *British Homes Assurance Corporation v. Paterson* [1902] 2 Ch. 404.

¹²) P. A. 1890, s. 17, subs. 3.

¹³) *Rouse v. Bradford Banking Co.* [1894] A. C. 586.

¹⁴) *Re Head, Head v. Head* [1893] 3 Ch. 426.

¹⁵) *Kirwan v. Kirwan* (1834), 2. Cr. & M. 617.

he strikes a fresh balance with the new firm for a different rate of interest; or if a new partner joins the firm and the creditor, knowing of the retirement of the late partner, accepts an account in which the new partner is charged with the balance, in each of these cases the retiring partner is discharged from liability¹⁾.

A continuing guaranty given to a firm or third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm²⁾.

The application of Statutes of Limitation which bar the recovery of debts after the lapse of a certain time (six years in the case of simple contract debts, twelve years in the case of money charged upon land, twenty years in the case of money secured by covenant) has been affected in the case of partners by the Mercantile Law Amendment Act 1856³⁾. Under that Act an acknowledgment or promise signed by an agent of the party chargeable, duly authorized to make such acknowledgment or promise, will have the same effect as if the writing had been signed by the party himself⁴⁾. An acknowledgment in writing by one partner will be regarded as an acknowledgment by the firm so as to prevent the Statute running. Where there are two or more co-contractors or co-debtors, whether liable jointly only, as is the case in a partnership, or jointly or severally, no such co-contractor or co-debtor will lose the benefit of the Statutes of Limitations, so as to be chargeable by reason only of payment of any principal, interest, or other money, by any other of such co-contractors or co-debtors⁵⁾.

4. Dissolution of Partnerships.

A partnership may be dissolved in any of the following events, subject to any agreement to the contrary between the partners:

- a) If entered into for a fixed term, by the expiration of that term;
- b) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking;
- c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership, and in such case the partnership is dissolved as from the date mentioned in the notice of dissolution, or, if no date is mentioned, as from the date of the communication of the notice⁶⁾;
- d) By the death or bankruptcy of any partner⁷⁾;
- e) At the option of the other partners, if any partner suffers his share of the partnership property to be charged for his separate debt⁸⁾;
- f) In any case by the happening of any event which makes it unlawful for the business of the firm to be carried on or for members of the firm to carry it on in partnership⁹⁾.

Where a partnership at will has originally been constituted by deed, a notice in writing signed by the partner giving the notice is sufficient to determine it¹⁰⁾. A notice to determine a partnership, once given, cannot be withdrawn without the consent of the partner to whom it is given¹¹⁾. A partnership which according to the agreement constituting it is to be "terminated by mutual arrangement only" is not one in which no fixed term has been agreed upon and which can be determined by notice by any partner. It cannot be terminated during the joint lives of the partners except by mutual agreement¹²⁾.

In addition to dissolution in consequence of any of the events above mentioned a partnership may be determined by a decree of the Court in any of the following cases:

1) *Hart v. Alexander* (1837), 2 M. & W. 484.

2) P. A. 1890, s. 18.

3) 19 & 20 Vict. c. 97.

4) S. 13.

5) S. 14.

6) P. A. 1890, s. 32.

7) P. A. 1890, s. 33, subs. 1.

8) P. A. 1890, s. 33, subs. 2.

9) P. A. 1890, s. 34.

10) P. A. 1890, s. 26, subs. 2.

11) *Jones v. Lloyd* (1874), L. R. 18 Eq. 265.

12) *Moss v. Elphick* [1910] 1 K. B. 846.

- a) When a partner is found lunatic by inquisition, or is shown to the satisfaction of the Court to be of permanently unsound mind;
- b) When a partner other than the partner suing becomes in any other way permanently incapable of performing his part of the partnership contract;
- c) When a partner, other than the partner suing, has been guilty of such conduct as in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business;
- d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partners to carry on the business in partnership with him;
- e) When the business of the partnership can only be carried on at a loss;
- f) Whenever in any case circumstances have arisen which in the opinion of the Court render it just and equitable that the partnership be dissolved¹⁾.

As an instance of conduct calculated to prejudicially affect the carrying on of the business it has been held that travelling on a railway without a ticket with intent to avoid payment was detrimental to the business of general drapers carried on under a partnership deed²⁾.

When a partnership is dissolved or a partner retires, any partner may publicly notify the fact and require the other partner or partners to concur for that purpose in all necessary or proper acts³⁾, so that any liability as a member of the firm under the doctrine of "holding out" may cease. But no partner can retire from a firm, unless a dissolution takes place, except under special provisions in the contract of partnership or by agreement with his co-partners⁴⁾.

When a partnership is dissolved the partners are not discharged from liabilities incurred by them before the date of dissolution, but after the dissolution the authority of each partner to bind the firm and the other rights and obligations of the partners, only continue so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the date of dissolution⁵⁾. But a firm is in no case bound by the acts of a partner who has become bankrupt, bankruptcy causing as above stated a dissolution of the firm. A person may however render himself liable for the acts of a bankrupt, if after the bankruptcy he represents himself or knowingly suffers himself to be represented as a partner of the bankrupt⁶⁾.

If a premium has been paid by one partner to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and the length of time during which the partnership has continued, unless:

- a) The dissolution of the partnership is wholly or chiefly due to the misconduct of the partner who paid the premium, or
- b) The partnership has been dissolved by an agreement containing no provision for a return of the premium⁷⁾.

On the dissolution of a partnership each partner is entitled to have the partnership assets applied in liquidation of the partnership debts and liabilities and to have the surplus assets applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners. In order to enforce the proper application of the assets a partner or his representatives may apply to the Court to wind up the business of the firm⁸⁾.

In an action for dissolution of a partnership the Court will direct an account to be taken of all partnership dealings and transactions, and if necessary it will grant an injunction to prevent the improper conduct of a partner.

1) P. A. 1890, s. 35.

2) *Carmichael v. Evans* [1904] 1. Ch. 486.

3) P. A. 1890, s. 37.

4) *Lindley on Partnership*, p. 663.

5) P. A. 1890, s. 38.

6) P. A. 1890, s. 38.

7) P. A. 1890, s. 40.

8) P. A. 1890, s. 39.

In finally settling the accounts between partners after a dissolution, the following rules will be observed subject to any agreement between the partners:

- a) Losses, including losses and deficiencies of capital, will be paid first out of profits, next out of capital, and lastly if necessary will be borne by the partners individually in the proportion in which they were entitled to share the profits of the firm;
- b) The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital will be applied:
 1. In paying the debts and liabilities of the firm to persons not partners therein;
 2. In paying to each partner rateably what is due to him for advances as distinguished from capital;
 3. In paying to each partner what is due to him from the firm in respect of capital; and
 4. The ultimate residue, if any, will be divided amongst the partners in the proportion in which profits are divisible¹).

When partners agree to provide capital in unequal shares, but to divide net profits equally, and on a dissolution there is a deficiency of capital, each partner must contribute to the assets an equal share of the deficiency of capital, and then the assets must be applied in paying rateably what is found due to each in respect of capital²).

In the absence of any agreement to the contrary the partners are entitled on dissolution to have the partnership property converted into money by a sale, even though it may not be necessary to sell for the payment of debts³). But a sale need not take place if the partners agree to a division of the assets or that one partner shall take the share of another at a valuation⁴).

The goodwill of a partnership business may be described as the advantage which has been acquired by a firm in carrying on its business, whether connected with the premises in which it has been carried on, or with the name of the firm, or any other matter carrying with it the benefit of the business. On the dissolution of a partnership the goodwill must be sold for the benefit of all the partners if any partner insists on a sale⁵). After dissolution and sale of the goodwill any partner is entitled to set up a similar trade or business in the same neighbourhood⁶). But the vendors may not solicit business from customers continuing to be customers of the old firm⁷). Nor if they set up a similar business may they hold out to the public that they are continuing the same business by using the name of the old firm⁸).

As has been already stated the assignee of a partner's share in the business cannot interfere in the management or affairs of the firm so long as the partnership continues. Upon the dissolution of the firm he is entitled to receive the actual share of the partnership assets, to which the assigning partner was entitled as between himself and the other partners, and to claim an account for the purpose of ascertaining that share; and his rights will not be affected by any sale of or agreement for valuing and dealing with the assignor's share entered into between the partners subsequently to the assignment and with notice of it⁹).

5. Death of a Partner.

As already stated, subject to any agreement to the contrary, a partnership will be dissolved by the death of any partner¹⁰), and the executors of a partner have no right to become partners with the surviving partners or to interfere with the partnership business¹¹). The surviving partners have no right, in the absence of agreement, to take the deceased partner's share at a valuation, but the share must be ascertained by a sale of the partnership assets including the goodwill of the business¹²).

¹) P. A. 1890, s. 44.

²) *Garner v. Murray* [1904] 1 Ch. 57.

³) *Burdon v. Barkus* (1862), 4 De. G. F. & J. 42.

⁴) *Dinham v. Bradford* (1869), L. R. 5 Ch. 519.

⁵) *Re David and Matthews* [1899] 1 Ch. 378.

⁶) *Crutwell v. Lye* (1810), 17 Ves. 335.

⁷) *Trego v. Hunt* [1896] A. C. 7.

⁸) *Churton v. Douglas* (1859), Johns 174.

⁹) *Watts v. Driscoll* [1901] 1 Ch. 294.

¹⁰) P. A. 1890, s. 33.

¹¹) *Pearce v. Chamberlain* (1750), 2 Ves. Sen. 33.

¹²) *Re David and Matthews* [1899] 1 Ch. 378.

The deceased partner's estate will be liable to creditors of the firm for debts contracted in his lifetime¹⁾, but not for the price of goods ordered by the partnership before, but not delivered till after, his death or otherwise for acts of the surviving partners or liabilities incurred subsequently to the death²⁾. The liability of the deceased's estate may however be discharged by the Statute of Limitations and payment by surviving partners will not keep alive the creditor's claim against the deceased's executors³⁾. The deceased's estate will not be liable for ordinary torts committed by the firm prior to his death, in accordance with the maxim *Actio personalis moritur cum persona*. In the administration of the estate of the deceased partner, his personal estate will be liable for his separate debts in priority to the debts of the firm⁴⁾.

If however the executors of a deceased partner allow the assets to continue to be employed in the business of the firm, they will become personally liable for debts and obligations of the firm⁵⁾, but when the business is so continued under directions in the will of the deceased, the executors will be entitled to an indemnity out of the estate⁶⁾.

The estate of a deceased partner may be discharged from liabilities contracted previously to his death by the creditor agreeing to accept the liability of the surviving partners and abandoning his rights against the deceased partner's estate⁷⁾.

6. Bankruptcy.

Partners may become bankrupt either collectively or individually, and bankruptcy proceedings may be taken against partners in the name of the firm, but in such case the Court may order the names of the persons who are members of the firm to be verified on oath⁸⁾. The acts or defaults which are acts of bankruptcy will be found stated in the article on Bankruptcy. A debt owing by all the partners of a firm is sufficient to support an adjudication against any one or more of them⁹⁾. When a firm is adjudicated bankrupt all the joint property of the partners, as well as all the separate property of each of them, vests in the trustee in bankruptcy¹⁰⁾. The joint estate of the partners will be applicable upon bankruptcy in the first instance to payment of their joint debts, and the separate estate of each partner will be applicable in the first instance to payment of his separate debts. If there is any surplus of the separate estates, it will be dealt with as part of the joint estate. If there is a surplus of the joint estate, it will be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate¹¹⁾.

A person to whom members of a firm are bound jointly and separately is not allowed in bankruptcy to prove both against the joint estate of the firm and the separate estate of a partner, but must elect whether to claim as a joint creditor or separate creditor¹²⁾. But if a debtor is at the date of the receiving order liable in respect of distinct contracts as a member of two or more separate firms, or as a sole contractor and also as a member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals or that the sole contractor is also one of the joint contractors, will not prevent proof in respect of the contracts against the properties respectively liable on the contracts¹³⁾.

In the case of the separate bankruptcy of a partner the partnership is in the absence of any agreement to the contrary dissolved¹⁴⁾. Where one member of a firm is adjudged bankrupt a creditor to whom the bankrupt is indebted jointly with the other partners of the firm or any of them, will not receive any dividend out of the

1) P. A. 1890, s. 9.

2) *Bagel v. Miller* [1903] 2 K. B. 212.

3) Mercantile Law Amendment Act, 1856, s. 14.

4) *Hills v. McRae* (1851), 9 Ha. 297.

5) *Wightman v. Townroe* (1813), 1 M. & S. 412.

6) *Dowse v. Gorton* [1891] A. C. 190.

7) *Re Head, Head v. Head* [1894] 2 Ch. 236.

8) Bankruptcy Act, 1883, s. 115.

9) *Ibid.* s. 110.

10) Bankruptcy Rules, 1886, r. 268.

11) Bankruptcy Act, 1883, s. 40, subs. 3.

12) *Ex parte Bond & Hill* (1745), 1 Atk. 98.

13) Bankruptcy Act, 1883, Sched. 2, rule 18.

14) P. A. 1890, s. 33.

separate property of the bankrupt until all the separate creditors have received the full amounts of their respective debts¹).

7. Actions by and against Partners.

A firm of partners differs from a corporation in that it is not regarded in English law as constituting a legal entity distinct from the members composing it. The name of the firm or partnership is regarded merely as a conventional and comprehensive name denoting the persons composing it²). Consequently, originally a firm could not sue or be sued otherwise than in the names of the partners composing it. The Judicature Acts, 1873 and 1875, and the rules of the Supreme Court made thereunder have now materially altered and improved legal proceedings by and against partners. It is provided that any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firm, if any, of which such persons were co-partners at the time when the cause of action accrued, but any party to an action may in such case apply by summons to a Judge for a statement of the names and addresses of the persons who were at that date co-partners in any such firm, to be verified on oath if necessary³). The writ by which the action is commenced may be served upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership, upon any person having the control or management of the partnership business there. Subject to the rules such service will be deemed good service upon the firm so sued, whether any of the members are out of the jurisdiction or not; but if the partnership has to the knowledge of the plaintiff been dissolved before the commencement of the action, the writ must be served upon every person within the jurisdiction sought to be made liable⁴). Where persons are sued as partners in the name of the firm they must appear individually in their own names, but all subsequent proceedings will continue in the name of the firm⁵). Any person served as a partner may enter an appearance under protest, denying that he is a partner, but such appearance will not preclude the plaintiff from otherwise serving the firm and obtaining judgment against it in default of appearance if no partner has entered an appearance in the ordinary form⁶). Where a judgment is against a firm in the firm name execution to enforce the judgment may be issued:

- a) Against any property of the partnership within the jurisdiction;
- b) Against any person who has appeared in his own name, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;
- c) Against any partner who has been individually served as a partner with the writ of summons, and has failed to appear⁷).

If the party who has obtained judgment or an order against a firm claims to be entitled to issue execution against any other person as a member of the firm, he may apply to the Court or a Judge for leave to do so, and the Court or Judge may give such leave if the liability is not disputed, or if such liability is disputed may order the question to be tried. But, except against any property of the partnership, a judgment against a firm will not render liable, release or otherwise affect any member thereof who was out of the jurisdiction when the writ was issued, and who has not appeared to the writ, unless he has been made a party to the action, or has been served within the jurisdiction after the issue of the writ⁸). If a plaintiff in an action brought against a firm in the firm name claims to be entitled to issue execution against a person who has not been served with the writ as being a member of the firm, and an issue is directed to try the liability of such person, the plaintiff is entitled upon the trial of the issue to show that such person is liable by reason of his having held himself out as a partner⁹). When however a plaintiff sues individual members of a firm, not in the firm name, and obtains a judgment against them, that judgment will be a bar to subsequent proceedings against another member of the firm, even though the previous judgment

¹) Bankruptcy Act, 1883, s. 59, subs. 1.

²) Lindley on Partnership, p. 135 *et seq.*

³) R. S. C. 1883, Order XLVIIIa, r. 1.

⁴) R. S. C. 1883, Ord. XLVIIIa, r. 3.

⁵) *Ibid.* r. 5.

⁶) *Ibid.* r. 7.

⁷) R. S. C. 1883, Ord. XLVIIIa, r. 8.

⁸) *Ibid.* r. 8.

⁹) *Davis v. Hyman* [1903] 1 K. B. 854.

remains unsatisfied¹⁾. This is on the principle of English law that the matter has become *res judicata* under the first judgment and cannot be the foundation of any further proceeding. But if a creditor of a firm sues the surviving partners and recovers judgment against them, he can subsequently sue for and obtain payment of his debt out of the assets of a deceased partner²⁾. And if a creditor seeks payment first out of the estate of a deceased partner, he is not precluded afterwards from suing a surviving partner³⁾.

In actions between partners, when dissolution and winding up of the partnership is sought, all the partners within the jurisdiction must be parties⁴⁾. The Court is averse to interfering between partners unless for the purpose of dissolving the partnership, and if it has already been dissolved, for finally winding up its affairs⁵⁾. But in certain cases relief may be given even though no dissolution is asked, as where a partner was excluding his co-partner and applying the assets for his own use⁶⁾, or where partners refuse to admit into the partnership a person duly nominated and introduced into the firm by a co-partner under a power in the articles⁷⁾.

III. Limited Partnerships.

As already stated, under the general law the liability of each member of a partnership is for all the debts and obligations of the firm jointly with the other partners, and there is no limit to his liability. The law however has been altered in this respect by the Limited Partnerships Act, 1907, which enables a partnership to include members whose liability will be limited to the amount of capital contributed by them. A "limited partnership" must consist in the case of a partnership carrying on the business of banking, of not more than ten persons, and in the case of any other partnership, of not more than twenty persons, and must comprise one or more persons called "general partners", who will be liable for all debts and obligations of the firm, and one or more persons called "limited partners", who must at the time of entering into the partnership contribute thereto a sum or sums as capital or property valued at a stated amount, and who are not liable for the debts and obligations of the firm beyond the amount so contributed⁸⁾. A limited partner must not during the continuance of the partnership either directly or indirectly draw out or receive back any part of his contribution, and if he does so, he will be liable for the debts and obligations of the firm up to the amount so drawn out or received back⁹⁾. A body corporate may be a limited partner¹⁰⁾. Every limited partnership must be registered and in default of registration will be deemed a general partnership¹¹⁾. Registration must be effected with the Registrar of Joint Stock Companies by sending by post or delivering to the Registrar a statement signed by the partners and stating:

- a) The firm name;
- b) The general nature of the business;
- c) The principal place of business;
- d) The full name of each partner;
- e) The term, if any, for which the partnership is entered into and the date of its commencement;
- f) A statement that the partnership is limited, and the description of every limited partner as such;
- g) The sum contributed by each limited partner, and whether paid in cash or how otherwise¹²⁾.

If during the continuance of a limited partnership any change is made or occurs in:

¹⁾ *Kendall v. Hamilton* (1879), 4 App. Cas 504.

²⁾ Lindley p. 238.

³⁾ *Re Hodgson, Beckett v. Ramsdale* (1885), 31 Ch. D. 177.

⁴⁾ Lindley on Partnership, p. 533.

⁵⁾ *Ibid.* p. 529.

⁶⁾ *Fairthorne v. Weston* (1844), 3 Ha. 387.

⁷⁾ *Byrne v. Reid* [1902] 2 Ch. 735.

⁸⁾ L. P. A. 1907, s. 4, subs. 1.

⁹⁾ L. P. A. 1907, s. 4, subs. 2.

¹⁰⁾ L. P. A. 1907, s. 4, subs. 3.

¹¹⁾ L. P. A. 1907, s. 5.

¹²⁾ L. P. A. 1907, s. 8.

- a) The firm name;
- b) The general nature of the business;
- c) The principal place of business;
- d) The partners or the name of any partner;
- e) The term or character of the partnership;
- f) The sum contributed by any limited partner;
- g) The liability of any partner by reason of his becoming a limited instead of a general partner or a general instead of a limited partner;

a statement signed by the firm and specifying the nature of the change must within seven days be sent by post or delivered to the Registrar under penalty of a fine of £1 for each day during which the default in compliance with these requirements continues¹).

The Registrar must file any statement made in pursuance of the Act and must send a certificate of registration to the firm²). Any person may inspect the statement filed by the Registrar under the Act on payment of the fees appointed by the Board of Trade not exceeding one shilling for each inspection³). Notice of any arrangement or transaction under which any person will cease to be a general partner in any firm and will become a limited partner in that firm, or under which the share of a limited partner in a firm is assigned to any person, must be forthwith advertised in the London Gazette, and until so advertised will for the purpose of the Act be deemed to be of no effect⁴).

The general law as to the rights of partners *inter se* is modified in the case of limited partnerships in several respects. A limited partner may not take part in the management of the partnership business, and has no power to bind the firm, but he may by himself or his agent at any time inspect the books of the firm, and examine into the state and prospects of the partnership and may advise with the other partners thereon. If a limited partner takes part in the management of the partnership business, he will be liable for all debts and obligations of the firm incurred while he so takes part in the management as though he were a general partner⁵). A limited partnership will not be dissolved by the death or bankruptcy of a limited partner, and the lunacy of a limited partner will not be a ground for the dissolution of the partnership, unless the lunatic's share cannot be otherwise ascertained and realised⁶). In the event of the dissolution of a limited partnership its affairs will be wound up by the general partners unless the Court otherwise orders⁷). If application is made to the Court to wind up a limited partnership, it must be by petition under the Companies (Consolidation) Act 1908, and the provisions of the Act relating to the winding up of companies by the Court will apply, subject to any modifications provided by rules under the Limited Partnership Act, 1907, with the substitution of general partners for directors⁸). Where a general partner had neglected to pay interest to a limited partner on his capital and to sign the general account as agreed, and had also in breach of the partnership articles habitually absented himself from the partnership business and misapplied a sum advanced by the limited partners for a specific purpose of the business, the Court decreed a compulsory winding up of the partnership on the petition of the limited partner⁹).

¹) L. P. A. 1907, s. 9.

²) L. P. A. 1907, s. 13.

³) L. P. A. 1907, s. 16.

⁴) L. P. A. 1907, s. 10.

⁵) L. P. A. 1907, s. 6, subs. 1.

⁶) L. P. A. 1907, s. 6, subs. 2.

⁷) L. P. A. 1907, s. 6, subs. 3.

⁸) L. P. A. 1907, s. 6, subs. 4.

⁹) *Re Hughes & Co.* [1911] 1 Ch. 342.

Title III. Agency.

By the General Editor.

Introduction.

The English law relating to mercantile agency is almost wholly "judge-made" law. The only statutory provisions directly bearing on the subject are those of the Factors Act, 1889, which are designed for the protection of persons dealing in good faith with mercantile agents in possession of goods or documents of title to goods with the consent of the owner, who act in excess of their authority; certain sections of the Conveyancing Acts 1881 and 1882 relating to powers of attorney; and the Prevention of Corruption Act, 1906, which provides for the punishment criminally of persons bribing agents and agents receiving bribes as an inducement to or reward for departing from their duties to their principals. For the rest, the law has to be sought for in some thousands of reported judicial decisions. An attempt is made in the following pages to state the result of these decisions as accurately as possible, but only the more important cases are cited. Recent cases are chosen for citation in preference to those of an earlier date.

The most important classes of agents from a commercial point of view are factors, brokers and shipmasters. The term "broker", when unqualified, usually signifies a broker who is concerned in the negotiation of sales and purchases of goods, wares or merchandise, and it is used in that sense in this title. The special rules applicable to stockbrokers and insurance brokers are treated of in subsequent titles, as also those relating to bankers acting in the capacity of agents¹). In this title the general principles applying to all classes of agents, and also those peculiar to factors, brokers and to some extent shipmasters²), are dealt with.

The most marked characteristics of the English law of agency are the rules governing the rights and liabilities of the undisclosed principal — rules which are believed to be peculiar to English law and the systems having English law for their foundation — and the extreme length to which the principle of ratification has been carried.

In this title the following expressions are used with the following meanings, unless a contrary meaning appears from the context: "public agent" means an agent of the State; "agent" does not include a public agent; "home agent" means an agent residing and carrying on business in that capacity in England, Wales or Ireland; "undisclosed principal" means a principal who is not known to be such by a third person dealing with an agent; "foreign principal" means a principal who does not reside or carry on business in England, Wales or Ireland; "third person" means any person other than the principal or agent; "goods" includes wares and merchandise, "goods and chattels" all personal property, and "property" every kind of property, whether real or personal.

I. Creation of the Relationship of Agency.

Definitions. It is difficult, if not impossible, to define "agent" in terms which on the one hand will include all agents and on the other hand will exclude all persons who are not agents. This much, however, may be said: that an agent is a person with authority, either express, or inferred, or implied by law, to represent or contract or act on behalf of another person, who is called his principal, the relationship existing between them being called "agency". Sometimes, especially when he is authorised by power of attorney, an agent is called an attorney. Usually, an agent is employed to bring the principal into direct contractual relationship with third persons, but, as will be seen, this is not always so, especially in the case of home agents acting on behalf of foreign principals, such agents not having authority as a general rule to pledge the personal credit of their principals to third persons. The term "general agent" is sometimes used to signify an agent who is authorised either to act generally for his principal in all matters, or all matters in reference to a particular trade or

¹) See titles "Stock Exchange", "Banking" and "Marine Insurance", *infra*.

²) See also title "Maritime Law", *infra*.

business or of a particular class, or to do some act in the ordinary course of an agency business carried on by him, as for example, where a factor or broker is employed in that capacity; and "special agent" to signify one who is only authorised to do some particular act or represent his principal in some particular transaction, such act or transaction not being in the ordinary course of a business carried on by the agent¹). The terms "general agent" and "special agent" are not, however, often used nowadays.

A factor²) is an agent whose ordinary course of business is to sell or dispose of goods entrusted by the principal to his possession or control, and has authority by implication of law to contract in his own name on the principal's behalf³). A broker is an agent whose ordinary course of business is to negotiate and make contracts for the sale and purchase of goods, of which he is not entrusted with the possession and control, and he has not authority by law to contract in his own name, although in practice he frequently does so³). A mercantile agent, for the purposes of the Factors Act, 1889⁴), is a mercantile agent having, in the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

Del credere agent. A *del credere* agent is one who, in consideration of an extra remuneration, which is called a *del credere* commission, guarantees to his principal that third persons with whom he enters into contracts on the principal's behalf will duly perform those contracts⁵). Such an agent is in effect a surety, but it is not necessary that a contract of *del credere* agency should be evidenced by writing⁶). It may be inferred from a course of conduct between the parties⁷). Where goods are consigned to a person for the purpose of sale, on the terms that he shall have the right to sell at such prices as he thinks fit, and shall pay an agreed price to the consignor for all goods sold within a fixed time after the sale, the question whether the relation between the consignor and consignee is that of seller and buyer or that of principal and *del credere* agent, depends upon what appears to have been the intention of the parties, having regard to all the circumstances of the particular case⁸). No general rule on the subject can be laid down.

Capacity of parties. Capacity to contract or do any other act by means of an agent is co-extensive with the capacity of the principal to himself make the contract or do the act in question⁹). A minor or lunatic may authorise an agent to contract on his behalf, and so as to bind him, whenever the contract is of such a nature, and the circumstances are such, that he would have been bound if he had made the contract himself¹⁰); and on the other hand, a corporation or joint-stock company cannot authorise an agent to enter into any transaction beyond the scope of its charter or memorandum of association¹¹). A married woman, although a minor, may appoint an attorney by deed for the purpose of executing any deed or doing any other act on her behalf which she could herself execute or do if she were unmarried and of full age¹²), and generally may appoint an agent to make any contract or do any act which she is capable of doing herself¹³). The only exception to the generality of the rule above stated is that where capacity to do a particular act exists only by virtue of a special custom, it can only be done by means of an agent if the delegation is in accordance with the custom, and this exception is of no importance in mercantile matters.

Any person of sound mind is capable of acting or contracting as an agent so as to bind his principal, even although, by reason of minority or otherwise, he may

¹) See *Brady v. Todd* (1861) 9 C. B. N. S. 592; *Smith v. McGuire* (1858) 3 H. & N. 554.

²) In most commercial codes factors are called "commission" agents.

³) *Baring v. Corrie* (1818) 2 B. & A. 137; *Stevens v. Biller* (1883) 25 Ch. D. 31, C. A.

⁴) 52 & 53 Vict. c. 45. This Act is printed amongst the statutes, *infra*.

⁵) *Morris v. Cleasby* (1816) 4 M. & S. 566; *Hornby v. Lacy* (1817) 6 M. & S. 166.

⁶) *Coutourier v. Hastie* (1852) 8 Ex. 40.

⁷) *Shaw v. Woodcock* (1827) 7 B. & C. 73.

⁸) *In re Nevill* (1870) L. R. 6 Ch. 397; *In re Smith* (1879) 10 Ch. D. 566, C. A., *Weiner v. Harris* [1910] 1 K. B. 285, C. A.

⁹) As to capacity generally, see title "Contracts", *infra*.

¹⁰) *Rex v. Longnor* (1833) 4 B. & Ad. 647; *Drew v. Nunn* (1879) 4 Q. B. D. 661, C. A.

¹¹) *Montreal Assurance Co. v. McGillivray* (1859) 13 Moo. P. C. 87; *Poultton v. L. and S. W. Rail Co.* [1867] L. R. 2. Q. B. 534. See title "Companies", *supra*.

¹²) 44 & 45 Vict. c. 41, s. 40.

¹³) See title "Contracts", *infra*.

have no capacity to do the act or enter the contract in question on his own behalf. But the personal liability of the agent on the contract of agency, and also on any contract by him with any third person, depends on his capacity to enter into such a contract on his own behalf¹). In cases where, by statute, a contract is required to be evidenced by a note or memorandum in writing, signed by the party to be charged or his agent, a party to the contract is not competent to sign as the agent of the other party thereto²); but the same agent may be authorised by each of the parties to sign for him, as in the case of a broker employed by both buyer and seller, and in such case the signature of the agent will bind both parties³). So, a clerk or factor of one of the parties is competent to sign on behalf of the other party if duly authorised by him to do so⁴).

What acts may be done by means of an agent. Generally speaking, any act may be done or contract made by means of an agent, which the principal is himself competent to do or enter into. A foreign corporation which by a contract submits to the jurisdiction of the English Courts, may appoint an agent to accept service of a writ of summons on its behalf, and service on such an agent is as effective as personal service within the jurisdiction⁵). A partner may exercise his right to inspect and take copies of partnership books by means of an agent to whom no personal objection can reasonably be made by the other partners⁶). An agent may be appointed to subscribe his principal's name to the memorandum of association of a joint-stock company, and such a signature is a sufficient compliance with section 2 of the Companies (Consolidation) Act, 1908⁷). On a petition for the winding up of a company, an affidavit in verification of the petition by the attorney of the petitioner may be accepted⁸).

But if a power or authority is conferred, or a duty imposed, on the principal personally, the exercise or performance of which involves skill or discretion, he must, as a general rule, exercise or perform it in person, and not by means of an agent⁹). It is on this principle that an agent is generally forbidden to delegate his authority¹⁰). A duty which is merely ministerial, and the performance of which does not involve the exercise of skill or discretion may, however, be performed by means of an agent¹¹).

There are some acts which are required by statute to be done in person. For example, the Statute of Frauds Amendment Act (9 Geo. IV. c. 14) s. 6, requires that certain transactions, to be effectual in law, shall be evidenced by a writing signed by the party to be charged, and it has been decided that the signature of an agent, even though expressly ratified by the principal, is insufficient to satisfy the requirement¹²). But, as a general rule, where the signature of a person is required by statute, it is sufficient if the name of that person is signed by a duly authorised agent, where a contrary intention does not plainly appear¹³).

Co-agents. An authority given to two or more persons is presumed to be given to them jointly, unless a contrary intention appears, either from the nature or terms of the authority, or from the circumstances of the particular case¹⁴). Where an authority is given to two or more agents jointly, all the co-agents must, except in the case of an authority of a public nature, concur in the execution of it, in order to bind the principal, unless it has been provided that a certain number of them

¹) *Smally v. Smally* (1700) 1 Eq. Ab. 6.

²) *Sharman v. Brandt* (1871) L. R. 6 Q. B. 720; *Farebrother v. Simmons* (1822) 5 B. & A. 333. As to when writing is necessary, see titles "Contracts" and "Sale of Goods", *infra*.

³) *Thompson v. Gardiner* (1876) 1 C. P. D. 777; *Emmerson v. Heelis* (1809) 2 Taunt. 38.

⁴) *Durrell v. Evans* (1862) 1 H. & C. 174; *Bird v. Boulter* (1833) 4 B. & Ad. 443.

⁵) *Tharsis Copper Co. v. La Société des Metaux* (1889) 58 L. J. Q. B. 435; *La Bourgogne* [1899] A. C. 431, H. L.; *Montgomery v. Liebenhal* [1898] 1 Q. B. 487, C. A.

⁶) *Bevan v. Webb* [1901] 2 Ch. 59, C. A.

⁷) *In re Whitley* (1886) 32 Ch. D. 337, C. A.

⁸) *In re African Farms* [1906] 1 Ch. 640.

⁹) *Hawkins v. Kemp* (1803) 3 East, 410.

¹⁰) See *infra*.

¹¹) *London County Council v. Hobbis* (1897) 75 L. T. 688.

¹²) *Swift v. Jewesbury* (1874) L. R. 9 Q. B. 301; *Hirst v. West Riding Banking Co.* [1901] 2 K. B. 560.

¹³) *France v. Dutton* [1891] 2 Q. B. 208; *Dennison v. Jeffs* [1896] 1 Ch. 611.

¹⁴) *Brown v. Andrew* (1849) 18 L. J. Q. B. 153; *In re Liverpool Household Stores* [1890] 59 L. J. Ch. 616.

shall form a quorum¹). Where a provisional committee appointed eight specified persons to act as a managing committee on their behalf, it was held that the provisional committee were not bound by an order within the scope of the authority given by six of the managing committee¹). A company whose regulations provide for management by directors, a certain number of whom are to constitute a board, is only bound by the acts of the directors concurred in by them all, or by a majority present at a duly convened and constituted board meeting²). If an authority vested in two or more jointly is of a public nature, and the persons in whom it is vested all meet for the purpose of executing it, the act of the majority is considered that of the whole body³).

Where an authority is given to two or more persons severally, or jointly and severally, any one or more of them may exercise it without the concurrence of the other or others⁴).

How the relationship of agency may be constituted. Save in certain cases of agency of necessity⁵), the relationship of agency is constituted, and can only be constituted, by virtue of the express or implied assent of both principal and agent⁶).

The assent of the principal is implied whenever another person occupies such a position that, according to the ordinary usages of mankind, he would be understood to have the principal's authority to act on his behalf⁷). At a sale by auction it is understood that, in the ordinary course of business, the auctioneer has authority to sign a contract of sale on behalf of the highest bidder, and the assent of the highest bidder to his doing so is therefore implied⁸); but no such assent is implied on the part of a purchaser of unsold lots by private contract with the auctioneer after the conclusion of the public sale⁹). Nor does the implication of authority to sign, even at the sale by auction, extend to the clerk of the auctioneer¹⁰), and consequently the highest bidder will only be bound by the signature of the clerk if he shows by his conduct that he in fact assents to the clerk's signing on his behalf¹¹). And where the purchaser at a sale by auction had, without the knowledge of the auctioneer, previously agreed with the vendor that the price of any goods he might buy should be set off against a debt due to him from the vendor, it was held that the auctioneer had no authority to sign on his behalf a contract providing for payment in cash¹²). A mere pledgee of an insurance policy has no implied authority, as such, to give a notice of abandonment on behalf of the pledgor¹³). Nor are the promoters of a company, as such, implied agents to pledge the credit, or receive money on behalf, of one another in connection with the promotion of the company¹⁴).

The assent of the agent is implied whenever he acts or assumes to act on behalf of another person, and after having so acted or assumed to act, he will not be permitted to deny the existence of the agency in any proceedings by such person¹⁵).

Where a person assumes to act on behalf of another, the assent of the latter will not be implied from his mere acquiescence or silence, unless the situation of the parties is such as to raise a presumption that the act is done by his authority¹⁶).

¹) *Brown v. Andrew*, *supra*.

²) *Ridley v. Plymouth Grinding Co.* (1848) 2 Ex. 711; *Kirk v. Bell* (1850) 16 Q. B. 290; *In re Haycraft, &c. Co.* [1900] 2 Ch. 230.

³) *Grindley v. Barker* (1798) 1 B. & P. 229; *Cortis v. Kent Waterworks Co.* (1827) 7 B. & C. 314.

⁴) *Guthrie v. Armstrong* (1822) 5 B. & A. 628, where a power of attorney given to 15 persons "jointly or severally to execute such policies as they or any of them should jointly or severally think proper" was held to be well exercised by a policy executed by four of such persons.

⁵) See *infra*.

⁶) *Markwick v. Hardingham* (1880) 15 Ch. D. 339, 349, C. A.; *Pole v. Leask* (1862) 33 L. J. Ch. 155. *Gosling v. Gaskell* [1897] A. C. 575, H. L.

⁷) *Pole v. Leask*, *supra*; *In re Vimbos* [1900] 1 Ch. 470.

⁸) *Emmerson v. Heelis* (1809) 2 Taunt. 38; *White v. Proctor* (1811) 4 Taunt. 209.

⁹) *Mews v. Carr* (1856) 1 H. & N. 484.

¹⁰) *Bell v. Balls* [1897] 1 Ch. 663.

¹¹) *Sims v. Landray* [1894] 2 Ch. 318; *Bird v. Boulter* (1833) 4 B. & Ad. 443.

¹²) *Bartlett v. Purnell* (1836) 4 A. & E. 792.

¹³) *Jardine v. Leathley* (1863) 3 B. & S. 700.

¹⁴) *Burnside v. Dayrell* (1849) 3 Ex. 224; *Norris v. Cottle* (1850) 2 H. L. C. 647; *Bright v. Hutton* (1852) 3 H. L. C. 341.

¹⁵) *Roberts v. Ogilby* (1821) 9 Price, 269.

¹⁶) *Murphy v. Boese* (1875) L. R. 10 Ex. 126; *Graham v. Musson* (1839) 7 Scott, 769.

Where the situation of the parties is not such as to raise a presumption of authority, there must be some act on the part of the principal showing that he assents to the assumed agency¹).

The relationship of principal and agent may be constituted:

- a) By express appointment by the principal, assented to by the agent²);
- b) By express appointment by a person duly authorised by the principal to make such appointment, assented to by the agent³);
- c) By implication of law from the conduct or situation of the parties⁴), or from the necessity of the case⁵);
- d) By subsequent ratification by the principal of an act done on his behalf⁶).

Agency of necessity. The doctrine of agency of necessity has only a limited application in English law, and it is open to some doubt how far it extends⁷). The agency arises where, in an emergency, it becomes the duty of a person to act on behalf of another without his consent, in order to prevent serious injury; and also where, in default of the performance by a person of a legal duty, another person interested in the performance thereof is by reason of the default invested with authority to act on his behalf. If an animal is sent by carrier, and there is no one to receive it at its destination, the carrier, being bound to take reasonable measures for its preservation, is an agent of necessity of the consignor for that purpose⁸). If a husband, who is under a legal obligation to supply his wife with necessaries, deserts her and leaves her unprovided for, she has authority of necessity to pledge his credit for necessaries⁹). Other instances of the application of the doctrine, most of which have reference to carriage by sea, will be found elsewhere¹⁰). In cases where the doctrine applies, the principal is bound by the consequences of the agency, though he may not have assented thereto and even notwithstanding his express dissent.

Agency by estoppel. If a person by words, written or spoken, or by acts, represents or permits it to be represented that another person is his agent, he will not be permitted to deny the existence of the agency with respect to any third person dealing, on the faith of any such representation, with the person so held out as an agent, even if no agency in fact exists¹¹).

II. Married Women as Agents of their Husbands.

The authority of a wife to pledge her husband's credit for necessaries affords an interesting example of implied or presumed authority. No such authority exists by virtue of the marriage alone. But if they live together, authority is in some cases presumed from the fact of cohabitation; and where they are living apart, an authority of necessity may arise from the neglect of the husband to provide for the wife. In all cases the presumed or implied authority is confined to necessaries; and it is not affected by the insanity or lunacy of the husband¹²).

Presumption of authority from cohabitation. Where a husband and wife live together, it will be presumed from the mere fact of cohabitation that she has authority to pledge his credit for necessaries suitable to their style of living¹³). But this presumption may be rebutted by proof that he had in fact forbidden her to pledge his credit¹⁴), or that she was adequately provided with necessaries, or that he had made her a sufficient or agreed allowance therefor¹⁵). The presumption is confined to necessaries suitable to the style in which they live, and does not extend to orders

¹) *Durrell v. Evans* (1862) 1 H. & C. 174.

²) Part III, *infra*.

³) *In re Hale* [1899] 2 Ch. 107, C. A.; *Gosling v. Gaskell* [1897] A. C. 575, H. L.

⁴) *Supra*, and Part II, *infra*.

⁵) *Infra*.

⁶) Part IV, *infra*.

⁷) *Gwilliam v. Twist* [1896] 2 Q. B. 84.

⁸) *G. N. Rail Co. v. Swaffield* (1874) L. R. 9 Ex. 132.

⁹) See below, Part II.

¹⁰) As to the authority of necessity of shipmasters, see below, Part V, and as to salvage, see title "Maritime Law", *infra*.

¹¹) *Pole v. Leask* (1862) 33 L. J. Ch. 155, H. L. And see Part X, Sect. I, *infra*.

¹²) *Richardson v. Du Bois* (1869) L. R. 5 Q. B. 51; *Read v. Lugard* (1851) 6 Ex. 636.

¹³) *Harrison v. Grady* (1865) 13 L. T. 369.

¹⁴) *Jolly v. Rees* (1864) 15 C. B. N. S. 628; *Debenham v. Mellon* (1880) 6 App. Cas. 24, H. L.

¹⁵) *Seaton v. Benedict* (1828) 5 Bing 28; *Debenham v. Mellon*, *supra*; *Holt v. Brien* (1821) 4 B. & A. 252.

which are extravagant in their nature or excessive in their extent¹). The question of suitability does not depend on the husband's means, but on the style of living he chooses to adopt. A wealthy man may live in a niggardly fashion if he thinks fit; and on the other hand, a person with small means may adopt an extravagant style of living. In either case the test of what are suitable necessities is the manner of living he assumes²). Where the wife has the management of the household, her presumed authority extends to all such things as are required in the ordinary course of such management, provided they are of a kind which are usually bought on credit³).

A wife living with her husband has no presumed authority to borrow money in his name, even for the purpose of purchasing necessities for the price of which he would have been liable if they had been bought by her on his credit⁴).

Where a husband holds his wife out as having authority, as, for instance, by paying for goods bought on his credit, he will be liable to any person dealing with her on the faith of such holding out, though he may have revoked the authority or forbidden her to pledge his credit, provided the person dealing with her has no knowledge of the revocation or prohibition⁵).

Where living apart. A wife separated from her husband is presumed to have no authority to pledge his credit, and the burden of proving that the circumstances of the separation are such as to raise a presumption of authority lies on the person seeking to charge the husband on her contracts⁶). If the wife is separated under a judicial decree, the husband is under no liability in respect of any contract she may make, unless he has been ordered to pay alimony, and fails to do so, in which case he is liable for necessities supplied for her use⁷). But a decree for judicial separation does not affect the liability of the husband under any contract made by the wife before the date of the decree⁸).

If the separation is by mutual consent, and the husband and wife have made an agreement as to her maintenance, she has no authority to pledge his credit so long as he duly carries out the terms of the agreement, whether adequate provision is made for her or not⁹); but if the husband does not carry out the terms of the agreement, she has implied authority to pledge his credit for necessities suitable to her station¹⁰). If, being separated by mutual consent, there is no agreement between them as to her maintenance, she has implied authority to pledge his credit for suitable necessities, unless she has adequate separate means, or is provided with an adequate allowance, either by her husband or some other person¹¹). The test of the husband's liability in such a case is whether she is adequately provided for from some source¹²), and it is immaterial, if she is so provided, that the tradesman dealing with her has no knowledge of that fact¹³). Where the wife has the custody of the children of the marriage, necessities for them are considered necessities for her¹⁴).

Where a wife leaves her husband without his consent, or lives apart from him contrary to his wishes, she has no implied authority to pledge his credit unless he has been guilty of misconduct which justifies her in so leaving him or living apart¹⁵). But if a wife has been deserted by her husband¹⁶), or has been turned away by him without adequate cause¹⁷), or has left him in consequence of misconduct on his part

¹) *Debenham v. Mellon*, *supra*; *Lane v. Ironmonger* (1844) 13 M. & W. 368.

²) *Phillipson v. Hayter* (1870) L. R. 6 C. P. 38.

³) *Debenham v. Mellon*, *supra*; *Phillipson v. Hayter*, *supra*.

⁴) *Knox v. Bushell* (1857) 3 C. B. N. S. 334.

⁵) *Filmer v. Lynn* (1835) 4 N. & M. 559; *Debenham v. Mellon*, *supra*.

⁶) *Johnstone v. Sumner* (1858) 3 H. & N. 261.

⁷) 20 & 21 Vict. c. 85, Sects. 21, 26; 58 & 59 Vict. c. 39, Sect. 5 (a).

⁸) *In re Wingfield* [1904] 2 Ch. 665, C. A.

⁹) *Eastland v. Burchell* (1878) 3 Q. B. D. 432; *Negus v. Forster* (1882) 46 L. T. 675, C. A.

¹⁰) *Beale v. Arabin* (1877) 36 L. T. 249.

¹¹) *Johnston v. Sumner* (1858) 3 H. & N. 261; *Mizen v. Pick* (1838) 3 M. & W. 481.

¹²) *Lidlow v. Wilmot* (1817) 2 Stark. 86; *Clifford v. Laton* (1827) 3 C. & P. 15; *Hodgkinson v. Fletcher* (1814) 4 Camp. 70.

¹³) *Mizen v. Pick*, *supra*.

¹⁴) *Rawlins v. Vandyke* (1800) 3 Esp. 250.

¹⁵) *Hindley v. Westmeath* (1827) 6 B. & C. 200; *Johnstone v. Sumner*, *supra*.

¹⁶) *Wilson v. Ford* (1868) L. R. 3 Ex. 63.

¹⁷) *Harrison v. Grady* (1865) 13 L. T. 369.

which justifies her in so leaving him¹), and is living apart from him, she is an agent with authority of necessity to pledge his credit for necessities suitable to her station, unless she is adequately provided for; and if she has been given the custody of the children by reason of his misconduct, to pledge his credit for their maintenance and education, even if they are living with her contrary to his wishes²). The fact that the husband makes the wife an allowance is immaterial unless it is of an adequate amount³), and he is liable for necessities ordered by the wife in the exercise of her authority of necessity, although he may have given the tradesman supplying them express notice not to trust her⁴). Moreover, he is liable to repay any money lent to her for, and expended in, the purchase of necessities⁵).

Effect of adultery by the wife. A husband is under no obligation to support his wife, and consequently she has no presumed or implied authority to pledge his credit, whether they live together or not, and even though he may have himself been guilty of misconduct, after she has committed adultery, unless he connived at or has condoned the offence⁶); provided that if, with a knowledge of the fact of adultery, he continues to hold her out as his agent, as, for instance, by permitting her to continue living in his house with the children, he is liable to any persons dealing with her on the faith of such holding out, and without notice of the determination of her authority, to the same extent as he would have been if the authority had not been determined⁷). If a husband connives at or has condoned his wife's adultery, her authority to pledge his credit is not affected thereby⁸).

Acknowledgment of debt by wife. Where a wife has authority to pledge her husband's credit, she also has implied authority to acknowledge on his behalf a debt incurred in pursuance thereof, and if such an acknowledgment is in writing, signed by her, it will interrupt the operation of the Statute of Limitations⁹).

Husband not liable unless credit is given to him. A husband is not in any case liable for necessities supplied to his wife, whether they live together or not, if exclusive credit is given to the wife, or to some third person, by the person supplying them¹⁰). The mere fact of booking the things to the wife is not, however, conclusive evidence of an intention to give credit to her alone; it must be shown that the tradesman intended to give credit to her or some third person to the exclusion of the husband¹¹). Suing the wife to judgment is conclusive evidence of such an intention¹²).

Cohabitation with mistress. If a man lives with a woman as his wife, she has the same authority to pledge his credit during the continuance of the cohabitation, as if they were legally married¹³). The authority entirely ceases on a separation¹⁴), except where there is an estoppel by reason of holding out¹⁴).

III. Appointment of Agents.

An agent may be appointed and his authority conferred by power of attorney, a formal instrument under seal; by writing under hand only; or merely by word of mouth or signs.

Authority to execute a deed (i. e. an instrument under seal) must be given by deed¹⁵), except where it is executed in the name and presence of the principal and the authority is given by him then and there, in which case it may be given by word of mouth or even by signs¹⁶).

¹) *Houlston v. Smyth* (1825) 3 Bing. 127.

²) *Baseley v. Forder* (1868) L. R. 3 Q. B. 559.

³) *Baker v. Sampson* (1863) 14 C. B. N. S. 383.

⁴) *Harris v. Morris* (1801) 4 Esp. 41.

⁵) *Jenner v. Morris* (1861) 30 L. J. Ch. 361.

⁶) *Govier v. Hancock* (1796) 6 T. R. 603; *Atkins v. Pearce* (1857) 2 C. B. N. S. 763; *Cooper v. Lloyd* (1859) 6 C. B. N. S. 519.

⁷) *Norton v. Fazan* (1798) 1 B. & P. 226.

⁸) *Wilson v. Glossop* (1888) 20 Q. B. D. 354, C. A.

⁹) *Gregory v. Parker* (1808) 1 Camp. 394.

¹⁰) *Bentley v. Griffin* (1814) 5 Taunt. 356; *Harvey v. Norton* (1840) 4 Jur. 42.

¹¹) *Jewsbury v. Newbold* (1857) 26 L. J. Ex. 247.

¹²) *Morel v. Westmoreland* [1904] A. C. 11, H. L.; *French v. Howie* [1906] 2 K. B. 674, C. A.

¹³) *Ryan v. Sams* (1848) 12 Q. B. 460.

¹⁴) *Munro v. De Chemant* (1815) 4 Camp. 215.

¹⁵) *Berkeley v. Hardy* (1826) 5 B. & C. 335.

¹⁶) *Rex v. Longnor* (1833) 4 B. & Ad. 647.

At common law, subject to exceptions which have made the rule of no practical importance in commercial transactions, it is necessary that the appointment of an agent by a corporation should be under its common seal¹⁾. The rule, however, has no application to trading corporations²⁾ or joint stock companies³⁾, and need not, therefore, be further referred to.

Except as above mentioned, and except where otherwise expressly provided by statute, or by the terms of the power or authority (if any) under which the appointment is made, an agent may be appointed for any purpose either by deed, by writing under hand, or merely by word of mouth. This rule applies even when the agent is authorised to sign a written note or memorandum of a contract which, by statute, is unenforceable unless evidenced by writing⁴⁾, or to subscribe the name of his principal to the memorandum of a joint stock company⁵⁾; in either case the authority may be given verbally.

IV. Ratification.

Ratification equivalent to previous authority. Whenever a contract is made or act is done by one person in the name of another, or professedly on another's behalf, the person in whose name or on whose behalf it is made or done may, by subsequently ratifying it, make it as valid and effectual, subject to the conditions and limitations hereafter referred to, as if it had been originally made or done by his authority, whether the person making the contract or doing the act was an agent exceeding his authority or a person without any authority to act for him at all⁶⁾. Every act, whether lawful or unlawful, which is capable of being done by means of an agent, and which is not void in its inception, may be ratified by the person in whose name or on whose behalf it is done⁷⁾. There is a conflict of authority on the question whether a forgery is capable of ratification, so as to make the person whose name is forged civilly liable on the instrument⁸⁾, but it is clear that liability may be incurred in such a case on the ground of estoppel, if the person whose name is forged leads a third person to believe that the signature is his, and so induces the third person to alter his position to his detriment⁹⁾. A joint stock company cannot effectively ratify a transaction which is beyond the scope of its memorandum of association even with the assent of every shareholder, because it has no power to authorise any such transaction, which is necessarily void¹⁰⁾.

Who may ratify. The only person who can effectively ratify an act is the person in whose name or on whose behalf it was professedly done¹¹⁾. It is not sufficient that an agent acting in excess of his authority should intend to contract on behalf of his principal, unless he discloses that intention to the other contracting party¹²⁾. In other words, an undisclosed principal cannot ratify a contract made by his agent in his own name, in excess of his authority¹³⁾. Nor can A. ratify a contract professedly made on behalf of his wife, so as to give him a right of action jointly with his wife¹⁴⁾. It is further necessary that the principal should have been in existence at the time when the act ratified was done, so that a joint stock company cannot ratify a contract made by the promoters before its incorporation, although they may have purported to contract on behalf of the future company¹⁵⁾. It is also necessary that the principal should have been capable of being ascertained at the time when the act

¹⁾ *Kidderminster v. Hardwicke* (1873) L. R. 9 Ex. 13.

²⁾ *South of Ireland Colliery Co. v. Waddle* (1869) L. R. 4 C. P. 617.

³⁾ 8 Edw. VII, c. 69, Sect. 76. See title "Companies", *supra*.

⁴⁾ *Mortlock v. Buller* (1804) 10 Ves. 311; *Griffiths Cycle Corp'n. v. Humber* [1899] 2 Q. B. 414, C. A.

⁵⁾ *In re Whitley* (1886) 32 Ch. D. 337, C. A.

⁶⁾ *Maclean v. Dunn* (1828) 1 M. & P. 761; *Wilson v. Tunman* (1843) 6 M. & G. 236.

⁷⁾ *Wilson v. Tunman*, *supra*.

⁸⁾ Compare *Brook v. Hook* (1871) L. R. 6 Ex. 89, with *M'Kenzie v. British Linen Co.* (1881) 6 App. Cas. 82, H. L., per Lord Blackburn.

⁹⁾ *M'Kenzie v. British Linen Co.*, *supra*.

¹⁰⁾ *Ashbury Carriage Co. v. Riche* (1875) L. R. 7 H. L. 653. See title "Companies" *supra*, as to the doctrine of *ultra vires* generally.

¹¹⁾ *Wilson v. Tunman* (1843) 6 M. & G. 236.

¹²⁾ *Keighley v. Durant* [1901] A. C. 240, H. L.

¹³⁾ *Saunderson v. Griffiths* (1826) 5 B. & C. 909.

¹⁴⁾ *Kelner v. Baxter* (1866) L. R. 2 C. P. 174. See also title "Companies", *supra*.

was done¹⁾; but not that he should have been known, either personally or by name, to the person doing the act²⁾. If an insurance on goods is effected on behalf, generally, of all persons interested, any person interested in the goods may ratify the insurance so far as concerns his interest, and it will then become valid and binding in his favour to that extent³⁾.

Circumstances under which ratification can take place. Ratification can only take place in accordance with and subject to the following rules and qualifications:

1. If it is essential to the validity of the act that it should be done within a certain time, it cannot be ratified after that time has expired, to the prejudice of any third person. Thus, if an option of purchase is given, to be exercised by notice within 3 months, the person entitled to the option cannot, after the expiration of the 3 months, ratify a notice given on his behalf within that period⁴⁾. Nor can an unauthorised stoppage *in transitu* be ratified after the transit has come to an end⁵⁾.
2. The ratification of an act other than a contract cannot retrospectively impose a duty on a third person, so as to render him liable as for non-performance or breach of that duty⁶⁾. A shipowner cannot ratify an unauthorised notice of abandonment given by the pledgee of a policy of insurance on the ship so as to render the insurers liable as for a constructive total loss⁷⁾.
3. In order to justify by ratification an act which, without such ratification, would be tortious on the part of the person doing it, the ratification must take place at a time when the principal might lawfully do the act himself⁸⁾.
4. A payment cannot be ratified after the money paid has been returned to the person who paid it⁹⁾; but the fact that the person on whose behalf a payment is made refuses, at first, to recognise it, does not of itself prevent him from subsequently ratifying it¹⁰⁾.
5. The ratification of a contract must take place within a reasonable time after the contract was made, and before the time, if any, fixed for the commencement of the performance thereof by the other contracting party, in order by the ratification to render it binding upon him¹¹⁾, but the fact that the person on whose behalf the contract is made refuses, at first, to recognise it, does not of itself prevent him from subsequently ratifying it¹²⁾. Nor does the repudiation of the contract by the other contracting party affect the validity of a subsequent ratification¹³⁾.

A contract of marine insurance may be effectively ratified by the owner of the property insured, after the loss of the property, even if he has knowledge of the loss at the time of the ratification¹⁴⁾. This rule, however, is confined to marine insurance, and does not extend, for instance, to fire insurance¹⁵⁾.

Where an offer made to an agent is accepted by him without authority, the principal can ratify the acceptance and thereby make the contract binding on the person who made the offer, notwithstanding that in the meantime the latter has given him (the principal) notice of the withdrawal of the offer, the ratification in such a case being deemed to date back to the time of the unauthorised acceptance, and therefore to make the withdrawal of the offer inoperative¹⁶⁾.

¹⁾ *Watson v. Swann* (1862) 11 C. B. N. S. 756.

²⁾ *Lyell v. Kennedy* (1889) 14 App. Cas. 437, H. L.

³⁾ *Hagedorn v. Oliverson* (1814) 2 M. & S. 485.

⁴⁾ *Dibbins v. Dibbins* [1896] 2 Ch. 348.

⁵⁾ *Bird v. Brown* (1850) 4 Ex. 786.

⁶⁾ *Coore v. Callaway* (1794), 1 Esp. 115; *Solomons v. Dawes* (1794) 1 Esp. 83.

⁷⁾ *Jardine v. Leathley* (1863) 3 B. & S. 700.

⁸⁾ *Bird v. Brown*, *supra*.

⁹⁾ *Walter v. James* (1871) L. R. 6 Ex. 124.

¹⁰⁾ *Simpson v. Eggington* (1855) 10 Ex. 845.

¹¹⁾ *Metropolitan Asylum Board v. Kingham* (1890) 6 T. L. R. 217.

¹²⁾ *Soames v. Spencer* (1822) 1 D. & R. 32.

¹³⁾ *In re Tiedemann* [1899] 2 Q. B. 66.

¹⁴⁾ *Williams v. North China Assurance Co.* (1876) 1 C. P. D. 757, C. A.

¹⁵⁾ *Grover v. Mathews* [1910] 2 K. B. 401.

¹⁶⁾ *Bolton v. Lambert* (1888) 41 Ch. D. 295, C. A. The soundness of this decision has been questioned by the Judicial Committee of the Privy Council: *Fleming v. Bank of New Zealand* [1900] A. C. 577, 587.

How and under what conditions an act may be ratified. It is necessary for the validity of a ratification, that at the time thereof the principal should have full knowledge of all the material circumstances relating to the act ratified¹⁾, except where he shows an intention to take the risk, and ratify the act, whatever the circumstances may have been²⁾; as, for instance, where, an agent having entered into an agreement, the principal wrote a letter saying that he did not know what the agent had agreed to, but that he must support him in all he had done, and it was held that that was a sufficient ratification of the agreement, whatever might be its terms³⁾. It is not necessary for the validity of a ratification that the principal should be aware of the legal effect of the act⁴⁾, or that he should have knowledge of merely collateral circumstances affecting it⁵⁾.

A ratification may be express or implied. It will be implied whenever the conduct of the principal is such as to show that he intends to adopt or recognise the act or transaction in whole or in part, and the adoption of part of a transaction operates as a ratification of the whole⁶⁾. The receipt by the owners of the purchase-money for a ship sold by the master unnecessarily and without authority, is a ratification of the sale if the owners have full knowledge of the circumstances⁷⁾. The receipt by a trustee in bankruptcy of part of the proceeds of a wrongful sale of property of the bankrupt is a ratification of the sale⁸⁾. Where an agent bought goods at a price in excess of his limit, and the principal disposed of some of the goods, it was held that he had thereby ratified the purchase, although he objected to it⁹⁾. But a principal is not deemed to ratify an unauthorised contract merely because, after repudiating it, he enters into negotiations for a compromise with the other contracting party¹⁰⁾. In the case of an agent acting in excess of his authority, a ratification may be implied from the mere silence or acquiescence of the principal¹¹⁾.

It is not necessary that the ratification of a written contract should be in writing, even when the contract is one which is unenforceable unless evidenced by writing¹²⁾, but the execution of a deed can only be ratified by matter of record or by deed¹³⁾.

The directors may ratify acts on behalf of a company which are within the scope of their own powers¹⁴⁾, and a ratification by the directors may be implied from a part performance of the transaction in question¹⁵⁾. If the transaction is beyond the scope of the directors' powers, it can only be effectively ratified by the shareholders¹⁶⁾. A ratification by the shareholders of a transaction within the scope of the memorandum of association may be by ordinary resolution¹⁷⁾, and may be implied from their acquiescence if they have full knowledge of the circumstances¹⁸⁾.

Effect of ratification. Generally speaking, the effect of ratification is to invest all parties (the principal, agent and third persons) with the same rights, duties and liabilities in all respects as if the act ratified had been done by the antecedent authority of the person on whose behalf it was done. If the act is tortious, and is not justified by the ratification, the principal becomes jointly and severally liable with the agent for the wrong¹⁹⁾. If a contract is ratified, the principal and the other

¹⁾ *Lewis v. Read* (1845) 13 M. & W. 834; *Banque Jacques Cartier v. Banque D'Epargne* (1887) 13 App. Cas. 111, P. C.; *Wall v. Cockerell* (1863) 10 H. L. C. 229.

²⁾ *Marsh v. Joseph* [1897] 1 Ch. 214, C. A.

³⁾ *Fitzmaurice v. Bayley* (1856) 6 E. & B. 868.

⁴⁾ *Powell v. Smith* (1872) L. R. 14 Eq. 85.

⁵⁾ *Hilberry v. Hatton* (1864) 2 H. & C. 822.

⁶⁾ *Keay v. Fenwick* (1876) 1 C. P. D. 745.; *Bristow v. Whitmore* (1861) 9 H. L. C. 391; *Frixione v. Tagliaferro* (1856) 10 Moo. P. C. 175.

⁷⁾ *Hunter v. Parker* (1840) 7 M. & W. 322.

⁸⁾ *Brewer v. Sparrow* (1827) 7 B. & C. 310.

⁹⁾ *Cornwall v. Wilson* (1750) 1 Ves. 510. Compare *Forman v. The Liddesdale* [1900] A. C. 190.

¹⁰⁾ *Barrett v. Irvine* [1907] 2 Ir. R. 462, C. A.

¹¹⁾ *The Australia* (1859) 13 Moo. P. C. 132; *Smith v. Hull Glass Co.* (1852) 11 C. B. 897.

¹²⁾ *Maclean v. Dunn* (1828) 1 M. & P. 761.

¹³⁾ *Oxford v. Crow* [1893] 3 Ch. 535.

¹⁴⁾ *Wilson v. West Hartlepool &c. Rail Co.* (1864) 2 D. J. & S. 475.

¹⁵⁾ *Smith v. Hull Glass Co.* (1852) 11 C. B. 897.

¹⁶⁾ *Spackman v. Evans* (1868) L. R. 3 H. L. 171.

¹⁷⁾ *Grant v. U. K. Switchback Rail. Co.* (1888) 40 Ch. D. 135, C. A.

¹⁸⁾ *Evans v. Smallcombe* (1868) L. R. 3 H. L. 249; *London Financial Association v. Kelk* (1883) 26 Ch. D. 107.

¹⁹⁾ *Hilberry v. Hatton* (1864) 2 H. & C. 822.

contracting party become liable to one another as the contracting parties, and the agent is discharged from liability unless he contracted personally¹). The agent is discharged from liability to the principal for acting in excess of his authority²), and can enforce the transaction against the principal as if it had been duly authorised³). The principal becomes liable to pay the agent's commission on the transaction⁴), and to indemnify him against any expenses and liabilities incurred by him in respect thereof⁵).

But the ratification of a contract does not give the person who ratifies it a right of action in respect of any breach thereof committed before the time of the ratification⁶). Nor can the ratification of any act operate to divest or prejudicially affect any proprietary right vested in any third person at the time of the ratification⁷).

V. Authority of Agents.

The authority of an agent may be express or implied. Its nature and extent may be defined by power of attorney, by writing not under seal, or by verbal instructions, or may be inferred from a course of dealing between the principal and agent. Authority may be implied from the situation of the parties, the circumstances of the particular case, the usage of trade, or the conduct of the principal.

An agent's authority, whether express or implied, is necessarily confined within the limits of the powers of the principal.

Authority given in general terms is construed as authority to act only in the usual way, and in the ordinary course of business. Thus, authority to sell and warrant certain goods does not authorise the giving of a warranty at any other time than that of the sale⁸). Authority, on the dissolution of a partnership, to settle the partnership affairs, or to receive all debts owing to, and pay all debts owing by, the firm, does not authorise the drawing, acceptance or indorsement of bills of exchange in the name of the firm⁹). An agent authorised to receive payment of money has, *prima facie*, no authority to receive payment otherwise than in the ordinary course of business and in cash. He may not receive payment by bill of exchange¹⁰); nor even by cheque¹¹), unless he can prove that in the particular business in which he is employed, it is usual to receive payment by cheque¹²); and he has no authority to receive payment by way of set-off or settlement of accounts between himself and the debtor, even though such a mode of payment may be customary in the particular business, unless it is shown that the principal was aware of the custom at the time when he gave the authority¹³).

Where an agent's authority is given in such ambiguous terms, or the instructions given to him are so uncertain, as to be fairly capable of more than one construction, every act done by him in good faith, which is warranted by any one of those constructions, is deemed to have been duly authorised, although the construction adopted and acted upon was not the one intended by the principal¹⁴). Where an agent was instructed to sell goods at such a price as would realize 15s. per ton, net cash, it was held that the instructions might fairly be construed as meaning either 15s. per ton, net cash, such a price as would eventually realize 15s. after allowing for interest, or a *del credere* commission, and that a sale at 15s. 6d., subject to 2 months' credit, was within the authority¹⁵). An authority not given by power

¹) *Spittle v. Lavender* (1821) 5 Moo. 270.

²) *Risbourg v. Bruckner* (1858) 3 C. B. N. S. 812.

³) *Cornwall v. Wilson* (1750) 1 Ves 510.

⁴) *Keay v. Fenwick* (1876) 1 C. P. D. 745, C. A.

⁵) *Bristow v. Whitmore* (1861) 9 H. L. C. 391; *Frixione v. Tagliaferro* (1856) 10 Moo. P. C. 175.

⁶) *Kidderminster v. Hardwick* (1873) L. R. 9 Ex. 13.

⁷) *Donnelly v. Popham* (1807) 1 Taunt. 1.

⁸) *Helyear v. Hawke* (1803) 5 Esp. 72.

⁹) *Abel v. Sutton* (1800) 3 Esp. 108; *Kilgour v. Finlyson* (1789) 1 H. Bl. 156.

¹⁰) *Williams v. Evans* (1866) L. R. 1 Q. B. 352 (auctioneer); *Hine v. S. S. Insurance Syndicate* (1895) 72 L. T. 79, C. A. (insurance broker).

¹¹) *Papé v. Westcott* [1894] 1 Q. B. 272, C. A.

¹²) *Bridges v. Garrett* (1870) L. R. 5 C. P. 451.

¹³) *Blackburn v. Mason* (1893) 68 L. T. 510, C. A. (stockbroker); *Sweeting v. Pearce* (1859) 7 C. B. N. S. 499 (insurance broker).

¹⁴) *Ireland v. Livingston* (1872) L. R. 5 H. L. 395; *Loring v. Davis* (1886) 32 Ch. D. 625.

¹⁵) *Boden v. French* (1851) 10 C. B. 886.

of attorney is construed liberally, having due regard to the object of the authority and the usages of trade¹).

Constructions of powers of attorney. Powers of attorney must be strictly pursued, and are construed as giving only such authority as they confer expressly or by necessary implication²). The following are the most important rules of construction:

1. The operative part of the deed is controlled by the recitals³). Where it was recited that the principal was going abroad, and the operative part proceeded to give authority in general terms, it was held that the authority continued only during his absence abroad³).
2. Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts⁴). A power "to demand, sue for, recover and receive all moneys, debts, and dues whatsoever, and to give sufficient discharges, and transact all business" does not give authority to indorse bills of exchange on the principal's behalf⁵). Nor does a power to purchase goods for a business, either for cash or on credit, give any authority to the agent to borrow money on the principal's behalf⁶).
3. General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers when necessary, and "only when necessary, for that purpose⁷).
4. The deed must be construed so as to include all medium powers necessary for its effective execution⁸).

Implied authority. Every agent has implied authority to do whatever is necessary for or ordinarily incidental to the effective execution of his express authority in the usual way⁹). If he is authorised to enter into a binding contract, he has implied authority to sign a memorandum thereof when such a memorandum is necessary to render the contract enforceable¹⁰). — If employed to get a bill discounted, he has implied authority to warrant it a good bill, but not to indorse it in the principal's name¹). — If authorised to receive and sell certain goods, and to pay himself a debt out of the proceeds, he has implied authority to bring an action against a third person wrongfully detaining the goods¹²). — If authorised to sell a horse at a fair or public market-place, he has implied authority to warrant the horse¹³). — But an agent employed to obtain payment of a bill of exchange from the acceptor, has no implied authority to receive payment subject to a condition that the acceptor shall not be liable for the expenses of protesting the bill for non-payment¹⁴).

An agent who is authorised to conduct a particular trade or business, or generally to act for his principal in matters of a particular nature, or to do a particular class of acts, has implied authority to do whatever is incidental to the ordinary conduct of such a trade or business, or of matters of that nature, or is within the scope of that class of acts, and whatever is necessary for the proper and effective performance of his duties; but not to do anything outside the ordinary scope of his employment and duties. The following may be given as illustrations of these principles: The managing owner of a ship has implied authority to pledge the credit of his co-owners for all such things, including repairs, as are necessary for the usual or suitable employment of the ship¹⁵); but not to insure the vessel on behalf of the

¹) *Pole v. Leask* (1860) 28 Beav. 562.

²) *Bryant v. La Banque du Peuple* [1893] A. C. 170; *Jonmenjoy Coondoo v. Watson* (1884) 9 App. Cas. 561; *Smith v. Prosser* [1907] 2 K. B. 735, C. A.

³) *Danby v. Coutts* (1885) 29 Ch. D. 500.

⁴) *Hogg v. Snaith* (1808), 1 Taunt. 347.

⁵) *Murray v. East India Co.* (1821) 5 B. & A. 204.

⁶) *Jacobs v. Morris* [1902] 1 Ch. 816, C. A.

⁷) *Lewis v. Ramsdale* (1886) 55 L. T. 129; *Harper v. Godsell* (1870) L. R. 5 Q. B. 422.

⁸) *In re Wallace* (1884) 14 Q. B. D. 22, C. A.; *Routh v. Macmillan* (1863) 2 H. & C. 750.

⁹) *Beaufort v. Neeld* (1845) 12 C. & F. 248, H. L.

¹⁰) *Rosenbaum v. Belson* [1900] 2 Ch. 267.

¹¹) *Fenn v. Harrison* (1791) 3 T. R. 757; 4 T. R. 177.

¹²) *Curtis v. Barclay* (1826) 5 B. & C. 141.

¹³) *Brooks v. Hassall* (1883) 49 L. T. 569; *Howard v. Sheward* (1866) L. R. 2 C. P. 148. Compare *Brady v. Todd* (1861) 9 C. B. N. S. 592.

¹⁴) *Bank of Scotland v. Dominion Bank* [1891] A. C. 592.

¹⁵) *The Huntsman* [1894] P. 214; *Barker v. Highley* (1863) 15 C. B. N. S. 27.

co-owners¹⁾, or to agree to pay a sum of money for the cancellation of a charter-party made by him on their behalf²⁾. The manager of a manufacturing company has implied authority to order goods necessary for the company's business³⁾. The general manager of a railway company has implied authority to order medical attendance, on the credit of the company, for a servant of the company⁴⁾; but a station master has no implied authority to pledge the credit of the company for medical attendance to an injured passenger⁵⁾. An agent of an insurance company who has authority to receive the payment of premiums within 15 days of their falling due, has no implied authority to accept payment after that time has expired⁶⁾; nor has a local agent of an insurance company any implied authority to contract for the granting of a policy, that being outside the ordinary scope of the employment of such an agent⁷⁾. The directors of a banking or ordinary trading company have implied authority to borrow money for the purpose of the company's business⁸⁾. A bank manager has no implied authority to arrest or prosecute supposed offenders, on behalf of the bank⁹⁾.

An agent who is authorised to do any act in the course of his trade or business as an agent, has implied authority to do whatever is usually incidental, in the ordinary course of such trade or business, to the execution of his express authority, but not to do anything which is unusual in such trade or business, or which is neither necessary for nor incidental to the execution of his express authority¹⁰⁾. Thus, a horse dealer authorised to sell a horse has implied authority to warrant it¹¹⁾; an insurance broker authorised to subscribe a policy for an underwriter, has implied authority to adjust a loss arising thereunder¹²⁾, or to refer a dispute about such a loss to arbitration¹³⁾. But an insurance broker who is authorised to effect a policy has no implied authority, after having effected the policy, to cancel it, it not being part of a broker's ordinary authority or duty to cancel contracts once completely and validly made¹⁴⁾. Nor has a commission agent who is authorised to buy goods in England on behalf of a foreign principal, implied authority to pledge the principal's credit, even if they have agreed to share the profit and loss, because it is not usual to pledge the credit of the foreign principal in such cases¹⁵⁾.

Authority implied from special usages. Every agent has implied authority to act, in the execution of his express authority, according to the reasonable usages and customs of the particular place, market, or business in which he is employed¹⁶⁾. If an agent is employed to sell goods which it is usual to sell with a warranty, or on credit, he has implied authority to give a warranty on the sale, or to sell them on credit, as the case may be¹⁷⁾. A stockbroker authorised to deal on the London Stock Exchange has implied authority to execute the order according to the reasonable usages and rules and regulations of that Exchange¹⁸⁾. A broker authorised to buy goods in a particular market, by a custom of which a broker so authorised may either buy in his own name or in the name of the principal without giving the principal notice whether he has bought in his own name or not, may bind the

¹⁾ *Robinson v. Gleadow* (1835) 2 Bing. N. C. 156.

²⁾ *Thomas v. Lewis* (1878) 4 Ex. D. 18.

³⁾ *Smith v. Hull Glass Co.* (1852) 11 C. B. 897.

⁴⁾ *Walker v. G. W. Rail Co.* (1867) L. R. 2 Ex. 228.

⁵⁾ *Cox v. Mid. Rail Co.* (1849) 3 Ex. 268.

⁶⁾ *Acey v. Fernie* (1840) 7 M. & W. 151.

⁷⁾ *Linford v. Provincial Insurance Co.* (1864) 34 Beav. 291.

⁸⁾ *MacLae v. Sutherland* (1854) 3 E. & B. 1; *Ex parte Pitman* (1879) 12 Ch. D. 707.

⁹⁾ *Bank of New South Wales v. Owston* (1879) 4 App. Cas. 270, P. C.

¹⁰⁾ See post p. 173 *et seq.*, for the implied authority of factors, brokers, auctioneers and shipmasters.

¹¹⁾ *Howard v. Sheward* (1866) L. R. 2 C. P. 148.

¹²⁾ *Richardson v. Anderson* (1805) 1 Camp. 43, n.

¹³⁾ *Goodson v. Brooke* (1815) 4 Camp. 163.

¹⁴⁾ *Xenos v. Wickham* (1866) L. R. 2 H. L. 296.

¹⁵⁾ *Hutton v. Bulloch* (1874) L. R. 9 Q. B. 572; *Poirier v. Morris* (1853) 2 E. & B. 89.

¹⁶⁾ *Sutton v. Tatham* (1839) 10 A. & E. 27; *Pollock v. Stables* (1848) 12 Q. B. 765; *Foster v. Pearson* (1835) 1 C. M. & R. 849.

¹⁷⁾ *Dingle v. Hare* (1859) 7 C. B. N. S. 145; *Pelham v. Hilder* (1841) 1 Y. & Coll. C. C. 3.

¹⁸⁾ *Young v. Cole* (1837) 3 Bing. N. C. 724; *Harker v. Edwards* (1887) 57 L. J. Q. B. 147, C. A. See also title "Stock Exchange" *infra*.

principal by a contract in his own name according to the custom, such a custom not being considered unreasonable¹).

But an agent has no implied authority to act in accordance with any unreasonable usage or custom, unless the principal was aware of such usage or custom at the time when he conferred the authority²), or to act in accordance with any usage or custom which is unlawful. Any usage or custom which changes the intrinsic character of the contract of agency by turning the agent into a principal, and so giving him an interest at variance with his duty, such as a custom by which an agent for sale may himself purchase the goods in the event of his being unable to find a purchaser, or an agent to buy may sell his own goods to the principal, is unreasonable³); as also is a custom or usage by which an agent authorised to receive payment of money, may receive payment by means of a set-off or settlement of accounts between himself and the person from whom he is authorised to receive payment⁴).

Implied authority of factors. A factor entrusted with goods for sale has implied authority: to sell them in his own name⁵); to sell at such times and for such prices as he thinks best⁶); to sell on reasonable credit⁷); to warrant the goods sold if it is usual to warrant that class of goods⁸); and to receive payment of the price if he sells in his own name⁹). But he has no implied authority to delegate his commission, whether acting under a *del credere* commission or not¹⁰), or to barter or pledge goods, or the bill of lading for goods, entrusted to him for sale¹¹). Even if he is the acceptor of bills of exchange drawn by the principal to be provided for out of the proceeds of the goods, he has no implied authority to raise money by pledging them to meet the bills¹²).

Brokers. A broker has implied authority: where he has entered into a contract, to sign an entry in his book, or to sign bought and sold notes, on behalf of both buyer and seller, as a memorandum of the contract for the purpose of satisfying provisions of the 4th section of the Sale of Goods Act¹³); to sell on reasonable credit, where there is no usage to the contrary¹⁴); and to receive payment of the price in accordance with the terms of the contract, where he sells for an undisclosed principal¹⁵). He has no implied authority, as such: to contract in his own name¹⁶); to cancel contracts made by him¹⁷); to pay total or partial losses on behalf of underwriters¹⁸); to receive payment for an undisclosed principal otherwise than in accordance with the terms of the original contract¹⁹); to delegate his authority, whether acting under a *del credere* commission or not²⁰); to pledge bills entrusted to him to get discounted²¹), in the absence of a particular custom sanctioning the pledge²²); or to receive payment of the price of goods sold by him, where the principal is disclosed²³).

¹ *Cropper v. Cook* (1868) L. R. 2 C. P. 194.

² *Robinson v. Mollett* (1874) L. R. 7 H. L. 802.

³ *Ibid.*; *Hamilton v. Young* (1881) L. R. 7 Ir. 289; *Bostock v. Jardine* (1865) 3 H. & C. 700.

⁴ *Sweeting v. Pearce* (1859) 7 C. B. N. S. 449; *Blackburn v. Mason* (1893) 68 L. T. 510, C. A.; *Anderson v. Sutherland* (1897) 13 T. L. R. 163.

⁵ *Baring v. Corrie* (1818) 2 B. & A. 137.

⁶ *Smart v. Sandars* (1846) 3 C. B. 380.

⁷ *Houghton v. Matthews* (1803) 3 B. & P. 485, 489.

⁸ *Dingle v. Hare* (1859) 7 C. B. N. S. 145.

⁹ *Drinkwater v. Goodwin* (1775) Cowp. 251.

¹⁰ *Cockran v. Irlam* (1813) 2 M. & S. 301.

¹¹ *Guerreiro v. Peile* (1820) 3 B. & A. 616; *Martini v. Coles* (1813) 1 M. & S. 140; *Newson v. Thornton* (1805) 6 East, 17. See, however, the Factors Act, referred to *infra*, as to third persons dealing with him in good faith.

¹² *Gill v. Kymer* (1821) 5 Moo. 513.

¹³ *Parton v. Crofts* (1864) 16 C. B. N. S. 11; *Thompson v. Gardiner* (1876) 1 C. P. D. 777. See title "Sale of Goods", *infra*.

¹⁴ *Boorman v. Brown* (1842) 3 Q. B. 511.

¹⁵ *Campbell v. Hassel* (1816) 1 Stark. 233.

¹⁶ *Baring v. Corrie* (1818) 2 B. & A. 137. But a custom to do so is reasonable, see *supra*, p. 172.

¹⁷ *Xenos v. Wickham* (1866) L. R. 2 H. L. 296.

¹⁸ *Bell v. Auldjo* (1784) 4 Doug. 48.

¹⁹ *Campbell v. Hassel*, *supra*.

²⁰ *Henderson v. Barnewell* (1827) 1 Y. & J. 387.

²¹ *Haynes v. Foster* (1833) 2 C. & M. 237.

²² *Foster v. Pearson* (1835) 1 C. M. & R. 849.

²³ *Linck v. Jameson* (1886) 2 T. L. R. 206, C. A.

Auctioneers. An auctioneer has implied authority at a sale by auction to sign a contract or memorandum thereof on behalf of both buyer and seller¹). He has no implied authority, as such: to rescind any contract made by him²); to warrant goods sold³); to take a bill of exchange in payment, where it is provided that the price shall be paid to him⁴); to sell by private contract, even if the auction proves abortive and he is offered more than the reserve price⁵); to deliver goods sold, without payment, or to allow a set-off against the price⁶).

Shipmasters. The extent of a shipmaster's authority to sell or hypothecate the ship or cargo, or to bind his principals personally by contracts, is determined by the law of the country to which the ship belongs, and the ship's flag operates as notice to all the world that his authority is limited by the law of that flag⁷). Thus, if an English cargo is hypothecated by the master of an Italian ship, the validity of the bond is governed by Italian law, and if found to be valid by that law, it will be enforced by the English Courts, although the conditions required for its validity by English law were not fulfilled⁸).

A shipmaster is appointed for the purpose of conducting the voyage on which the ship is engaged to a favourable termination, and has implied authority to do all things necessary for the due and proper pursuance of that voyage⁹). He also has implied authority to enter into contracts in respect of the usual employment of the ship¹⁰). But he can only bind personally those persons who appointed him or were privy to his appointment¹¹). If the ship is chartered, and the possession and control thereof given up to the charterers, who appoint the master, the owners are not liable on a bill of lading or other contract entered into by the master¹²). The same principle applies if the vessel is chartered, and the possession and control given up, to the master himself¹³).

The master of a British ship has implied authority:

1. To contract for the conveyance of merchandise according to the usual employment of the ship¹⁴).
2. To enter into a charter-party on behalf of the owners when he is in a foreign port and there is difficulty in communicating with them¹⁵).
3. To render salvage services to vessels in distress¹⁶).
4. To enter into reasonable towage agreements¹⁷).
5. To enter into reasonable salvage agreements, if necessary for the benefit of the owners; but not merely for the purpose of saving the lives of the master and crew without regard to saving the owners' property¹⁸).
6. To pledge his principals' credit, at home or abroad, for fit and proper repairs and stores necessary for the equipment of the vessel on her voyage, such as a prudent owner himself would order¹⁹), provided it is reasonably necessary to obtain them on the principals' credit²⁰).
7. To borrow money on his principals' credit, at home or abroad, if the advance is necessary for the prosecution of the voyage, communication

¹) See cases cited *ante* p. 163.

²) *Nelson v. Aldridge* (1818) 2 Stark. 435.

³) *Payne v. Leconfield* (1882) 51 L. J. Q. B. 642.

⁴) *Williams v. Evans* (1866) L. R. 1 Q. B. 352.

⁵) *Marsh v. Jelf* (1862) 3 F. & F. 234.

⁶) *Brown v. Staton* (1816) 2 Chit. 353.

⁷) *Lloyd v. Guibert* (1865) 6 B. & S. 100; *The Karnak* (1869) L. R. 2 P. C. 505; *The Gaetano and Maria* (1882) 7 P. D. 137, C. A.

⁸) *The Gaetano and Maria*, *supra*.

⁹) *Arthur v. Barton* (1840) 6 M. & W. 138.

¹⁰) *Grant v. Norway* (1851) 10 C. B. 665.

¹¹) *Mitcheson v. Oliver* (1855) 5 E. & B. 419.

¹²) *Baumwooll Manufactur v. Furness* [1893] A. C. 8, H. L.

¹³) *Frazer v. Marsh* (1811) 13 East, 238; *Colvin v. Newberry* (1832) 1 C. & F. 283, H. L.

¹⁴) *Runquist v. Ditchell* (1801) 3 Esp. 64.

¹⁵) *The Fanny* (1883) 5 Asp. M. C. 75.

¹⁶) *The Thetis* (1869) L. R. 2 Ad. 365.

¹⁷) *Wellfield v. Adamson* (1884) 5 Asp. M. C. 214.

¹⁸) *The Renpor* (1883) 8 P. D. 119; *The Mariposa* [1896] P. 273. Unreasonable contracts for towage or salvage services will not be enforced.

¹⁹) *Frost v. Oliver* (1853) 1 C. L. R. 1003.

²⁰) *Gunn v. Roberts* (1874) L. R. 9 C. P. 331.

with the principals is not practicable, and they have no solvent agent on the spot¹).

8. To hypothecate the ship, cargo, and freight (bottomry), when communication with the respective owners is impracticable, and it is necessary to obtain supplies or repairs in order to prosecute the voyage, and impossible to obtain them on personal credit, or in any other way than by hypothecation²). When ship and cargo are hypothecated for repairs, the shipowners are bound to indemnify the owners of the cargo from liability under the bond³).
9. To hypothecate the cargo alone, when it is necessary for the benefit of the cargo or for the prosecution of the voyage, and communication with the owners is impracticable⁴).
10. To sell the ship, in cases of absolute or urgent necessity, when there is no other course open to the master as a prudent and skilful man, and it is not practicable to communicate with the owners⁵).
11. To sell part of the cargo — but not in any case the whole of it — in cases of extreme necessity — where repairs are absolutely necessary for the prosecution of the voyage, and communication with the owners of the cargo is impracticable⁶).

The master has no implied authority to vary any contract made by the owners⁷); to agree to the substitution of another voyage for that agreed upon between the owners and freighters, or make any contract outside the scope of that voyage⁸); to sign a bill of lading at a lower freight than the owners contracted for⁹), or making the freight payable to any other persons than the owners¹⁰); or to sign a bill of lading for goods not actually received, or for a greater quantity than are actually received, on board¹¹).

VI. Delegation of Agency.

No agent has power to delegate his authority, or to appoint a sub-agent to do any act on behalf of the principal, except with the express or implied authority of the principal. Authority to delegate is implied:

1. Where the employment of a sub-agent is justified by the usage of the particular trade or business in which the agent is employed, provided that such usage is not unreasonable, nor inconsistent with the express terms of the agent's authority or instructions¹²).
2. Where the principal knows, at the time of the agent's appointment, that the agent intends to delegate his authority¹³).
3. Where, from the conduct of the principal and agent, it may reasonably be presumed to have been their intention that the agent should have a power of delegation¹⁴).
4. Where, in the course of the agent's employment, unforeseen emergencies arise which render delegation necessary¹⁴).
5. Where the authority is of such a nature as to necessitate its execution wholly or in part by means of a deputy or sub-agent¹³).

¹) *Arthur v. Barton* (1840) 6 M. & W. 138; *Beldon v. Campbell* (1851) 6 Ex. 886; *Edwards v. Havill* (1853) 14 C. B. 107.

²) *Stainbank v. Shepard* (1853) 13 C. B. 418; *Kleinwort v. Cassa Marittima Genoa* (1877) 2 App. Cas. 156, P. C.

³) *Benson v. Duncan* (1849) 3 Ex. 644.

⁴) *The Sultan* (1859) Swa. 504; *The Onward* (1873) L. R. 4 Ad. 38.

⁵) *The Australia* (1859) 13 Moo. P. C. 132; *Cobeguid Marine Insurance Co. v. Barteaux* (1875) L. R. 6 P. C. 319; *Ireland v. Thomson* (1847) 4 C. B. 149; *Hunter v. Parker* (1840) 7 M. & W. 322.

⁶) *Benson v. Duncan* (1849) 3 Ex. 644; *Australasian S. N. Co. v. Morse* (1872) L. R. 4 P. C. 222; *Atlantic Mutual Ins. Co. v. Huith* (1879) 16 Ch. D. 474, C. A.; *Acatos v. Burns* (1878) 3 Ex. D. 282, C. A.

⁷) *Grant v. Norway* (1851) 10 C. B. 665.

⁸) *Burton v. Sharpe* (1810) 2 Camp. 529.

⁹) *Pickernell v. Jauberry* (1862) 3 F. & F. 217.

¹⁰) *Reynolds v. Jex* (1865) 7 B. & S. 86.

¹¹) *Grant v. Norway*, *supra*; *Cox v. Bruce* (1886) 18 Q. B. D. 147, C. A.; *Thorman v. Burt* (1886) 54 L. T. 349, C. A.

¹²) *De Bussche v. Alt* (1877) 8 Ch. D. 286, C. A.

¹³) *Quebec &c. Rail Co. v. Quinn* (1858) 12 Moo. P. C. 232.

¹⁴) *De Bussche v. Alt*, *supra*; *Gwilliam v. Twist* [1895] 2 Q. B. 84, C. A.

6. Where the act done by the substitute or sub-agent is purely ministerial, and does not involve confidence or discretion¹⁾.

There is no privity of contract between a principal and sub-agent, as such, whether the sub-agent was appointed with the authority of the principal or not; and the rights and duties arising out of the contracts between the principal and agent, and between the agent and sub-agent, respectively, are only enforceable by and against the immediate parties thereto²⁾. But the relationship of principal and agent may be established by an agent between his principal and a third person, if the agent is expressly or impliedly authorised to constitute such relationship, and it is the intention of the agent and of the third person that such relationship should be constituted, and where it is so constituted, there is privity of contract between the third person and the principal to the same extent as if the third person had been appointed agent by the principal himself³⁾.

Where a sub-agent is appointed without the authority, express or implied, of the principal, the principal is not bound by his acts⁴⁾ or receipts⁵⁾, nor has the sub-agent any lien, or other rights of an agent, as against the principal⁶⁾.

VII. Duties of Agents.

To perform undertaking. Every agent who enters into an undertaking for valuable consideration is bound, under liability in damages for failure, to perform the undertaking⁷⁾; but no agent is liable in damages for the mere non-performance of that which he has undertaken to do gratuitously⁸⁾. Every agent is bound to perform his undertaking in person, unless he is expressly or impliedly authorised by the principal to delegate his duties⁹⁾.

To obey instructions, and in the absence thereof, to act according to usage and for the principal's benefit. It is the duty of every agent to strictly pursue the terms of his authority and obey the lawful instructions of his principal¹⁰⁾; and, in the absence of express instructions, to act according to any lawful and reasonable usage applicable to the matter in hand¹¹⁾, or where there is no special usage, and in all matters left to his discretion, to act in good faith to the best of his judgment solely for the benefit of the principal¹²⁾.

To keep principal's property separate, and keep accounts. It is the duty of every agent: 1. To keep the money and property of the principal separate from his own and from that of third persons¹³⁾. If he mixes the principal's property with his own, everything not proved by him to be his own will be deemed to be the principal's¹⁴⁾; — 2. To preserve and be constantly ready with correct accounts of all his dealings and transactions in the course of his agency¹⁵⁾; — 3. To produce to the principal or a proper person appointed by him, all books and documents in his hands relating to the principal's affairs¹⁶⁾; — 4. To pay over to the principal on demand, money received in the course of the agency to the use of the principal¹⁷⁾. If an agent pays his principal's

¹⁾ *Hemming v. Hale* (1859) 7 C. B. N. S. 487; *Ex parte Birmingham Banking Co.* (1868) L. R. 3 Ch. 651.

²⁾ *New Zealand and Australian Land Co. v. Watson* (1881) 7 Q. B. D. 374, C. A.; *Montagu v. Forwood* [1893] 2 Q. B. 350; *Schmaling v. Tomlinson* (1815) 6 Taunt. 147.

³⁾ *De Bussche v. Alt* (1877) 8 Ch. D. 286, C. A.; *Powell v. Jones* [1905] 1 K. B. 11, C. A.

⁴⁾ *Wray v. Kemp* (1883) 26 Ch. D. 169; *Doe v. Robinson* (1837) 3 Bing. N. C. 677.

⁵⁾ *Dunlop v. De Murrieta* (1886) 3 T. L. R. 166, C. A.

⁶⁾ *Solly v. Rathbone* (1814) 2 M. & S. 298.

⁷⁾ *Turpin v. Bilton* (1843) 5 M. & G. 455.

⁸⁾ *Balfe v. West* (1853) 12 C. B. 466.

⁹⁾ See Part VI, *supra*.

¹⁰⁾ *Smart v. Sandars* (1846) 3 C. B. 380; *Bertram v. Godfray* (1830) 1 Knapp, 381; *Barber v. Taylor* (1839) 5 M. & W. 527. He is not bound to obey unlawful instructions, e. g. instructions to an auctioneer not to accept less than a certain sum at a sale without reserve: *Bezwell v. Christie* (1776) Cowp. 395.

¹¹⁾ *In re Overweg* [1900] 1 Ch. 209; *Wiltshire v. Sims* (1808) 1 Camp. 258; *Papè v. Westacott* [1894] 1 Q. B. 272, C. A.

¹²⁾ *Gray v. Haig* (1854) 20 Beav. 219.

¹³⁾ *Clarke v. Tipping* (1846) 9 Beav. 284.

¹⁴⁾ *Lupton v. White* (1808) 15 Ves. 432.

¹⁵⁾ *Gray v. Haig*, *supra*; *Clarke v. Tipping*, *supra*.

¹⁶⁾ *Dadswell v. Jacobs* (1887) 34 Ch. D. 278, C. A.

¹⁷⁾ *Harsant v. Blaine* (1887) 56 L. J. Q. B. 511, C. A.

money into his own banking account, he is responsible for the amount, in the event of the failure of the banker, even if he is acting gratuitously¹⁾; and if he improperly refuses to pay over money on demand he is chargeable with interest from the date of the demand²⁾.

To exercise due skill, care and diligence. An agent acting for reward is bound to exercise such skill, care, and diligence in the performance of his undertaking as is usual or necessary in or for the ordinary or proper conduct of the business in which he is employed, or is reasonably necessary for the proper performance of the duties undertaken by him³⁾. A broker who is employed on commission to buy and ship goods is not, however, bound to inspect the goods in order to see whether they are of the quality bought, because such inspection is not part of a broker's ordinary business⁴⁾. Nor, where a matter is referred to the opinion of a broker in the capacity of an arbitrator, is he bound to exercise any skill in order to form a correct opinion⁵⁾. In all cases, the degree of skill, care and diligence required from an agent acting for reward, depends upon the nature of the agency, and upon the ordinary course of the particular business⁶⁾.

An agent acting gratuitously is bound to exercise such skill as he actually possesses, and such care and diligence as he would exercise in his own affairs⁷⁾; and if he has held himself out to the principal as possessing skill adequate to the performance of the particular undertaking, he is bound to exercise such care and skill as is reasonably necessary for the performance thereof⁸⁾.

Every agent, whether acting gratuitously or for reward, is bound to exercise reasonable care and diligence in looking after and protecting the money and property of his principal in his possession or custody, or under his control⁹⁾.

To pay over money received to principal's use. An agent who receives money to his principal's use, is bound to pay over or account for such money to the principal, even if the money was received in respect of a void or illegal transaction¹⁰⁾; provided that where the money was obtained by the agent wrongfully, or was paid to him under a mistake of fact or for a consideration which failed, he may discharge himself from liability to the principal by showing that he has repaid it to the person from whom he obtained or received it¹¹⁾, and where the money was paid to him in respect of a voidable contract, by showing that the contract has been rescinded, and the money repaid, even if the rescission was on the ground of his own fraud¹²⁾; provided also that if the agency is in itself unlawful, no action will lie by the principal for the recovery of money received in pursuance thereof¹³⁾.

An agent who receives money to the use of two or more principals jointly is bound to account to them jointly, and is not bound to pay any portion to one or some only of them without the consent of the other or others, whatever may be the rights of the principals *inter se*¹⁴⁾.

An agent, when accounting for money received to the use of the principal, is entitled to take credit for all just allowances, and for any sums expended by him with the principal's authority¹⁵⁾.

As to disputing principal's title. No agent is permitted to deny the title of his principal to any goods or chattels entrusted to him by, or which he has expressly

¹⁾ *Massey v. Banner* (1820) 1 Jac. & W. 241.

²⁾ *Harsant v. Blaine* (1887) 56 L. J. Q. B. 511, C. A.

³⁾ *Lee v. Walker* (1872) L. R. 7 C. P. 121; *Parker v. Rolls* (1854) 14 C. B. 691; *Beal v. South Devon Rail Co.* (1864) 3 H. & C. 337; *Harmer v. Cornelius* (1858) 5 C. B. N. S. 236.

⁴⁾ *Zwilchenbart v. Alexander* (1860) 1 B. & S. 234.

⁵⁾ *Pappa v. Rose* (1872) L. R. 7 C. P. 32, 525.

⁶⁾ *Lambert v. Heath* (1846) 15 M. & W. 486.

⁷⁾ *Moffatt v. Bateman* (1869) L. R. 3 P. C. 115; *Wilson v. I rett* (1843) 12 L. J. Ex. 264; *Whitehead v. Greetham* (1825) 2 Bing. 464.

⁸⁾ *Beal v. South Devon Rail Co.* (1864) 3 H. & C. 337.

⁹⁾ *Massey v. Banner* (1820) 1 Jac. & W. 241; *Reeve v. Palmer* (1859) 5 C. B. N. S. 84.

¹⁰⁾ *Tenant v. Elliott* (1797) 1 B. & P. 3; *De Mattos v. Benjamin* (1894) 63 L. J. Q. B. 248; *Bridger v. Savage* (1885) 15 Q. B. D. 363, C. A.

¹¹⁾ See *infra*, p. 199.

¹²⁾ *Murray v. Mann* (1848) 2 Ex. 538.

¹³⁾ *Booth v. Hodgson* (1795) 6 T. R. 405; *Sykes v. Beadon* (1879) 11 Ch. D. 170.

¹⁴⁾ *Heath v. Chilton* (1844) 12 M. & W. 632; *Jones v. Outhbertson* (1873) L. R. 8 Q. B. 504.

¹⁵⁾ *Dale v. Sollet* (1767) 4 Burr. 2133; *Bayntun v. Cattle* (1833) 1 M. & Rob. 265.

or impliedly agreed to hold on behalf of, the principal¹); provided that where a third person is entitled to the goods or chattels as against the principal, and claims them from the agent, the agent may set up the title of that third person, if he does so on his behalf and by his authority, or if he has delivered up the goods or chattels to him, unless at the time when the goods or chattels were entrusted to the agent by the principal, or when he agreed to hold them on the principal's behalf, he had notice of the claim of such third person²).

To make full disclosure of any personal interest. No agent is permitted to enter into any transaction in which he has a personal interest in conflict with his duty to his principal, unless the principal, with a full knowledge of all the material circumstances, and of the exact nature and extent of the agent's interest, consents³). The reported cases in illustration of this rule are very numerous, but the rule itself is so well established that it would be superfluous to refer to more than a few of them. No agent for sale of property may purchase it himself, and no agent to purchase may buy his own property, or property in which he has an interest, on the principal's behalf, unless he makes full disclosure to the principal, and the fact that he pays or charges a fair price is immaterial⁴). It is not sufficient for the agent to merely disclose that he has an interest: he must fully disclose all the material facts, and the exact nature and extent of his interest⁵). Any special custom or usage which is inconsistent with this rule is considered unreasonable, and is not binding on the principal unless he had knowledge of it at the time when he conferred the authority⁶). If any transaction is entered into in violation of the rule, the principal, when the circumstances come to his knowledge, may repudiate the transaction, or affirm it and recover from the agent any profit made by him in respect thereof⁷).

To make full disclosure etc. when dealing with the principal. Where an agent enters into any contract or transaction with his principal, he must act with the most perfect good faith, and make full and fair disclosure of all the material circumstances, and of everything known to him respecting the subject-matter of the contract or transaction which would be likely to influence the conduct of the principal⁸). When any question arises as to the validity of any such contract or transaction, or of any gift made by a principal to his agent, the burden of proving that no advantage was taken by the agent of his position, or of the confidence reposed in him, and that the transaction was entered into in the most perfect good faith and after full disclosure, lies on the agent⁹). But the principal, if he seeks to set aside any such contract or transaction, on the ground of want of disclosure or good faith, must take proceedings for that purpose within a reasonable time after the circumstances upon which he relies come to his knowledge⁹).

Must not make use of information acquired in course of the agency. No agent is permitted, unless with the consent of his principal, either during or after the termination of the agency, to make use in any manner prejudicial to the interests of the principal, of any materials or information acquired in the course of the agency¹⁰).

¹ *Zulueta v. Vinent* (1851) 1 D. M. & G. 315; *Betteley v. Reed* (1843) 4 Q. B. 511; *Henderson v. Williams* [1895] 1 Q. B. 521, C. A.

² *Biddle v. Bond* (1865) 6 B. & S. 225; *Ross v. Edwards* (1895) 73 L. T. 100, P. C.; *Rogers v. Lambert* [1891] 1 Q. B. 318, C. A.; *Ex parte Davies* (1881) 19 Ch. D. 86, C. A.

³ *Rothschild v. Brookman* (1831) 2 Dow. & C. 188, H. L.; *Parker v. McKenna* (1874) L. R. 10 Ch. 96; *Tyrrell v. Bank of London* (1862) 10 H. L. C. 26; *Williamson v. Barbour* (1877) 9 Ch. D. 529; *Robinson v. Mollett* (1874) L. R. 7 H. L. 802.

⁴ *Gillette v. Peppercorne* (1840) 3 Beav. 78; *Rothschild v. Brookman*, *supra*; *Salomans v. Pender* (1865) 3 H. & C. 639.

⁵ *Dunne v. English* (1874) L. R. 18 Eq. 524.

⁶ *Hamilton v. Young* (1881) 7 L. R. Ir. 289; *Robinson v. Mollett*, *supra*; *De Bussche v. Alt* (1877) 8 Ch. D. 286, C. A.

⁷ *In re Cape Breton Co.* (1884) 26 Ch. D. 221; *Lagunas Nitrate Co. v. Lagunas Syndicate* [1899] 2 Ch. 392, C. A.; *Benson v. Heathorn* (1842) 1 Y. & Coll. C. C. 326; *Rothschild v. Brookman*, *supra*.

⁸ *Imperial Mercantile Credit Co. v. Coleman* (1873) L. R. 6 H. L. 189; *Gluckstein v. Barnes* [1900] A. C. 240, H. L.; *McPherson v. Watt* (1877) 3 App. Cas. 254, H. L.; *Lewis v. Hillman* (1852) 3 H. L. C. 607; *Savery v. King* (1856) 5 H. L. C. 627.

⁹ *Wentworth v. Lloyd* (1864) 10 H. L. C. 589; *De Montmorency v. Devereux* (1840) 7 C. & F. 188, H. L.; *Flint v. Woodin* (1852) 9 Hare, 618.

¹⁰ *Robb v. Green* [1895] 2 Q. B. 315, C. A.; *Lamb v. Evans* [1893] 1 Ch. 218, C. A.; *Kirchner v. Gruban* [1909] 1 Ch. 413.

Duty to account for secret profits. An agent is not permitted to acquire any personal profit or benefit in the course or by means of his agency without the knowledge and consent of the principal. If he does acquire any such profit or benefit without the principal's consent, he is bound to pay over or account for it to the principal, even if, in acquiring it, he incurred a risk of loss, and the principal suffered no injury thereby¹). But where a principal is aware that his agent will receive remuneration from third persons in the course of the agency, and acquiesces in his so doing under a misapprehension as to the extent of the remuneration, such remuneration is not, in the application of this rule, deemed to be acquired without the consent of the principal, unless the agent misinformed or intentionally misled the principal as to the extent thereof, or, with the knowledge that he laboured under a misapprehension, neglected to correct it²). Where an agent secretly sells to his principal property which belonged to him (the agent) before the commencement of the agency, the principal cannot claim as a secret profit the difference between the price charged to him and the market value, or between that price and the price originally paid by the agent for the property³). The only remedy of the principal in such a case is the rescission of the transaction³).

Duties of factors. It is the duty of a factor to give his principal the free and unbiassed use of his judgment and discretion, to keep and render just and true accounts, and keep the principal's property separate from his own and from that of third persons⁴); to keep each sale separate and distinct from other transactions, and not to barter goods entrusted to him for sale⁵); to account for goods sold, pay over the proceeds, and deliver unsold goods to the principal, on demand⁶); to keep goods entrusted to him for sale with as much care as would be taken by a prudent man in respect of his own goods⁷), and not to pledge them unless expressly authorised to do so⁸); to insure goods consigned to him, if instructed to do so, or if he has been in the habit of doing so⁹); and not to purchase the principal's goods for himself, without full and fair disclosure¹⁰).

Duties of brokers. It is the duty of a broker to contract in the principal's name, subject to any special instructions or usage to the contrary¹¹); to execute contracts in such a way as to be legally binding on both parties, and give each party a right to sue thereon¹²); to inform his principal of the actual terms of any contract made on his behalf¹³); to comply with statutory provisions in entering into contracts, notwithstanding a custom amongst brokers to disregard such provisions¹⁴); to make a careful estimate of the value of goods which he is instructed to sell, so that he may not sell them at an undervalue¹⁵); to exercise his skill and fairly communicate his opinion to his principal¹⁶); not to deliver goods sold by him, otherwise than in accordance with the terms of sale¹⁷); and not to sell his own property to his principal, nor buy the principal's property himself, without full and fair disclosure¹⁸).

¹) *Parker v. McKenna* (1874) L. R. 10 Ch. 96; *Imperial Mercantile Credit Co. v. Coleman* (1873) L. R. 6 H. L. 189; *Williams v. Stevens* (1866) L. R. 1 P. C. 352; *Burrell v. Mossop* (1888) 4 T. L. R. 270, C. A.; *De Bussche v. Alt* (1877) 8 Ch. D. 286, C. A.; *Powell v. Jones* [1905] 1 K. B. 11, C. A.; *Hippisley v. Knee* [1905] 1 K. B. 1; *Gluckstein v. Barnes* [1900] A. C. 240, H. L.

²) *Baring v. Stanton* (1876) 3 Ch. D. 502, C. A.; *Norreys v. Hodgson* (1897) 13 T. L. R. 421, C. A.

³) *In re Cape Breton Co.* (1884) 29 Ch. D. 795, C. A.; *Burland v. Earle* [1902] A. C. 83, P. C.

⁴) *Clarke v. Tipping* (1846) 9 Beav. 284; *Gray v. Haig* (1854) 20 Beav. 219.

⁵) *Guerriero v. Peile* (1820) 2 B. & A. 616.

⁶) *Topham v. Braddick* (1809) 1 Taunt. 572.

⁷) *Coggs v. Bernard*, 2 Ld. Raym. 909, 918.

⁸) *Martini v. Coles* (1813) 1 M. & S. 140.

⁹) *Smith v. Lascelles* (1788) 2 T. R. 187.

¹⁰) *Clarke v. Tipping* (1846) 9 Beav. 284.

¹¹) *Baring v. Corrie* (1818) 2 B. & A. 137.

¹²) *Grant v. Fletcher* (1826) 5 B. & C. 436; *Robinson v. Mollett* (1874) L. R. 7 H. L. 802; *Beckhouson v. Hamblett* [1901] 2 K. B. 73, C. A.

¹³) *Johnson v. Kearley* [1908] 2 K. B. 82, C. A.

¹⁴) *Neilson v. James* (1882) 9 Q. B. D. 546, C. A.

¹⁵) *Solomon v. Barker* (1862) 2 F. & F. 726.

¹⁶) *Ex parte Dyster* (1816) 2 Rose, 349.

¹⁷) *Boorman v. Brown* (1842) 11 C. & F. 1, H. L.

¹⁸) *Wilson v. Short* (1847) 6 Hare, 366.

Duties of auctioneers. It is the duty of an auctioneer to sell for ready money only, in the absence of instructions to the contrary¹⁾; to disclose his principal²⁾; to see that the deposit is duly paid³⁾, and where it is paid to him, to hold it as a stakeholder until completion of the sale⁴⁾; to accept the highest *bonâ fide* bid at a sale without reserve, notwithstanding express instructions from the principal to the contrary⁵⁾; to account for the proceeds of goods sold, to the person from whom he received them⁶⁾; and not to deliver goods sold until they are paid for, nor allow any deduction from the price, unless authorised to do so by the principal⁷⁾.

VIII. Liabilities of Agents to their Principals.

In respect of contracts made on principal's behalf. Subject to any special usage⁸⁾, an agent does not incur any personal liability to his principal in respect of any contract entered into on the principal's behalf, and in pursuance of his authority⁹⁾, unless he was acting under a *del credere* commission, in which case he is personally responsible to the principal for the due performance of the contract by the other contracting party¹⁰⁾.

Where an agent, in the course of his agency, signs a bill of exchange in his own name as drawer or indorser, and the principal becomes the holder of the bill, the question whether the agent is personally liable to the principal on the bill depends upon what was the real intention of the parties. If the agent intended to bind himself, or if, by signing in his own name without qualification, he led the principal to believe that such was his intention, and to act in a way in which he would not have acted but for such belief, the agent is liable to the principal on the bill¹¹⁾. Otherwise, he is not so liable¹¹⁾.

For negligence or other breach of duty. An agent is liable to make good any legal damage¹²⁾ suffered by his principal as a natural and probable consequence¹³⁾ of the agent's negligence or other breach of duty in the course of the agency, the word "negligence" meaning his neglect or omission to exercise such a degree of skill, care and diligence as it is his duty to exercise¹⁴⁾. If an agent, being instructed to insure goods, neglects to do so, and the goods are lost, the agent is liable to the principal to the same extent as an insurer would have been¹⁵⁾. Where an agent was intrusted, and undertook, to warehouse certain goods at a particular place, and warehoused a portion of them at another place, where they were destroyed, it was held that the agent was liable to the principal for their value, though the destruction was not brought about by any negligence on the agent's part¹⁶⁾. If a broker sells goods on the terms that they are to be paid for on delivery, he is liable to his principal for any loss suffered in consequence of delivering the goods without payment¹⁷⁾. So, if a broker sells goods below the price at which he is authorised to sell¹⁸⁾ or sells them at an undervalue in consequence of not having made an estimate of their value in accordance with usage¹⁹⁾. An auctioneer who takes a bill of exchange

¹⁾ *Sykes v. Giles* (1839) 5 M. & W. 645.

²⁾ *Franklyn v. Lamond* (1847) 4 C. B. 637.

³⁾ *Hibbert v. Bayley* (1860) 2 F. & F. 48.

⁴⁾ *Gray v. Gutteridge* (1827) 3 C. & P. 40.

⁵⁾ *Warlow v. Harrison* (1858) 1 E. & E. 295, 309.

⁶⁾ *Crowther v. Elgood* (1887) 34 Ch. D. 691, C. A.

⁷⁾ *Brown v. Staton* (1816) 2 Chit. 353.

⁸⁾ As to the special usage under which insurance brokers are personally answerable for the payment of premiums, see title Marine Insurance, *infra*.

⁹⁾ *Risbourn v. Bruckner* (1858) 3 C. B. N. S. 812; *Gill v. Shepherd* (1902) 8 Com. Cas. 48.

¹⁰⁾ *Hornby v. Lacy* (1817) 6 M. & S. 166; *Morris v. Cleasby* (1816) 4 M. & S. 566.

¹¹⁾ *Castrique v. Buttigieg* (1855) 10 Moo. P. C. 94; *Goupy v. Harden* (1816) 2 Marsh. 454; *Kidson v. Dilworth* (1818) 5 Price, 564.

¹²⁾ A principal cannot recover damages from his agent for neglecting to effect an illegal insurance according to instructions: *Webster v. De Tastet* (1797) 7 T. R. 157.

¹³⁾ The damage is not recoverable if it is too remote a consequence of the negligence or breach of duty: *In re United Service Co.* (1870) L. R. 6 Ch. 212.

¹⁴⁾ As to the degree of skill &c required, see Part VII, *supra*.

¹⁵⁾ *Smith v. Lascelles* (1788) 2 T. R. 189.

¹⁶⁾ *Lilley v. Doubleday* (1881) 7 Q. B. D. 510, C. A.

¹⁷⁾ *Boorman v. Brown* (1842) 3 Q. B. 511; 11 C. & F. 1.

¹⁸⁾ *Dufresne v. Hutchinson* (1810) 3 Taunt. 117.

¹⁹⁾ *Solomon v. Barker* (1862) 2 F. & F. 726.

in payment of the price of goods sold is liable to his principal for the amount, in the event of the bill being dishonoured¹). A shipmaster who signs a bill of lading which is incorrectly dated is liable for any damages thereby caused to his principals²). An auctioneer who sells goods under conditions requiring the payment of an immediate deposit, is liable in an action for negligence if he allows the highest bidder to go away without paying the deposit³).

Where an agent is clearly authorised to do a particular act, or to effect a particular transaction, he is not liable to the principal for any loss or injury suffered in consequence of the imprudent or improper nature of the act or transaction in itself, and not in consequence of any negligence in carrying out what he is authorised to do⁴). Nor is an agent liable for the consequences of strictly following his instructions⁵); nor, in the absence of express instructions, for any loss or injury resulting from acting in accordance with usage and in the ordinary course of business⁶), or on the best advice he can obtain under the circumstances⁷), or where he uses his best judgment in a matter of pure discretion⁸).

Measure of damages for negligence or breach of duty. The measure of damages in an action by a principal against his agent for negligence or any other breach of duty is the loss actually sustained by the principal, being such loss as in the ordinary course of things would naturally result, or such as, under the particular circumstances, the agent might reasonably have expected to result, from such negligence or breach of duty⁹). Where an agent, who was instructed not to part with certain goods until they were paid for, parted with them, and the purchaser failed to pay the price, it was held that the measure of damages was the full value of the goods¹⁰). Where an agent, instructed to buy certain stock, sold stock of his own to the principal, fraudulently representing that it belonged to third persons, and the principal held the stock for some months after discovery of the fraud, it was held that the measure of damages was the difference between the price paid by the principal and the price at which he could have resold on discovery of the fraud, and not the loss ultimately sustained by him¹¹). If an agent, employed to sell property, renders the contract of sale void by the omission of a statutory requirement, the measure of damages is the amount the principal would have obtained if the contract had been validly made¹²). Where an agent wrongfully abandoned his agency, it was held that the principal was entitled to recover compensation for loss of business in consequence of injury to his credit, and in consequence of the suspension of the business, the losses being such as, under the particular circumstances, the agent might reasonably have expected to result as a consequence of his breach of duty¹³).

Liability of agents accepting bribes. Where an agent accepts any money or property in the course of his agency by way of a bribe, he is liable to account for the money, or for the highest value of the property while in his possession, and to pay over the amount to the principal, with interest at the rate of 5 per cent. per annum from the date of the receipt of the bribe; and if he has been induced by the bribe to depart from his duty to the principal, he is also liable, jointly and severally with the person who bribed him, to make good any loss suffered by the principal in consequence of such departure from duty, without being entitled to take into consideration the amount of the bribe so accounted for or paid over to the principal¹⁴).

¹) *Ferrers v. Robbins* (1835) 2 C. M. & R. 152.

²) *Stumore v. Breen* (1886) 12 App. Cas. 698, H. L.

³) *Hibbert v. Bayley* (1860) 2 F. & F. 48.

⁴) *Overend v. Gibb* (1872) L. R. 5 H. L. 480.

⁵) *Pariente v. Lubbock* (1855) 8 D. M. & G. 5.

⁶) *Russell v. Hankey* (1794) 6 T. R. 12; *Commonwealth Portland Cement Co. v. Weber* [1905] A. C. 66; *Lambert v. Heath* (1846) 15 M. & W. 486.

⁷) *Miles v. Bernard* (1795) 2 Peake, 61.

⁸) *Cullerne v. L. & S. Building Society* (1890) 25 Q. B. D. 485, C. A.

⁹) *Salveson v. Rederi Aktiebolaget Nordstjernan* [1905] A. C. 302; *Hadley v. Bazendale* (1854) 9 Ex. 341; *Cassaboylou v. Gibb* (1882) 11 Q. B. D. 797, C. A.

¹⁰) *Stearine Co. v. Heintzmann* (1864) 17 C. B. N. S. 56.

¹¹) *Waddell v. Blockey* (1879) 4 Q. B. D. 678.

¹²) *Neilson v. James* (1882) 9 Q. B. D. 546, C. A.

¹³) *Boyd v. Fitt* (1864) 11 L. T. 280.

¹⁴) *Mayor of Salford v. Lever* [1891] 1 Q. B. 168, C. A.; *Phosphate Sewage Co. v. Hartmont* (1887) 5 Ch. D. 394, 448, C. A. *Cohen v. Kushke* (1900) 83 L. T. 102; *Hovenden v. Millhoff* (1900) 83 L. T. 41, C. A.; *McKay's Case* (1875) 2 Ch. D. 1, C. A.; *Eden v. Ridsdale's Lamp Co.* (1889)

He also forfeits any commission or remuneration which would otherwise have been payable to him¹).

The claim of a principal in respect of a bribe received by his agent is barred by the Statute of Limitations after the expiration of six years from the time when the principal became aware of the bribery²).

The principal is justified in dismissing without notice any agent who accepts a bribe in the course of the agency³).

Liability to pay interest. An agent is not, as a general rule, liable to pay interest upon money received by him to the use of his principal⁴). But where he receives or deals with the money improperly, and in breach of his duty, he is liable to pay interest from the time when he so receives or deals with it⁵). If, for instance, he has undertaken to invest the money, and instead of doing so, makes use of it for his own purposes, he is bound to pay interest thereon⁶); and he is liable to pay interest on bribes⁷), or profits made in the course of the agency without the principal's knowledge⁸), and in all cases of fraud or wilful concealment⁹). Where an agent wrongfully refuses to pay over on demand, money due to the principal, he is liable to pay interest from the date of the demand¹⁰).

Liability for sub-agents and co-agents. An agent who employs a sub-agent, though with the knowledge of the principal, is liable to the principal for money received by the sub-agent to the principal's use¹¹), and is also responsible to the principal for the fraud, negligence, and other breaches of duty of the sub-agent in the course of his employment¹²). But co-agents, not being partners, are not, as such, responsible to the principal for the acts and defaults of each other¹³).

IX. Rights of Agents against their Principals.

1. Right of Remuneration.

Founded on an express or implied contract. The right of an agent to remuneration for his services is founded in all cases on an express or implied contract between the principal and agent¹⁴). A contract for the payment of remuneration may be implied from custom or usage, from the conduct of the principal, or from the circumstances of the particular case¹⁵). Such a contract is implied from the mere employment of a person who transacts agency business as a profession, in the absence of evidence showing that there was no intention to remunerate him¹⁶).

Where the remuneration of an agent is provided for by an express contract, no other contract which is inconsistent with the terms thereof, whether founded on custom or otherwise, can be implied; but evidence of a particular custom or usage may be given for the purpose of explaining any ambiguity in the terms of the express contract, or for the purpose of incorporating a provision which is not inconsistent

58 L. J. Q. B. 579, C. A. An agent who accepts a bribe is also criminally liable; see the Prevention of Corruption Act, 1906, printed in the Appendix, *infra*.

¹) *Andrews v. Ramsay* [1903] 2 K. B. 635.

²) *Metropolitan Bank v. Heiron* (1880) 5 Ex. D. 319, C. A.

³) *Boston Deep Sea Fishing Co. v. Ansell* (1888) 39 Ch. D. 339, C. A.

⁴) *Webster v. British Empire Assurance Co.* (1880) 15 Ch. D. 169, C. A.; *Turner v. Burkinshaw* (1869) L. R. 2 Ch. 488.

⁵) *Wolfe v. Findlay* (1847) 6 Hare, 66.

⁶) *Burdick v. Garrick* (1869) L. R. 5 Ch. 233; *Barwell v. Parker* (1751) 2 Ves. 364.

⁷) See *supra*.

⁸) *Tyrrell v. Bank of London* (1862) 10 H. L. C. 26.

⁹) *Hardwicke v. Vernon* (1808) 14 Ves. 504.

¹⁰) *Harsant v. Blaine* (1887) 56 L. J. Q. B. 511, C. A. *Edgell v. Day* (1865) L. R. 1 C. P. 80.

¹¹) *Mackersy v. Ramsays* (1843) 9 C. & F. 818; *In re Mitchell* (1884) 54 L. J. Ch. 342; *Skinner v. Weguelin* (1882) 1 C. & E. 12.

¹²) *Swire v. Francis* (1877) 3 App. Cas. 106, P. C.; *Eccossaise S. S. Co. v. Lloyd* (1891) 7 T. L. R. 76.

¹³) *Cullerne v. L. and S. Building Society* (1890) 25 Q. B. D. 485, C. A.; *Land Credit Co. v. Fermoyle* (1870) L. R. 5 Ch. 763.

¹⁴) *Taylor v. Brewer* (1813) 1 M. & S. 290; *Roberts v. Smith* (1859) 4 H. & N. 315.

¹⁵) *Bryant v. Flight* (1839) 5 M. & W. 114; *Hulse v. Hulse* (1856) 17 C. B. 711.

¹⁶) *Miller v. Beale* (1879) 27 W. R. 403; *Turner v. Reeve* (1901) 17 T. L. R. 592; *Manson v. Baillie* (1855) 2 Macq. 80.

with the terms thereof¹). Where it was agreed that an agent should receive commission on "all sales effected or orders executed by him", it was held that he was entitled to commission on sales which resulted in bad debts, although by a custom of the trade commission was not payable in respect of such sales, the custom being inconsistent with the terms of the contract²). So, if it is agreed that an agent shall receive a fixed commission, to be payable only in the event of success, he cannot claim on a *quantum meruit* in the absence of success³).

Where the remuneration is not provided for by an express contract, the amount thereof, and the conditions under which it becomes payable, must be ascertained from the custom or usage of the particular trade or business⁴). If there is no particular custom or usage, the implied contract is to pay reasonable remuneration for the services performed.

On what transactions commission can be claimed. Where the remuneration of an agent, by express agreement or usage, is a commission upon transactions brought about by him, or is only payable in the event of a transaction being brought about by him, he is not entitled to be paid the commission or remuneration unless the transaction in respect of which it is claimed is a direct, though not necessarily an immediate, result of his agency⁵), and is a transaction the bringing about of which was within the scope of his employment⁶); but it is not necessary, in order to entitle the agent to remuneration, that he should complete the transaction, or even that he should be acting for the principal at the time of the completion thereof⁷).

An agent or his representatives may be entitled to commission upon business arising wholly after his death or after his employment has ceased, if it arises as the result of his introduction⁸). Whether he is so entitled or not, depends upon the nature and terms of his employment⁸).

Remuneration may be payable, though the principal does not benefit. Where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquires no benefit from his services, and except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed falls through, provided it does not fall through in consequence of any act or default of the agent⁹). A *del credere* commission is due and payable immediately the contract in respect of which it is claimed is made¹⁰).

Wrongfully preventing agent from earning remuneration. Where a principal, in breach of the contract of agency, refuses to complete a transaction, or otherwise prevents the agent from earning his remuneration, the agent is entitled to recover from the principal, by way of damages, the loss actually sustained by him as a natural and probable consequence of the breach of contract¹¹); and where nothing further remains to be done by the agent to carry out his undertaking, the measure of dam-

¹) *Ward v. Stuart* (1856) 1 C. B. N. S. 88; *Fullwood v. Akerman* (1862) 11 C. B. N. S. 737; *Battams v. Tompkins* (1892) 8 T. L. R. 707, C. A.; *Caine v. Horsfall* (1847) 1 Ex. 519; *Allan v. Sundius* (1862) 1 H. & C. 123.

²) *Bower v. Jones* (1831) 8 Bing. 65.

³) *Green v. Mules* (1861) 30 L. J. C. P. 343; *Lott v. Outhwaite* (1893) 10 T. L. R. 76, C. A.; *Barnett v. Isaacson* (1888) 4 T. L. R. 645, C. A.

⁴) *Read v. Rann* (1830) 10 B. & C. 438; *Broad v. Thomas* (1830) 7 Bing 99; *Baring v. Stanton* (1876) 3 Ch. D. 502.

⁵) *Gibson v. Crick* (1862) 1 H. & C. 142; *Tribe v. Taylor* (1876) 1 C. P. D. 505; *Millar v. Radford* (1903) 19 T. L. R. 575, C. A.; *Green v. Bartlett* (1863) 14 C. B. N. S. 681; *Barnett v. Isaacson* (1888) 14 T. L. R. 645, C. A.; *Bayley v. Chadwick* (1878) 39 L. T. 429.

⁶) *Toulmin v. Millar* (1887) 58 L. T. 96, H. L.

⁷) *Green v. Bartlett, supra*; *Burchell v. Gowrie Collieries* [1910] A. C. 614; *Wilkinson v. Martin* (1837) 8 C. & P. 1.

⁸) *Wilson v. Harper* [1908] 2 Ch. 370; *Bilbee v. Hasse* (1889) 5 T. L. R. 677; *Salomon v. Brownfield* (1896) 12 T. L. R. 239; *Boyd v. Mathers* (1893) 9 T. L. R. 443, C. A.; *Weare v. Brimsdown Lead Co.* (1910) 103 L. T. 429.

⁹) *Webb v. Rhodes* (1837) 3 Bing. N. C. 732; *Moir v. Marten* (1891) 7 T. L. R. 330, C. A.; *Fisher v. Drewett* (1879) 48 L. J. Ex. 32, C. A.; *Green v. Lucas* (1876) 33 L. T. 584, C. A.; *Lockwood v. Levick* (1860) 8 C. B. N. S. 603; *Passingham v. King* (1898) 14 T. L. R. 392, C. A.; *White v. Turnbull* (1898) 78 L. T. 726, C. A.; *Beale v. Bond* (1901) 84 L. T. 313, C. A.

¹⁰) *Solly v. Weiss* (1818) 2 Moo. 420.

¹¹) *Turner v. Goldsmith* [1891] 1 Q. B. 544, C. A.; *Emmens v. Elderton* (1852) 4 H. L. C. 624. Compare *Rhodes v. Forwood* (1876) 1 App. Cas. 256.

ages is the full amount that he would have earned if the principal had duly completed the transaction, or otherwise carried out the contract of agency¹).

Where the authority of an agent is revoked by the principal, or the agency is otherwise determined, after it has been partially executed, or after the agent has endeavoured to execute it, the question whether the agent is entitled to any, and if so, to what remuneration for the work previously done, depends upon the nature and terms of his employment, and the custom or usage of the particular business in which he is employed²).

Cases where remuneration cannot be recovered. An agent cannot recover remuneration in any of the following cases:

1. Where, at the time when the services in respect of which he claims remuneration were rendered, he was not legally qualified to act in the capacity in which he claims the remuneration³).
2. In respect of any transaction which is obviously, or to his knowledge, unlawful; as for instance, in respect of an illegal insurance⁴). But if the transaction is only unlawful in the event of a certain license not being obtained, and it is not part of the agent's duty to obtain the license, he is not precluded from claiming remuneration by the absence of the license⁵).
3. In respect of any gaming or wagering contract, or of any services in relation thereto or connection therewith⁶).
4. In respect of any unauthorised transaction not ratified by the principal⁷).
5. In respect of any transaction entered into by him in violation of the duties arising from the fiduciary character of the relationship between him and the principal, even if the principal adopts the transaction⁸).
6. Where he has been guilty of wilful breach of duty or misconduct in the course of the agency⁹); as for instance, where an agent for sale fraudulently takes a secret commission from the purchaser¹⁰), or a confidential agent neglects to keep regular and proper accounts¹¹), or a shipmaster is guilty of habitual drunkenness¹²). But an agent who improperly retains secret profits, without fraud, does not thereby forfeit his remuneration, though he is accountable for the profits¹³); and the fact that he makes fraudulent overcharges in respect of some transactions, does not disentitle him to remuneration in respect of other separate and distinct transactions in which he has acted honestly¹⁴).
7. Where, in consequence of his negligence or breach of duty, the principal derives no benefit from his services¹⁵).

2. Rights of Reimbursement and Indemnity.

Subject to the following paragraphs of this section, every agent has a right, founded on an implied contract, to be indemnified by his principal against all losses and liabilities, and to be reimbursed all expenses, incurred by him in the execution of his authority¹⁶); and where the agent is sued for money due to his principal he has a right to set off the amount of any such losses, liabilities, or expenses¹⁷). The

¹) *Prickett v. Badger* (1856) 1 C. B. N. S. 296; *Harris v. Petherick* (1878) 39 L. T. 543.

²) *Simpson v. Lamb* (1856) 17 C. B. 603; *Noah v. Owen* (1886) 2 T. L. R. 364, C. A.

³) *Palk v. Force* (1848) 12 Q. B. 666; *In re Sweeting* [1898] 1 Ch. 268.

⁴) *Allkins v. Jupe* (1877) 2 C. P. D. 375.

⁵) *Haines v. Busk* (1814) 5 Taunt. 521.

⁶) 8 & 9 Vict. c. 109; 55 Vict. c. 9.

⁷) *Toppin v. Healey* (1863) 11 W. R. 466; *Gillow v. Aberdare* (1893) 9 T. L. R. 12, C. A.

⁸) *Salomans v. Pender* (1865) 3 H. & C. 639.

⁹) *Hurst v. Holding* (1810) 3 Taunt. 32; *In re Hereford Waggon Co.* (1876) 2 Ch. D. 621, C. A.

¹⁰) *Andrews v. Ramsay* [1903] 2 K. B. 635.

¹¹) *White v. Lincoln* (1803) 8 Ves. 363.

¹²) *The Macleod* (1880) 5 P. D. 254.

¹³) *Hippesley v. Knee* [1905] 1 K. B. 1.

¹⁴) *Niddale Taendstikfabrik v. Bruster* (1906) 75 L. J. Ch. 798.

¹⁵) *Hill v. Featherstonhaugh* (1831) 7 Bing. 569; *Huntley v. Bulwer* (1839) 6 Bing. N. C. 111; *Dalton v. Irwin* (1830) 4 C. & P. 289.

¹⁶) *Thacker v. Hardy* (1878) 4 Q. B. D. 685, C. A.; *Campbell v. Lorkworthy* (1894) 9 T. L. R. 528, C. A.; *Smith v. Lindo* (1858) 5 C. B. N. S. 587; *Warlow v. Harrison* (1858) 1 E. & E. 295, 309; *In re Fox* (1880) 15 Ch. D. 400, C. A.

¹⁷) *Alaager v. Currie* (1844) 12 M. & W. 751; *Cropper v. Cook* (1868) L. R. 3 C. P. 194.

right of indemnity extends to all liabilities incurred by the agent, not merely to actual losses. The fact that, by the rules of the exchange in which the agent dealt, he cannot be sued for the balance of his liabilities, having been declared a defaulter and paid a composition thereon, without the permission of the Exchange Committee, does not prevent him from recovering from his principal the full amount of the liabilities incurred on his behalf¹). The right to reimbursement extends to damages and expenses incurred in defending an action on the principal's behalf, if the agent was acting within the scope of his authority in defending the action²), and also to a sum paid by way of compromise of such an action, if the principal had notice thereof, and did not give any instructions as to the course to be pursued, even though the action could not, under the circumstances, have been successful³). An agent who makes advances to his principal has a right of action, as well as a lien, for the recovery of such advances; provided that a *del credere* agent cannot sue for advances which are covered by sums due to the principal the payment of which he has guaranteed⁴).

Where an agent is authorised to deal at a particular place, or in a particular market, he is entitled to be indemnified by the principal against all losses and liabilities, and to be reimbursed all expenses, incurred by him in the execution of his authority under the rules or regulations, or according to the customs or usages, of that place or market⁵); provided that where the rule, regulation, custom or usage is unreasonable, the agent can only claim such indemnity or reimbursement, if it is shown that the principal had knowledge of the rule, regulation, custom or usage in question at the time when he conferred the authority on the agent⁶).

Cases where an agent is not entitled to indemnity or reimbursement. An agent is not entitled to indemnity against any losses or liabilities, or reimbursement of any expenses, incurred by him:

1. In respect of any transaction which is obviously, or to his knowledge, unlawful⁷). This rule does not apply where the transaction is *prima facie* lawful and is only unlawful by reason of circumstances unknown to the agent⁸).
2. In respect of any gaming or wagering transaction⁹).
3. In respect of any unauthorised act on transaction not ratified by the principal¹⁰).
4. In consequence of any act of his own which is obviously, or to his knowledge, unlawful¹¹).
5. In consequence of his own negligence¹²), default¹³), insolvency¹³), or breach of duty¹⁴).

3. Right of Lien.

Definitions. A "possessory lien" is a right of a person in possession of goods or chattels belonging to another, to retain possession thereof until the satisfaction

¹) *Lacey v. Hill* (1870) L. R. 18 Eq. 182.

²) *Frizione v. Tagliaferro* (1855) 10 Moo. P. C. 175.

³) *Pettman v. Keble* (1850) 9 C. B. 701.

⁴) *Graham v. Ackroyd* (1852) 10 Hare, 192.

⁵) *Harker v. Edwards* (1887) 57 L. J. Q. B. 147, C. A.; *Bayliffe v. Butterworth* (1847) 1 Ex. 425; *Reynolds v. Smith* (1893) 9 T. L. R. 474, H. L.; *Taylor v. Stray* (1857) 2 C. B. N. S. 175, 197; *Walter v. King* (1897) 13 T. L. R. 270, C. A.; *In re Overweg* [1900] 1 Ch. 209; *Macoun v. Erskine* [1901] 2 K. B. 493, C. A. And see title "Stock Exchange", *infra*.

⁶) *Perry v. Barnett* (1885) 15 Q. B. D. 388, C. A.; *Coates v. Pacey* (1892) 8 T. L. R. 474, C. A.; *Seymour v. Bridge* (1885) 14 Q. B. D. 460.

⁷) *Josephs v. Pebrer* (1825) 3 B. & C. 639; *Allkins v. Jupe* (1877) 2 C. P. D. 375; *Scott v. Brown* [1892] 2 Q. B. 724, C. A.

⁸) *Adamson v. Jarvis* (1827) 4 Bing. 66; *Betts v. Gibbins* (1834) 2 A. & E. 57.

⁹) 8 & 9 Vict. c. 109; 55 Vict. c. 9; *Tatam v. Reeve* [1893] 1 Q. B. 44; *Levy v. Warburton* (1901) 70 L. J. K. B. 708.

¹⁰) *Warwick v. Slade* (1811) 3 Camp. 127; *Fisher v. Liverpool Insurance Co.* (1874) L. R. 9 Q. B. 418; *Service v. Bain* (1893) 9 T. L. R. 95, C. A.; *Frizione v. Tagliaferro* (1856) 10 Moo. P. C. 175.

¹¹) *Allkins v. Jupe*, *supra*; *In re Parker* (1882) 21 Ch. D. 408, C. A.; *Ex parte Mather* (1797) 3 Ves. 373.

¹²) *Lewis v. Samuel* (1846) 8 Q. B. 685; *Thomas v. Atherton* (1878) 10 Ch. D. 185, C. A.

¹³) *Duncan v. Hill* (1873) L. R. 8 Ex. 242; *Allen v. Wingrove* (1901) 17 T. L. R. 261, C. A.

¹⁴) *Ellis v. Pond* [1898] 1 Q. B. 426, C. A.

of some debt or obligation by the owner of the goods or chattels. A "general lien" is a right to retain goods or chattels for a general balance of account, or until the satisfaction of debts or obligations incurred independently of the goods or chattels subject to the lien. A "particular lien" is a right of retention only in respect of debts or obligations incurred in connection with the particular goods or chattels subject to the lien.

Possessory lien of agents. Every agent has either a general or particular possessory lien on the goods and chattels of his principal in his possession¹⁾, in respect of all lawful claims he may have as such agent²⁾ against the principal, either for remuneration earned, or advances made, or losses or liabilities incurred, in the course of the agency, or otherwise arising in the course of the agency³⁾, provided:

1. That the possession of the goods or chattels was lawfully obtained by him in the course of the agency, and in the same capacity in which the lien is claimed⁴⁾. If the goods are unlawfully obtained, as, for instance, by misrepresentations, the agent has no lien thereon.⁵⁾ Nor has an agent a lien on goods acquired otherwise than in his capacity as such agent⁶⁾, as where a document is entrusted to an agent merely for safe custody⁷⁾.
2. That there is no express agreement inconsistent with the right of lien⁸⁾. But the lien is not excluded unless there is an express agreement which is clearly inconsistent therewith⁹⁾.
3. That the goods or chattels were not delivered to the agent with express directions, or for a special purpose, inconsistent with the right of lien¹⁰⁾.

An agent's lien is a particular lien only, unless there is an agreement, express or implied, with the principal, by which the agent is entitled to a general lien¹¹⁾. Such an agreement may be implied from a course of dealing between the principal and agent, or from a trade custom or usage¹¹⁾. Factors¹²⁾, insurance brokers¹³⁾, stockbrokers¹⁴⁾, and bankers¹⁵⁾ have a general lien by implication from custom.

The lien of an agent attaches only upon goods or chattels in respect of which the principal has, as against third persons, the right or power to create the lien, and except in the case of money or negotiable instruments, is confined to the rights of the principal in the goods or chattels at the time when the lien attaches, and is subject to all rights of third persons available against the principal at that time¹⁶⁾. But the lien of an agent upon money or negotiable instruments deposited with him by or in the name of the principal is not affected by the rights of third persons, and is as effectual as if the principal were the absolute owner of the money or securities, provided that at the time when the lien attaches the agent has no notice of any defect in the title of the principal¹⁷⁾. If, however, the agent has notice, at the time when his lien would otherwise attach, of a defect in the title of the principal, he can claim

¹⁾ *Kinloch v. Craig* (1790) 3 T.R. 119, 783, H. L. Constructive possession is sufficient: *Bryans v. Nix* (1839) 4 M. & W. 775.

²⁾ *Houghton v. Matthews* (1803) 3 B. & P. 485.

³⁾ *Williams v. Millington* (1788) 1 H. Bl. 81; *Hammonds v. Barclay* (1802) 2 East 227; *Ridgway v. Lees* (1856) 25 L. J. Ch. 584.

⁴⁾ *Houghton v. Matthews* (1803) 3 B. & P. 485; *Stevens v. Biller* (1883) 25 Ch. D. 31, C. A.

⁵⁾ *Madden v. Kempster* (1807) 1 Camp. 12; *Walshe v. Provan* (1853) 8 Ex. 843.

⁶⁾ *Dixon v. Stansfeld* (1850) 10 C. B. 398.

⁷⁾ *Muir v. Fleming* (1823) D. & R. N. P. C. 29; *In re Long* (1881) 16 Ch. D. 617; *Misa v. Currie* (1876) 1 App. Cas. 554, H. L.

⁸⁾ *Walker v. Birch* (1795) 6 T. R. 258; *In re Bowes* (1886) 33 Ch. D. 586.

⁹⁾ *Brandao v. Barnett* (1846) 12 C. & F. 787, H. L.; *Fisher v. Smith* (1878) 4 App. Cas. 1, H. L.

¹⁰⁾ *Brandao v. Barnett*, *supra*; *Colvin v. Hartwell* (1837) 5 C. & F. 484, H. L.; *Burn v. Brown* (1817) 2 Stark. 272.

¹¹⁾ *Bock v. Gorrisen* (1861) 30 L. J. Ch. 39.

¹²⁾ *Baring v. Corrie* (1818) 2 B. & A. 137.

¹³⁾ *Snook v. Davidson* (1809) 2 Camp. 218.

¹⁴⁾ *Jones v. Peppercorne* (1858) Johns. 430.

¹⁵⁾ *London Chartered Bank v. White* (1879) 4 App. Cas. 413, P. C.

¹⁶⁾ *In re Humphreys* [1898] 1 Q. B. 520, C. A.; *Hollis v. Claridge* (1813) 4 Taunt. 807; *London and County Bank v. Ratcliffe* (1881) 6 App. Cas. 722, H. L.

¹⁷⁾ *Jones v. Peppercorne* (1858) Johns. 430; *Misa v. Currie* (1876) 1 App. Cas. 554, H. L.; *Brandao v. Barnett*, *supra*.

no lien, even on money or negotiable instruments, as against the person of whose rights be had notice¹).

Lien of sub-agents. If a sub-agent is employed without the authority, express or implied, of the principal, he has no lien as against the principal²). If he is employed with the express or implied authority of the principal he has the same right of lien, general or particular, on the goods and chattels of the principal, in respect of claims arising in the course of the sub-agency, as he would have had against the agent employing him if such agent had been the owner of the goods and chattels, and such right of lien is not liable to be defeated by any settlement between the principal and agent to which the sub-agent is not a party³). He also has the same right of general lien on the goods and chattels of the principal, whether arising in the course of the sub-agency or not, as he would have had against the agent employing him if such agent had been the owner of the goods and chattels; provided that, as against the principal, such right of lien is only available to the extent of the lien, if any, to which the agent would have been entitled if the goods and chattels had been in his possession⁴), except where at the time when the lien attaches the sub-agent believes on reasonable grounds that the agent employing him is the owner of the goods and chattels and is acting in the matter of the sub-agency on his own behalf⁵). In the latter case the lien of the sub-agent is as extensive in all respects as it would have been if the agent had been the owner of the goods and chattels⁵).

How lien extinguished. The lien of an agent is extinguished by his entering into any agreement, or acting in any capacity, which is inconsistent or incompatible with the continuance of the lien⁶). It may also be extinguished by waiver, express or implied. A waiver is implied whenever the conduct of the agent is such as to indicate an intention to abandon the lien, or is inconsistent with the continuance thereof⁷), as, for instance, where he takes other security for the claim secured by the lien, if the nature of the security or circumstances under which it is taken are inconsistent with the continuance of the lien or indicate an intention to abandon it⁸). An agent's lien is extinguished if he voluntarily parts with the possession of the goods or chattels subject thereto⁹), unless he is induced to part with the possession by fraud¹⁰), or the circumstances under which he does so are consistent with the continuance of the lien, and are such as to clearly show an intention to retain the lien, as if he gives up the goods or chattels to the principal in order that he may sell them and account for the proceeds to the agent¹¹). The lien is not affected where possession is obtained from the agent unlawfully or without his consent¹²). Nor is it affected by the circumstance that the claim secured by the lien becomes barred by the Statute of Limitations¹³), or that the principal becomes bankrupt or insolvent¹⁴), or sells or otherwise deals with the goods or chattels subject to the lien¹⁵), after it has attached.

X. Relations between Principal and Third Persons.

1. What acts of Agents bind their Principals.

Acts within scope of actual authority. Where an act done by an agent professedly on his principal's behalf is within the scope of his actual authority, it is immaterial with what motive the agent does the act, and the principal is bound by it even though

¹) *Cuthbert v. Roberts* [1909] 2 Ch. 226, C. A.; *Solomons v. Bank of England* (1810) 13 East, 135.

²) *Solly v. Rathbone* (1814) 2 M. & S. 298.

³) *Fisher v. Smith* (1878) 4 App. Cas. 1, H. L.; *Mildred v. Maspons* (1883) 8 App. Cas. 874, H. L.

⁴) *In re Johnson* (1881) 8 Q. B. D. 262, C. A.; *In re Jones* [1905] 2 Ch. 219, C. A.; *Mildred v. Maspons*, *supra*.

⁵) *Mann v. Forrester* (1814) 4 Camp. 60; *Taylor v. Kymer* (1832) 3 B. & Ad. 320; *Montagu v. Forwood* [1893] 2 Q. B. 350, C. A.

⁶) *Forth v. Simpson* (1849) 13 Q. B. 680; *How v. Kirchner* (1856) 11 Moo. P. C. 4.

⁷) *Jacobs v. Latour* (1828) 5 Bing 130; *Weeks v. Goode* (1859) 6 C. B. N. S. 367.

⁸) *Cowell v. Simpson* (1809) 16 Ves. 275; *Tamvaco v. Simpson* (1866) L. R. 1 C. P. 363; *In re Morris* [1908] 1 K. B. 473, C. A.

⁹) *Sweet v. Pym* (1800) 1 East, 4.

¹⁰) *Wallace v. Woodgate* (1824) R. & M. 193.

¹¹) *North Western Bank v. Poynter* [1895] A. C. 56, H. L.

¹²) *Dicas v. Stockley* (1836) 7 C. & P. 587; *In re Carter* (1886) 55 L. J. Ch. 230.

¹³) *Curwen v. Milburn* (1889) 42 Ch. D. 424, C. A.

¹⁴) *Ex parte Beall* (1883) 24 Ch. D. 408, C. A.; *Robson v. Kemp* (1802) 4 Esp. 233.

¹⁵) *Godin v. London Assurance Co.* (1758) 1 W. Bl. 103; *West of England Bank v. Batchelor* (1882) 51 L. J. Ch. 199.

it may be done fraudulently in furtherance of the agent's own interests, and in abuse of his authority, provided that the person dealing with the agent acts in good faith and without notice of the fraud¹).

Acts within scope of ostensible authority. Every act done by an agent in the course of his employment on behalf of the principal, and within the scope of his ostensible authority, binds the principal, unless the agent is in fact unauthorised to do the particular act, and the person dealing with him has notice that in doing such act he is exceeding his actual authority²). The reported cases illustrating this rule, which applies to undisclosed principals³), are very numerous. In the first place it is well established that no special instructions given by the principal affect the validity of acts within the scope of the agent's ostensible authority, with respect to third persons who have no notice of such instructions⁴). — If an agent is entrusted with a form of promissory note or acceptance in blank signed by the principal, with authority on certain conditions to fill it up and convert it into a promissory note or bill of exchange for a certain amount, and he fills it up for a larger amount and in breach of the conditions, the principal is liable on the instrument to a person to whom it is negotiated, if he takes it for value and in good faith⁵). — Where an agent was employed as manager of a business which he carried on in his own name, and it was incidental to the ordinary course of such a business to draw and accept bills of exchange, it was held that the principal was liable on a bill accepted in the name in which the business was carried on (i. e. the agent's own name), although it had been expressly agreed between the principal and agent that the agent should not accept bills on the principal's behalf⁶). — An agent having authority, in case of emergency, to borrow money on exceptional terms outside the ordinary course of business, it was held that the principal was liable to a third person who in good faith lent money to the agent on such exceptional terms, although in the particular case the emergency had not arisen⁷). — If a shipmaster signs a bill of lading containing a statement that the freight has been paid, the shipowners will be estopped from claiming the freight from an indorsee for value of the bill of lading⁸). — Where the directors of a company borrow money or do any other act within the scope of their powers, the company is bound, although the money may have been borrowed for purposes which are *ultra vires*, or the formalities or conditions required by the regulations of the company may not have been complied with, if the persons dealing with the directors act in good faith and without notice of the improper nature of the transaction or of the irregularity, as the case may be⁹).

Acts beyond scope of ostensible authority or not done in course of employment. A principal is not, generally speaking, bound by any act of his agent which is not done in the course of the agent's employment on his behalf¹⁰); nor by any act beyond the scope of the agent's ostensible authority, unless he in fact authorised him to do the particular act¹¹). — Where the manager and director of the business of a company in South America gave a promissory note in the name of the company, it was held that the company was not liable on the note, it not being shown that it was necessary, or in the ordinary course of the business of such a company, when carried on in the usual way, to give promissory notes¹²). — An insurance company

¹) *Hambro v. Burnand* [1904] 2 K. B. 10, C. A.

²) *Heyworth v. Knight* (1864) 17 C. B. N. S. 298; *Waller v. Drakeford* (1853) 1 E. & B. 749.

³) *Watteau v. Fenwick* [1893] 1 Q. B. 346; *Kinahan v. Parry* [1910] 2 K. B. 389.

⁴) *Beaufort v. Neeld* (1845) 12 C. & F. 248, H. L.; *Davy v. Waller* (1899) 81 L. T. 107; *National Bolivian Navigation Co. v. Wilson* (1880) 5 App. Cas. 176, 209, H. L.; *Trickett v. Tomlinson* (1863) 13 C. B. N. S. 663.

⁵) *Lloyd's Bank v. Cooke* [1907] 1 K. B. 794, C. A.; *Montague v. Perkins* (1853) 22 L. J. C. P. 187. Compare *Smith v. Prosser* [1907] 2 K. B. 735, C. A.

⁶) *Edmunds v. Bushell* (1865) L. R. 1 Q. B. 97.

⁷) *Montaignac v. Shitta* (1890) 15 App. Cas. 357.

⁸) *Howard v. Tucker* (1831) 1 B. & Ad. 712; *Compania Naviera Vasconzada v. Churchill* [1906] 1 K. B. 237.

⁹) *In re Payne* [1904] 2 Ch. 608, C. A.; *Royal British Bank v. Turquand* (1856) 6 E. & B. 327; *Montreal, &c. Co. v. Robert* [1906] A. C. 196, P. C.; *Gloucester Bank v. Rudry Colliery Co.* [1895] 1 Ch. 629, C. A.

¹⁰) *McGowan v. Dyer* (1873) L. R. 8 Q. B. 141; *Whitechurch v. Cavanagh* [1902] A. C. 117, H. L.; *Ruben v. Great Fingall Consolidated* [1906] A. C. 439, H. L.

¹¹) *Kendal v. Wood* (1870) L. R. 6 Ex. 243; *Brettell v. Williams* (1849) 4 Ex. 623.

¹²) *In re Cunningham* (1887) 36 Ch. D. 532.

is not bound by the acceptance of a premium by its local agent after the expiration of the time for payment of the premium¹), nor by a contract made by him to grant a policy unless it can be shown that he was in fact authorised to make the contract²). If an insurance broker, without express authority, agrees to cancel a policy effected by him, the principal is not bound by the cancellation³). — A company is not bound by unauthorised representations of its secretary, it not being part of the ordinary duties of a secretary to make any representations on the company's behalf⁴).

Dealings with money and negotiable instruments. Where an agent, in consideration of an antecedent debt or liability, or for any other valuable consideration, pays or negotiates money or negotiable instruments in his possession to a person who receives the same in good faith and without notice of any want of authority, the payment or negotiation is as valid as if it had been expressly authorised by the owner thereof⁵). This is not a principle of the law of agency, but merely an application of the rule that any person taking money or negotiable instruments in good faith and for value, acquires a good title, notwithstanding any defect in the title of the person from whom he takes them⁶).

Dispositions within the Factors Act. The object of the Factors Act⁷), which is printed in the Appendix, is to protect third persons dealing in good faith with mercantile agents⁸) in possession of goods or documents of title⁸) to goods with the consent of the owner, although they may make dispositions thereof in excess of their authority. In effect it provides that any sale, pledge⁹) or other disposition of the goods for valuable consideration made by such an agent when acting in the ordinary course of business of a mercantile agent, shall be as valid as if it were expressly authorised, provided the person taking under the disposition acts in good faith, and has no notice of the want of authority¹⁰). It is not necessary that the pledge or other disposition should be in the ordinary course of business of the particular agent, and evidence of a custom of a particular trade excluding authority to pledge goods entrusted to an agent in that trade is not admissible for the purpose of limiting the protection given by the Act¹¹). A pledge to a pawnbroker or money-lender is not necessarily outside the ordinary course of business because a high rate of interest is charged¹²); the rate of interest is only material as evidence that the pledgee did not act in good faith, or that he had notice of the pledge being unauthorised¹³). It is not, however, in the ordinary course of business for an agent to ask a friend to pawn goods entrusted to him¹⁴). A person is not deemed to act in good faith and without notice if the circumstances of the particular case are such as would lead a reasonable business man to believe that the agent is exceeding his authority or acting in bad faith¹⁵); and in the case of a disposition to two or more persons who are acting in the transaction as partners, want of good faith on the part of any of them will deprive them all of the protection of the Act¹⁶). The Act does not authorise an agent, as between himself and the principal, to exceed or depart from his authority, or exempt him from any civil or criminal liability for so doing¹⁷).

No unauthorised act binding with respect to persons with notice. No act done by an agent in excess of his actual authority is binding on the principal with respect

¹) *Acey v. Fernie* (1840) 7 M. & W. 151.

²) *Linford v. Provincial Insurance Co.* (1864) 34 Beav. 291.

³) *Xenos v. Wickham* (1866) L. R. 2 H. L. 296.

⁴) *Barnett v. South London Tram. Co.* (1887) 18 Q. B. D. 815, C. A.; *New Brunswick Rail. Co. v. Conybeare* (1862) 9 H. L. C. 711.

⁵) *Goodwin v. Roberts* (1876) 1 App. Cas. 476, H. L.; *London Joint Stock Bank v. Summons* [1892] A. C. 201, H. L.; *Marten v. Roake* (1885) 53 L. T. 946.

⁶) See title "Bills of Exchange &c." *infra*.

⁷) 52 & 53 Vict. c. 45.

⁸) For definitions of 'mercantile agent', 'document of title', &c., see sec. 1.

⁹) As to pledges for antecedent debts or liabilities, or for a consideration other than money, see sections 4 and 5.

¹⁰) See also section 7 as to the lien of a consignee for advances to the ostensible owner of goods.

¹¹) *Oppenheimer v. Attenborough* [1908] 1 K. B. 221, C. A.

¹²) *Weiner v. Harris* [1910] 1 K. B. 285, C. A.

¹³) *Janesich v. Attenborough* (1910) 102 L. T. 605.

¹⁴) *De Gorter v. Attenborough* (1905) 21 T. L. R. 19.

¹⁵) *Gobind Chunder Sein v. Ryan* (1861) 9 Moo. Ind. App. 140; *Navalshaw v. Brownrigg* (1852) 2 D. M. & G. 441.

¹⁶) *Oppenheimer v. Frazer* [1907] 2 K. B. 50, C. A.

¹⁷) Section 12 (1).

to persons having notice that in doing the act the agent is exceeding his authority¹). Thus, if a broker pledges goods on which he has a lien for advances, to a person who knows that in pledging them he is exceeding his authority, the pledgee acquires no title as against the principal, even to the extent of the broker's lien²). Where an agent, purporting to act under a power of attorney, which he represented gave him full power to borrow, contracted a loan and produced the power to the lender, it was held that the lender must be taken to have notice of the terms of the power, which did not authorise the loan, although he did not read it and relied on the agent's representation, and that the principal was not bound by the loan³). The rule applies to dealings with money and negotiable instruments⁴).

A signature 'per procuracy' on a bill of exchange, promissory note, or cheque operates as notice that the agent has but a limited authority to sign, and the principal is only bound by the signature if it is in fact authorised⁵); and where the regulations of a company are registered, persons dealing with the directors and other agents of the company are deemed to have notice of the extent of their authority according to such regulations⁶).

Holding out. Where any person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to any one dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority which he was so represented to have⁷). — If an owner of goods permits a person, whose ordinary business is to sell that class of goods, to have possession of the goods or documents of title thereto, the owner will be bound by an unauthorised sale by him to a purchaser in good faith, independently of the Factors Act⁸). — The owners of a chartered ship are liable on a bill of lading signed the master appointed by them, although the charter-party may provide that the master shall sign bills of lading as agent of the charterers only, if the shipper has no notice of the charter-party⁹). — A company is bound by the acts of persons acting as directors, though they may not have been properly appointed, with respect to persons dealing with them in the belief that they are duly authorised¹⁰); so, if the directors hold out a person as an agent of the company, though he may not have been duly appointed¹¹).

2. Rights and liabilities of the Principal on Contracts made by Agent.

Contract by public agent. The Crown may sue, or may be sued by petition of right,¹² on any contract duly made on its behalf by a public agent¹³).

Principal may sue or be sued in own name. Except in the case of foreign principals, deeds, bills of exchange, promissory notes and cheques, every principal, whether disclosed or undisclosed, may sue or be sued in his own name on any contract duly made on his behalf¹⁴), and in respect of any money paid or received by his agent on his behalf¹⁵). The right and liability of the principal to sue and be sued are not affected by the circumstance that the contract is made by the agent in his own name¹⁶); or that it is to be partly performed by the agent, and from its terms

¹) *Forman v. The Liddesdale* [1900] A. C. 190, P. C.; *Russo-Chinese Bank v. Li Yan Sam* [1910] A. C. 174, P. C.

²) *M'Combie v. Davies* (1805) 7 East, 5.

³) *Jacobs v. Morris* [1902] 1 Ch. 816, C. A.

⁴) *Litt v. Martindale* (1856) 18 C. B. 314; *Evans v. Kymer* (1830) 1 B. & Ad. 528; *Truettell v. Barandon* (1817) 1 Moo. 543.

⁵) 45 & 46 Vict. c. 61, s. 25; *Reid v. Rigby* [1894] 2 Q. B. 40. Compare *Bryant v. Quebec Bank* [1893] A. C. 179, P. C.

⁶) *Balfour v. Ernest* (1859) 5 C. B. N. S. 601.

⁷) *Brazier v. Camp* (1894) 63 L. J. Q. B. 257, C. A. *Little v. Spreadbury* [1910] 2 K. B. 658; *In re Bentley* (1893) 69 L. T. 204, C. A.; *Fry v. Smellie* [1912] 3 K. B. 282, C. A.

⁸) *Pickering v. Busk* (1812) 15 East, 38; *Henderson v. Williams* [1895] 1 Q. B. 521, C. A.

⁹) *Manchester Trust v. Furness* [1895] 2 Q. B. 539, C. A.

¹⁰) *Mahony v. East Holyford Mining Co.* (1875) L. R. 7 H. L. 869.

¹¹) *Wilson v. West Hartlepool Harbour Co.* (1854) 34 Beav. 187.

¹²) *Thomas v. Reg.* (1874) L. R. 10 Q. B. 31.

¹³) *Browning v. Provincial Insurance Co.* (1873) L. R. 5 P. C. 263; *Skinner v. Stocks* (1821) 4 B. & A. 437.

¹⁴) *Coulthurst v. Sweet* (1866) L. R. 1 C. P. 649; *Annesley v. Muggridge* (1816) 1 Madd. 596; *Evans v. Collins* (1844) 5 Q. B. 804.

¹⁵) *Sadler v. Leigh* (1815) 4 Camp. 195.

the consideration appears to move from the agent alone¹); nor by the circumstance that the agent was acting under a *del credere* commission²); but the right of the principal to sue, and his liability to be sued, may be excluded by the express terms of the contract³). Where an agent enters into a contract, whether verbally or in writing, in his own name, parol evidence is admissible to show who is the real principal, in order to charge him or entitle him to sue on the contract⁴), provided that such evidence is not inconsistent with the express terms of a written contract⁵).

Foreign principals. A foreign principal cannot sue or be sued on any contract made by a home agent, unless the agent had authority to establish privity of contract between the principal and the other contracting party, and it clearly appears from the terms of the contract, or from the surrounding circumstances, that it was the intention of the agent and of the other contracting party to establish such privity of contract; and in the absence of evidence to the contrary, it is presumed that a home agent has not authority to establish privity of contract between his foreign principal and third persons⁶).

Deeds. A principal cannot sue or be sued on any deed (i. e. instrument under seal), even if it expressed to be executed on his behalf, unless he is described as a party thereto and it is executed in his name⁷). It is doubtful whether this rule is affected by the provisions of s. 46 of the Conveyancing and Law of Property Act, 1881⁸), which will be found in the Appendix.

Bills, notes and cheques. The only persons liable on a bill of exchange, promissory note or cheque, are those whose signatures appear thereon, and in determining whether a signature is that of the principal or that of the agent by whose hand it is written, the construction most favorable to the validity of the instrument is adopted⁹); and no person can be liable as acceptor of a bill of exchange except the person on whom it is drawn, unless it be accepted for honour¹⁰). Hence, where a bill of exchange is drawn on the principal, he is deemed to be the acceptor, whether the acceptance is in his name or in that of the agent¹¹); where it is drawn on the agent, the principal is not liable as acceptor, even if it is accepted in his name and with his authority¹²); and where a signature is placed on a bill of exchange, promissory note or cheque, otherwise than as that of the acceptor of a bill of exchange, the principal is only liable if his name is signed or the signature is expressed to be made on his behalf¹³).

Brokers' bought and sold notes. Where a broker contracts on behalf of both buyer and seller, an entry of the transaction in his book, signed by him, operates as a memorandum of the contract signed by both parties¹⁴), and a mistake in the bought and sold notes does not affect the validity of such a contract¹⁵). When there is no such signed entry, signed bought and sold notes form a binding contract in writing if they substantially agree¹⁵), but not if there is a material variance between them¹⁶). If the broker acts on behalf of only one of the parties, and sends a note of the contract to the other party, that note forms the contract, and its validity is not affected by a variance in a note sent by him to his own principal¹⁷).

¹) *Phelps v. Prothero* (1855) 16 C. B. 370.

²) *Hornby v. Lacy* (1817) 6 M. & S. 166.

³) *United Kingdom, &c. Association v. Nevill* (1889) 19 Q. B. D. 110, C. A. Compare *Great Britain, &c. Assn. v. Wyllie* (1889) 22 Q. B. D. 710, C. A.; *British Marine, &c. Assn. v. Jenkins* [1900] 1 Q. B. 299.

⁴) *Bateman v. Phillips* (1812) 15 East, 272; *Calder v. Dobell* (1871) L. R. 6 C. P. 486.

⁵) *Humble v. Hunter* (1848) 12 Q. B. 310; *Formby v. Formby* (1910) 102 L. T. 116, C. A.

⁶) *Malcolm v. Hoyle* (1893) 63 L. J. Q. B. 1, C. A.; *Hutton v. Bullock* (1874) L. R. 9 Q. B. 572; *Die Elbinger v. Claye* (1873) L. R. 8 Q. B. 313.

⁷) *Chesterfield Colliery Co. v. Hawkins* (1865) 3 H. & C. 677; *Schack v. Anthony* (1813) 1 M. & S. 573; *Southampton v. Brown* (1827) 6 B. & C. 718.

⁸) 44 & 45 Vict. c. 41.

⁹) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61) ss. 23, 26 (2). Printed in Appendix.

¹⁰) *Polhill v. Walter* (1832) 3 B. & Ad. 114; *Davis v. Clarke* (1844) 6 Q. B. 16.

¹¹) *Lindus v. Bradwell* (1848) 5 C. B. 583; *Okell v. Charles* (1876) 34 L. T. 822, C. A.

¹²) *Polhill v. Walter*, supra.

¹³) *Furze v. Sharwood* (1841) 2 Q. B. 388; *Aggs v. Nicholson* (1856) 1 H. & N. 165.

¹⁴) *Thompson v. Gardiner* (1876) 1 C. P. D. 777.

¹⁵) *Siveuright v. Archibald* (1851) 20 L. J. Q. B. 529; *Kempson v. Boyle* (1865) 3 H. & C. 763; *Townend v. Drakeford* (1843) 1 C. & K. 20.

¹⁶) *Grant v. Fletcher* (1826) 5 B. & C. 436; *Gregson v. Ruck* (1843) 4 Q. B. 737; *Cowie v. Remfry* (1846) 5 Moo. P. C. 232.

¹⁷) *Mc Caul v. Strauss* (1883) 1 C. & E. 106.

Effect of particular rules and usages. Where an agent contracts in a particular market, the contract is deemed to be made subject to the rules and usages of that market¹⁾, except so far as they are inconsistent with the express terms of the contract²⁾; provided that the principal is not bound by any unreasonable rule or usage unless he had notice of and agreed to be bound by it, at the time when he authorised the agent to make the contract³⁾; provided also that the right of the principal, whether disclosed or undisclosed, to sue in his own name, and his liability to be sued, on a contract made on his behalf, are not affected by the circumstance that it was made in a market by the rules or usages of which the agent is personally liable on the contract, and it is there regarded as the contract of the agent alone, whether such rules or usages were known to the principal at the time when he authorised the agent to make the contract or not⁴⁾.

Effect of suing or giving credit to agent. Where an agent contracts in such terms as to be personally liable, and a judgment is obtained against him on the contract, the judgment, although unsatisfied, is, so long as it subsists, a bar to any proceedings against the principal on the contract⁵⁾.

Where an agent enters into a contract in such terms that he is personally liable thereon, the other contracting party may sue either him or the principal, but cannot sue both, and if, with a full knowledge who is the real principal, he elects to give exclusive credit to the agent, he is irrevocably bound by the election, and cannot afterwards turn round and sue the principal on the contract⁶⁾. Suing the agent to judgment is conclusive evidence of such an election⁷⁾; but such acts as calling on him to pay, and threatening legal proceedings⁸⁾, or taking and renewing his acceptances for the amount due⁹⁾, or proving for the amount against his estate in bankruptcy¹⁰⁾, although they are strong evidence of such an election in point of fact, are not conclusive as a matter of law.

Except where a judgment has been obtained against the agent, or it is found as a fact that there has been an election to give exclusive credit to him, the liability of the principal is not affected by the circumstances that the agent is personally liable, and that he was treated as the party liable by the other contracting party¹¹⁾.

Effect of settlement between principal and agent. Where an agent buys goods in his own name from a person who believes him to be buying on his own account, and while the seller continues to give exclusive credit to the agent, believing him to be the principal and not knowing of any other person in the transaction, the principal in good faith pays the agent for the goods, the principal is discharged from liability to the seller¹²⁾.

Where a debt or obligation is contracted by means of an agent, and the principal is induced by the conduct of the creditor reasonably to believe that the agent has paid the debt or discharged the obligation, or that the creditor has elected to look to the agent alone for the payment or discharge thereof, and in consequence of such belief pays or settles, or otherwise deals to his prejudice, with the agent, the creditor will be estopped from denying, as between himself and the principal, that the debt has been paid or the obligation discharged, or that he has elected to give exclusive credit to the agent so as to discharge the principal¹³⁾; but mere

¹⁾ *Stray v. Russell* (1860) 29 L. J. Q. B. 115; *Kirchner v. Venus* (1859) 12 Moo. P. C. 361; *Grissel v. Bristowe* (1869) L. R. 4 C. P. 36; *Bowring v. Shepherd* (1871) L. R. 6 Q. B. 309.

²⁾ *Cruse v. Paine* (1869) L. R. 4 Ch. 441; *The Alhambra* (1881) 6 P. D. 68, C. A.; *Hayton v. Irwin* (1879) 5 C. P. D. 130, C. A.

³⁾ *Pearson v. Scott* (1878) 9 Ch. D. 198; *Sweeting v. Pearce* (1859) 7 C. B. N. S. 449.

⁴⁾ *Currie v. Booth* (1902) 7 Com. Cas. 77, C. A.; *Levitt v. Hamblet* [1901] 2 K. B. 43, C. A.; *Scott v. Godfrey* [1901] 2 K. B. 726; *Beckhouson v. Hamblet* [1901] 2 K. B. 73, C. A.

⁵⁾ *Priestley v. Fernie* (1865) 3 H. & C. 977; *Kendall v. Hamilton* (1879) 4 App. Cas. 504, H. L.

⁶⁾ *Smethurst v. Mitchell* (1859) 1 E. & E. 623; *Addison v. Gandasequi* (1812) 4 Taunt 574; *Paterson v. Gandasequi* (1812) 15 East, 62; *Morel v. Westmoreland* [1904] A. C. 11; *French v. Howie* [1906] 2 K. B. 674, C. A.

⁷⁾ *Priestley v. Fernie*, *supra*; *French v. Howie*, *supra*.

⁸⁾ *Calder v. Dobell* (1871) L. R. 6 C. P. 486; *Mortimer v. M'Callan* (1840) 6 M. & W. 58.

⁹⁾ *Robinson v. Read* (1829) 9 B. & C. 449; *The Huntsman* [1894] P. 214.

¹⁰⁾ *Curtis v. Williamson* (1874) L. R. 10 Q. B. 57; *Fell v. Parkin* (1882) 52 L. J. Q. B. 99.

¹¹⁾ *Thomson v. Davenport* (1829) 9 B. & C. 78; *Waring v. Favenck* (1807) 1 Camp. 85.

¹²⁾ *Armstrong v. Stokes* (1872) L. R. 7 Q. B. 598.

¹³⁾ *Smyth v. Anderson* (1849) 7 C. B. 21; *Smith v. Ferrand* (1827) 7 B. & C. 19; *Hopkins v. Ware* (1869) L. R. 4 Ex. 268.

delay by the creditor in enforcing his claim, or in making application to the principal for the payment of the debt, or discharge of the obligation, is not sufficient inducement for this purpose, unless there are special circumstances rendering the delay misleading in the particular case¹).

Except as above mentioned, the principal, whether disclosed or undisclosed, is not discharged, nor is the right of recourse against him affected, by the circumstance that he has paid or settled or otherwise dealt to his prejudice with the agent²).

Fraud, &c of agent may be set up in an action by the principal. Where a principal sues on a contract negotiated or made by his agent, the fraud³), misrepresentation⁴), non-disclosure⁵), or knowledge⁶) of either the principal or the agent may be set up by the other contracting party by way of defence in the same manner, and with the same effect, as the fraud, misrepresentation, non-disclosure or knowledge of the principal might have been if he had himself negotiated or made the contract.

How far principal bound by settlement with, or set-off against, agent. If a person, in dealing with an agent, is led by the conduct of the principal to believe, and does in fact believe, that the agent with whom he is so dealing is the principal in the transaction, he is discharged from liability by payment to or settlement with the agent in any manner which would have operated as a discharge if the agent had been the principal⁷), and is entitled, as against the principal, to the same right of set-off in respect of any debt due from the agent personally as he would have been entitled to if the agent had been the principal⁸); provided that he had not, at the time when the payment or settlement took place, or the set-off accrued, received notice that the agent was not in fact the principal⁹). And if a principal permits his agent to have the possession of goods, or of the documents of title to goods, he is considered, for this purpose, by his conduct to hold out the agent as the owner of the goods¹⁰). Thus, a purchaser from a factor has a right, in an action by the principal for the price of the goods, to set off a debt due from the factor personally, if the factor sold the goods in his own name and the purchaser believed that he was selling his own goods, and had no notice to the contrary up to the time when the debt sought to be set off was incurred¹¹). But the purchaser has no such right of set-off if he knows that the factor is selling the goods as an agent, even if he does not know who the principal is¹²), and even if the factor is selling under a *del credere* commission¹³). To entitle the purchaser from an agent to a right of set-off, as against the principal, of a debt due from the agent, it is necessary that the purchaser should have a positive belief, induced by the conduct of the principal, that the agent is selling his own goods¹⁴).

Where an agent, with the authority of the principal, contracts in his own name in respect of goods upon which he has a lien as against the principal, the right of the principal to sue on the contract, during the time the claim secured by the lien remains unsatisfied, is subservient to that of the agent; and a payment to or settlement with the agent by the other contracting party during that time operates as a discharge, notwithstanding that the person making the payment or settlement

¹) *Irvine v. Watson* (1880) 5 Q. B. D. 102, 414, C. A.; *Davison v. Donaldson* (1882) 9 Q. B. D. 623, C. A.

²) *Heald v. Kenworthy* (1855) 10 Ex. 739; *Dent v. Dunn* (1812) 3 Camp. 296.

³) *Ludgater v. Love* (1881) 44 L. T. 694, C. A.

⁴) *Reese River Mining Co. v. Smith* (1869) L. R. 4 H. L. 64; *Refuge Assurance Co. v. Kettlewell* [1909] A. C. 243, H. L.; *Mullens v. Miller* (1882) 22 Ch. D. 194.

⁵) *Blackburn v. Haslam* (1888) 21 Q. B. D. 144.

⁶) *Mayhew v. Eames* (1825) 3 B. & C. 601; *Apthorp v. Neville* (1907) 23 T. L. R. 575.

⁷) *Ramazzotti v. Bowring* (1859) 7 C. B. N. S. 851; *Coates v. Lewes* (1808) 1 Camp. 444.

⁸) *Montagu v. Forwood* [1893] 2 Q. B. 350, C. A.

⁹) *Mildred v. Maspons* (1883) 8 App. Cas. 874, H. L.; *Kaltenbach v. Lewis* (1885) 10 App. Cas. 617, H. L.

¹⁰) *In re Henley* (1876) 4 Ch. D. 133, C. A.

¹¹) *Borries v. Imperial Ottoman Bank* (1873) L. R. 9 C. P. 38; *George v. Clagett* (1797) 7 T. R. 359.

¹²) *Fish v. Kempton* (1849) 7 C. B. 689; *Cooper v. Strauss* (1898) 14 T. L. R. 233; *Semenza v. Brinsley* (1865) 18 C. B. N. S. 467.

¹³) *Hornby v. Lacy* (1817) 6 M. & S. 166.

¹⁴) *Cooke v. Eshelby* (1889) 12 App. Cas. 271, H. L.

may have had notice from the principal or his trustee in bankruptcy not to pay or settle with the agent; and such payment or settlement may, to the extent of the claim secured by the lien of the agent, be by way of set-off or settlement of accounts between the agent and the person making the payment or settlement¹).

Except in the cases above-mentioned a principal is not bound, nor is his right to sue on a contract made by his agent affected, by a payment to or settlement with the agent, unless the payment or settlement was made in the ordinary course of business, and in a manner actually or ostensibly authorised by him²).

3. Liability of Principal for Torts of Agent.

Public Agents. There is no remedy against the Crown or Government, by petition of right or otherwise, for any wrongful act or omission of a public agent³).

Wrongs in ordinary course of employment. Where loss or injury is caused to any third person by any wrongful act or omission of an agent while acting on behalf of the principal, either with the authority of the principal⁴) or in the ordinary course of his employment⁵), the principal is liable for the wrongful act or omission jointly and severally with the agent; but a judgment obtained against the agent, although it may be unsatisfied, is a bar to an action against the principal in respect of the same wrongful act or omission⁶). A corporation or incorporated company is liable for the wrongs of its agents to the same extent as an individual principal would be⁷).

Money &c received or misappropriated by agent. Where the money or property of a third person is received by an agent while acting within the scope of his ostensible authority, or is received by the principal, and is misapplied by the agent, the principal is liable to make good the loss⁸); and where, by any wrongful or unauthorised act of an agent, the money or property of a third person comes to the hands of the principal, or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or value of such money or property⁹).

Wrongs outside course of employment. A principal is not liable for any wrongful act or omission of his agent while acting, without his authority, outside the ordinary course of his employment¹⁰), or while acting otherwise than on the principal's behalf¹¹).

Fraud, intentional and malicious wrongs. A principal is not liable in excess of the amount or value of the benefit acquired by him¹²), for any fraud or other intentional or malicious wrong committed by his agent when acting outside the scope of his authority¹³). But a principal is liable for the fraud or other intentional or malicious wrong of his agent committed while acting in the ordinary course of his employment, although he did not authorise it, and even if he had expressly forbidden it¹⁴).

¹) *Warner v. M' Kay* (1836) 1 M. & W. 591; *Hudson v. Granger* (1821) 5 B. & A. 27.

²) *Kaye v. Brett* (1850) 5 Ex. 269; *Linck v. Jameson* (1886) 2 T. L. R. 206, C. A.; *Crossley v. Magniac* [1893] 1 Ch. 594; *Hogarth v. Wherley* (1875) L. R. 10 C. P. 630; *Catterall v. Hindle* (1876) L. R. 2 C. P. 368.

³) *Feather v. Reg.* (1865) 6 B. & S. 257.

⁴) *Schuster v. M' Kellar* (1857) 7 E. & B. 704.

⁵) *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. 233, 306, H. L.; *Betts v. De Vitre* (1868) L. R. 3 Ch. 429; *Tronson v. Dent* (1853) 8 Moo. P. C. 419; *The Apollo* [1891] A. C. 499, H. L.

⁶) *Brinsmead v. Harrison* (1872) L. R. 7 C. P. 547; *Wright v. L. G. O. Co.* (1877) 2 Q. B. D. 271.

⁷) *Giles v. Taff Vale Rail. Co.* (1853) 2 E. & B. 822; *Ranger v. G. W. Rail. Co.* (1854) 5 H. L. C. 72.

⁸) *Swire v. Francis* (1877) 3 App. Cas. 106; *Thompson v. Bell* (1854) 10 Ex. 10; *London Freehold &c. Co. v. Suffield* [1897] 2 Ch. 608, C. A.

⁹) *Reid v. Rigby* [1894] 2 Q. B. 40; *Bannatyne v. Mc Iver* [1906] 1 K. B. 103; *Marsh v. Keating* (1834) 1 Bing. N. C. 198, H. L.

¹⁰) *Smith v. Keal* (1882) 9 Q. B. D. 340, C. A.; *Beard v. L. G. O. Co.* [1900] 2 Q. B. 530.

¹¹) *N. E. Rail. Co. v. Reg.* (1889) 6 T. L. R. 15, C. A.; *Storey v. Ashton* (1869) L. R. 4 Q. B. 476; *Rayner v. Mitchell* (1877) 2 C. P. D. 357.

¹²) *Western Bank of Scotland v. Addie* (1867) L. R. 1 H. L. Sc. 145.

¹³) *British Mutual Bank v. Charnwood Forest Rail. Co.* (1887) 18 Q. B. D. 714, C. A.; *Thorne v. Heard* [1895] A. C. 495, H. L.; Compare *Lloyd v. Grace* [1912] A. C. 716, H. L.

¹⁴) *Lloyd v. Grace* [1912] A. C. 716, H. L.; *Udell v. Atherton* (1861) 7 H. & N. 172; *Pearson v. Dublin Corporation* [1907] A. C. 351, H. L.; *Mackay v. Commercial Bank* (1874) L. R. 5 P. C. 394; *Barwick v. English Joint Stock Bank* (1867) L. R. 2 Ex. 269; *Swire v. Francis* (1877) 3 App. Cas. 106, P. C.; *Citizens Life Assurance Co. v. Brown* [1904] A. C. 423, P. C.; *Limpus v. L. G. O. Co.* (1862) 1 H. & C. 526.

Misrepresentations as to credit &c. A principal cannot be sued in respect of any representation as to the character, credit, ability, trade or dealings of a third person, to the intent that such third person may obtain credit, unless the representation is in writing and signed by the principal¹). The signature of his agent is not sufficient, even if expressly authorised or ratified by him, and the rule applies even where the principal is a corporation or joint-stock company, the effect being that in the latter case the representation, to bind the corporation or company, must be under its common seal¹).

4. Admissions by Agent.

An admission or representation made by an agent is admissible in evidence against the principal:

1. Where it was made with the express or implied authority of the principal.
2. Where it has reference to some matter or transaction upon which the agent was employed on the principal's behalf at the time when the admission or representation was made, and was made in the ordinary course of that employment²).
3. Where it has reference to some matter or transaction respecting which the person to whom the admission or representation was made had been expressly referred by the principal to the agent for information³). Provided that a report made by an agent to his principal cannot be used in evidence against the principal by any third person⁴).

A principal is not bound by any unauthorised admission or representation concerning any matter or transaction upon which the agent who made it was not employed on his behalf at the time when it was made⁵), or which was not made in the ordinary course of the agent's employment, unless he expressly referred to the agent for information on the particular matter⁶).

5. Notice to Agent.

Where any fact or circumstance, material to any transaction, business, or matter in respect of which an agent is employed, comes to his knowledge in the course of such employment, and is of such a nature that it is his duty to communicate it to his principal, the principal is deemed to have notice thereof as from the time when he would have received such notice if the agent had performed his duty, and taken such steps to communicate the fact or circumstance as he ought reasonably to have taken⁷). Provided that where an agent is party or privy to the commission of a fraud upon or misfeasance against his principal, his knowledge of such fraud or misfeasance, and of the facts and circumstances connected therewith, is not imputed to the principal⁸); and where the person seeking to charge the principal with notice knew that the agent intended to conceal his knowledge from the principal, such knowledge is not imputed to the principal⁹).

Knowledge acquired by an agent otherwise than in the course of his employment on the principal's behalf¹⁰), or of any fact or circumstance which is not material to the transaction or business in respect of which he is employed¹¹), is not imputed to the principal.

¹) 9 Geo. IV c. 14, s. 6; *Swift v. Jewesbury* (1874) L.R. 9 Q. B. 301; *Hirst v. West Riding Banking Co.* [1901] 2 K. B. 560, C. A.; *Williams v. Mason* (1873) 28 L. T. 232.

²) *Kirkstall Brewery v. Furness Rail. Co.* (1874) L.R. 9 Q. B. 468; *British Columbia &c. Co. v. Nettleship* (1868) L. R. 3 C. P. 330.

³) *Williams v. Innes* (1808) 1 Camp. 364.

⁴) *Langhorn v. Allnutt* (1812) 4 Taunt. 511; *Ex parte Abbott* (1883) 22 Ch. D. 593.

⁵) *G. W. Rail. Co. v. Willis* (1865) 18 C. B. N. S. 748; *Tunley v. Evans* (1845) 2 D. & L. 747.

⁶) *Barnett v. South London Tram Co.* (1887) 18 Q. B. D. 815, C. A.

⁷) *Attwood v. Small* (1838) 6 C. & F. 232, H. L.; *Rainford v. Keith* [1905] 2 Ch. 147, C. A.; *Bawden v. London, &c. Ass. Co.* [1892] 2 Q. B. 534, C. A.; *Blackburn v. Vigors* (1889) 12 App. Cas. 531, H. L.

⁸) *Cave v. Cave* (1880) 15 Ch. D. 639; *In re Fitzroy Bessemer Steel Co.* (1884) 50 L. T. 144.

⁹) *Sharpe v. Foy* (1868) 17 W. R. 65.

¹⁰) *In re Payne* [1904] 2 Ch. 608, C. A.; *Tate v. Hyslop* (1885) 15 Q. B. D. 368, C. A.; *Welsbach &c. Co. v. New Sunlight Co.* [1900] 2 Ch. 1, C. A.

¹¹) *Wilde v. Gibson* (1848) 1 H. L. C. 605; *Wyllie v. Pollen* (1863) 32 L. J. Ch. 782.

6. Bribery of Agent.

Where an agent is induced by bribery to depart from his duty to his principal, the person who bribed the agent is liable jointly and severally with the agent to the principal for any loss suffered in consequence of the breach of duty, and in ascertaining the extent of the loss the amount of the bribe or any part thereof which may have been recovered by the principal from the agent is not taken into consideration¹).

Every contract made or act done by an agent under the influence of a bribe given or promised, or (to the knowledge of the other contracting party) in violation of the agent's duty to his principal, is voidable by the principal²).

An agent who has been bribed is conclusively presumed to be influenced by the bribe in entering into any contract or doing any other act affecting the relations between his principal and the person bribing him³).

XI. Relations between Agents and Third Persons.

1. Liabilities of Agents on Contracts.

Public agents. A public agent is not liable to be sued on any contract entered into by him on behalf of the Crown or Government⁴); but a public agent is personally liable where he expressly pledges his personal credit, or where he contracts otherwise than as an agent of the Crown or Government⁵).

Other agents. General rules. An agent who contracts personally, although on behalf of his principal, is personally liable, and may be sued in his own name, on the contract, whether the principal is named therein, or is known to the other contracting party or not⁶). But an agent is not personally liable on any contract made by him merely in his capacity of an agent, even if he makes it fraudulently, knowing that he has not authority to do so⁷). The question whether an agent who has made a contract on behalf of his principal is to be deemed to have contracted personally, and if so, the extent of his liability on the contract, depend on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances. If the agent contracts in his own name, he will generally be considered as contracting personally, though he may mention the name of his principal⁸). An auctioneer selling for an undisclosed principal is deemed to contract personally, and is liable for non-performance of the contract though he may subsequently offer to give the name of the principal⁹); and even although the principal is disclosed at the time of the sale, the conditions of sale may be such as to involve a personal undertaking on the part of the auctioneer¹⁰). If the sale is advertised as being without reserve, the auctioneer impliedly contracts to accept the highest *bonâ fide* bid¹¹). Where an agent contracts personally, his liability under the contract may be expressly limited; thus, where a clause in a charter-party provided that the liability of the agent as to all matters, as well before as after the shipping of the cargo, should cease as soon as the cargo was shipped, it was held that he was not personally liable for demurrage at the port of discharge¹²). A home agent who

¹) *Mayor of Salford v. Lever* [1891] 1 Q. B. 168, C. A. As to the criminal liability of persons bribing agents, see the Prevention of Corruption Act, 1906 (6 Edw. VII c. 34) printed in the Appendix.

²) *Hough v. Bolton* (1885) 1 T. L. R. 606; *Ex parte Huth* (1840) Mont. & Ch. 667; *Bartram v. Lloyd* (1904) 90 L. T. 357, C. A.; *Odessa Tramways Co. v. Mendel* (1877) 8 Ch. D. 235, C. A.

³) *Shipway v. Broadwood* [1899] 1 Q. B. 369, C. A.; *Hovenden v. Millhof* (1900) 83 L. T. 41, C. A.

⁴) *Palmer v. Hutchinson* (1881) 6 App. Cas. 619, P. C.; *Macbeath v. Haldimund* (1786) 1 T. R. 172.

⁵) *Clutterbuck v. Coffin* (1842) 3 M. & G. 842; *Graham v. Public Works Commissioners* [1901] 2 K. B. 781.

⁶) In such cases either the principal or agent may be sued, but not both.

⁷) *Wilson v. Bury* (1880) 5 Q. B. D. 518, C. A.; *Paquin v. Beauclerk* [1906] A. C. 148, H. L.; *Lewis v. Nicholson* (1852) 18 Q. B. 503. The agent may, however, be liable on an implied warranty of authority; see *infra*.

⁸) *Dramburg v. Pollitzer* (1873) 28 L. T. 470; *Williamson v. Barton* (1862) 7 H. & N. 899; *Magee v. Atkinson* (1839) 2 M. & W. 440.

⁹) *Franklyn v. Lamond* (1847) 4 C. B. 637.

¹⁰) *Woolf v. Horne* (1877) 2 Q. B. D. 355.

¹¹) *Warlow v. Harrison* (1858) 1 E. & E. 295, 309.

¹²) *Oglesby v. Yglesias* (1858) E. B. & E. 930.

contracts in England, Wales or Ireland on behalf of a foreign principal is presumed to contract personally unless a contrary intention plainly appears from the terms of the contract or from the surrounding circumstances¹).

Contracts under seal. An agent who is a party to a contract under seal, which he executes in his own name, is personally liable thereon, even if he is described in the contract as acting for and on behalf of a named principal²).

Bills, notes and cheques. No agent is personally liable on any bill of exchange, promissory note or cheque, unless his name appears thereon³). If a bill of exchange is drawn on an agent in his own name and is signed by him, he is personally liable as acceptor, even if he adds words to the signature, indicating that he signs for and on behalf of a principal, or as an agent⁴); if on the other hand the bill is drawn on the principal, the agent is not liable as acceptor, even if he signs his own name without qualification⁵). Where an agent signs a bill of exchange, promissory note or cheque otherwise than as acceptor of a bill of exchange, he is personally liable unless he qualifies the signature by adding words thereto, indicating that he signs for and on behalf of a principal, or as an agent⁶). If he does so qualify the signature he is not personally liable⁷); but the mere addition of words describing him as an agent is not sufficient to exempt him from personal liability, whether the principal is named in the instrument or not⁸). The words must not be merely descriptive, but must indicate that he signs in his capacity of agent⁸).

Other written contracts. The question whether the agent is to be deemed to have contracted personally, in the case of a contract in writing other than a bill of exchange, promissory note or cheque, depends upon the intention of the parties, as appearing from the terms of the written agreement as a whole⁹). If the contract is signed by the agent in his own name without qualification, he will be considered as contracting personally, unless a contrary intention plainly appears from other portions of the document¹⁰); if on the other hand the agent adds words to his signature, indicating that he signs as an agent, or for or on behalf of a principal, he will not be deemed to contract personally, unless it plainly appears from other portions of the document that, notwithstanding the qualified signature, he intended to bind himself¹¹); but mere words of description, whether connected with or forming part of the signature, or in the body of the contract, and whether the principal is named or not, raises no presumption that the agent did not intend to contract personally¹²). These rules extend to cases where the contract is made by a home agent on behalf of a foreign principal¹³).

Where it appears from the terms of a written contract made by an agent that he contracted personally, parol evidence is not admissible to show that, notwithstanding the terms of the contract, it was the intention of the parties that he should not be personally liable thereon, because such evidence would be contradictory to the written contract¹⁴); but he may, by way of equitable defence, prove a verbal agreement that, in consideration of his being merely an agent, he should not be per-

¹) *Hutton v. Bulloch* (1874) L. R. 9 Q. B. 572; *Die Elbinger v. Claye* (1873) L. R. 8 Q. B. 313.

²) *Cass v. Rudele* (1692) 2 Vern. 280, H. L.; *Appleton v. Binks* (1804) 5 East, 148.

³) 45 & 46 Vict. c. 61, s. 23. See title "Bills of Exchange &c.", *infra*.

⁴) *Ibid* s. 26 (2); *Mare v. Charles* (1856) 5 E. & B. 978; *Jones v. Jackson* (1870) 22 L. T. 828.

⁵) *Okell v. Charles* (1876) 34 L. T. 822, C. A.

⁶) *Leadbitter v. Farrow* (1816) 5 M. & S. 345; *Dutton v. Marsh* (1871) L. R. 6 Q. B. 361.

⁷) *Alexander v. Sizer* (1869) L. R. 4 Ex. 102; *Chapman v. Smethurst* [1909] 1 K. B. 927, C. A.;

Lindus v. Melrose (1858) 3 H. & N. 177.

⁸) *The Elmville* [1904] P. 319; *Landes v. Marcus* (1909) 25 T. L. R. 478; *Allan v. Miller* (1870) 22 L. T. 825. 45 & 46 Vict. c. 61, s. 26 (1).

⁹) *Bowes v. Shand* (1877) 2 App. Cas. 455, H. L.; *Mc Collin v. Gilpin* (1881) 6 Q. B. D. 516, C. A.; *Southwell v. Bowditch* (1876) 1 C. P. D. 374, C. A.

¹⁰) *Parker v. Winlow* (1859) 7 E. & B. 942; *Gadd v. Houghton* (1876) 1 Ex. D. 357, C. A.; *Hick v. Tweedy* (1890) 63 L. T. 765; *Paice v. Walker* (1870) L. R. 5 Ex. 173; *Morley v. Makin* (1906) 54 W. R. 395.

¹¹) *Deslandes v. Gregory* (1860) 30 L. J. Q. B. 36; *Redpath v. Wigg* (1866) L. R. 1 Ex. 335; *Lennard v. Robinson* (1855) 5 E. & B. 125; *Weidner v. Hoggett* (1876) 1 C. P. D. 533; *Young v. Schuler* (1883) 11 Q. B. D. 651, C. A.

¹²) *Parker v. Winlow* (1857) 7 E. & B. 942; *Paice v. Walker*, *supra*; *Hutcheson v. Eaton* (1884) 13 Q. B. D. 861, C. A.

¹³) *Gadd v. Houghton* (1876) 1 Ex. D. 357, C. A.; *Ogden v. Hall* (1879) 40 L. T. 751; *Glover v. Langford* (1892) 8 T. L. R. 628.

¹⁴) *Higgins v. Senior* (1841) 8 M. & W. 834; *Holding v. Elliott* (1860) 5 H. & N. 117.

sonally liable on the contract, because it would be inequitable in such a case to take advantage of his having contracted personally¹). Where it appears from the terms of a written contract made by an agent that he contracted merely as an agent, parol evidence is nevertheless admissible to show that by a custom or usage of the particular trade or business an agent so contracting is liable on the contract, either absolutely or conditionally, provided that such custom or usage is not inconsistent with nor repugnant to the express terms of the written contract. Thus, evidence of a custom or usage by which a broker contracting as such is personally liable unless the name of the principal is inserted in the written contract²), or unless he discloses the principal at the time of the contract³), or within a reasonable time⁴), is *primâ facie* admissible. But where it was provided that the broker should act as arbitrator in the event of a dispute between the parties, it was held that evidence of a custom rendering him personally liable was inadmissible, because the custom was inconsistent with the clause nominating him as arbitrator⁵).

Professing agent the real principal. Where a person professes to contract as an agent, whether in writing or verbally, and it is shown that he is in fact himself the principal, and was acting on his own behalf, he is personally liable on the contract⁶).

Principal fictitious or non-existent. Where a person professes to contract on behalf of a principal, and the principal is fictitious or non-existent, as, for instance, a company in the course of formation and not yet incorporated, the person so professing to contract is presumed to have intended to contract personally, unless a contrary intention is proved, and where the contract is in writing the contrary intention cannot be proved by parol evidence, but must appear from the terms of the contract or from the surrounding circumstances⁷).

Implied warranty of authority. Where any person, by words or conduct, represents that he has authority to act on behalf of another person, and a third person is induced by any such representation to act in a manner in which he would not have acted if the representation had not been made, the first-mentioned person is deemed to warrant that the representation is true, and is liable for any loss caused to the third person by a breach of such implied warranty, even if he acted in good faith, under a mistaken belief that he had the authority which he represented himself to have⁸). If any such representation is made fraudulently, the person injured thereby may sue either in contract for the breach of warranty, or in tort for the deceit, at his option⁹). A person who professes to contract as an agent is deemed by his conduct in so professing to contract, to represent that he is in fact duly authorised to make the contract, and therefore impliedly warrants that he is so authorised¹⁰), except where the nature and extent of his authority, or all material facts known to him from which its nature and extent may be inferred, are fully known to the other contracting party¹¹). If a broker acts for both buyer and seller, he impliedly warrants to each that he is duly authorised to act on behalf of the other¹²). A warranty of authority is not, however, implied from a representation made in good faith with regard to a mere question of law, in which no representation of fact is involved¹³).

¹) *Wake v. Harrop* (1862) 1 H. & C. 202.

²) *Fleet v. Murton* (1871) L.R. 7 Q. B. 126 (fruit trade & colonial market); *Baumeister v. Fenton* (1883) 1 C. & E. 121 (rice trade).

³) *Pike v. Ongley* (1887) 18 Q.B.D. 708 (hop trade); *Dale v. Humfrey* (1858) E. B. & E. 1004 (oil trade); *Imperial Bank v. L. & St. Katherine's Docks Co.* (1876) 5 Ch.D. 195 (London dry goods market).

⁴) *Hutchinson v. Tatham* (1873) L.R. 8 C.P. 482.

⁵) *Barrow v. Dyster* (1884) 13 Q. B. D. 635.

⁶) *Carr v. Jackson* (1852) 7 Ex. 382; *Jenkins v. Hutchinson* (1849) 13 Q. B. 744.

⁷) *Kelner v. Baxter* (1866) L.R. 2 C.P. 174; *Scott v. Ebury* (1867) L.R. 2 C.P. 255.

⁸) *Brown v. Law* (1895) 72 L.T. 779, H.L.; *Cherry v. Colonial Bank* (1869) 38 L.J.P.C. 49; *Richardson v. Williamson* (1871) L.R. 6 Q. B. 276; *Firbank v. Humphreys* (1886) 18 Q.B.D. 54, C.A.; *Starkey v. Bank of England* [1903] A.C. 114, H.L. This principle does not apply to public agents, contracting on behalf of the Crown: *Dunn v. Macdonald* [1897] 1 Q. B. 555, C.A.

⁹) *Randell v. Trimen* (1856) 18 C.B. 786; *Polhill v. Walter* (1832) 3 B. & Ad. 114.

¹⁰) *Collen v. Wright* (1857) 8 E. & B. 647; *Suart v. Haig* (1893) 9 T.L.R. 488, H.L.; *West London Bank v. Kitson* (1884) 13 Q. B. D. 360, C.A.

¹¹) *Smout v. Ilbery* (1842) 10 M. & W. 1; *Halbot v. Lens* [1901] 1 Ch. 344; *Lilly v. Smales* [1892] 1 Q. B. 456.

¹²) *Hughes v. Graeme* (1864) 33 L.J.Q.B. 335.

¹³) *Beattie v. Ebury* (1874) L.R. 7 H.L. 102; *Eaglesfield v. Londonderry* (1876) 38 L.T. 303, H.L.

The measure of damages for breach of an express or implied warranty of authority is the loss sustained, either as a natural and probable consequence, or such as both parties might reasonably expect to result as a probable consequence, of the breach of warranty¹). Where a contract is repudiated by the person on whose behalf it was professedly made, on the ground that it was made without his authority, such loss is *prima facie* the amount of damages that could have been recovered from him if he had duly authorised and refused to perform the contract, together with the costs and expenses (if any) incurred in respect of any legal proceedings reasonably taken against him on the contract²).

2. Liabilities of Agents in respect of Moneys received.

Money received for use of principal. Where money is paid to an agent for the use of his principal, and the circumstances of the case are such that the person paying the money is entitled to recover it back, the agent is personally liable to repay the money in the following, and only in the following³), cases:

1. Where the agent contracts personally, and the money is paid to him in respect of or pursuant to the contract, unless the other contracting party elects to give exclusive credit to the principal⁴).
2. Where the money is obtained by duress, or by means of any fraud or wrongful act, to which the agent is a party or privy⁵).
3. Where the money is paid under a mistake of fact, or under duress, or in consequence of some fraud or wrongful act, although the agent is not a party or privy thereto, if repayment is demanded of the agent, or notice is given to him of the intention of the payer to demand repayment, before he has in good faith paid the money over to, or otherwise dealt to his detriment with, the principal in the belief that the payment was a good and valid payment⁶).

Money received for use of third persons. An agent is not liable nor accountable to any third person in respect of money in his hands which he has been directed or authorised by his principal to pay to such third person⁷), except in the following cases:

1. Where a specific fund⁸) existing or accruing in the hands of the agent to the use of his principal, is assigned or charged by the principal to or in favour of the third person, and the agent has had notice of the assignment or charge, in which case he is bound to hold the fund, or so much of it as is necessary to satisfy the charge, to the use of the third person⁹).
2. Where the agent, having been directed or authorised by the principal to pay to a third person money existing or accruing in his hands to the use of the principal, expressly or impliedly contracts with such third person to pay him, or to receive or hold the money on his behalf, or for his use, in which case he is personally liable to pay the third person or to receive or hold

¹) *Firbank v. Humphreys* (1886) 18 Q. B. D. 54, C. A.; *Richardson v. Williamson* (1871) L. R. 6 Q. B. 276; *Meek v. Wendt* (1888) 21 Q. B. D. 126; *Spedding v. Nevell* (1869) L. R. 4 C. P. 212.

²) *Simons v. Patchett* (1857) 7 E. & B. 568; *Ex parte Panmure* (1883) 24 Ch. D. 367, C. A.; *Randell v. Trimen* (1856) 18 C. B. 786; *Godwin v. Francis* (1870) L. R. 5 C. P. 295.

³) *In re Bourne* (1851) 4 De. G. & S. 273; *Holland v. Russell* (1863) 4 B. & S. 14; *Ellis v. Goulton* [1893] 1 Q. B. 350, C. A.; *Galland v. Hall* (1888) 4 T. L. R. 761, C. A.; *Taylor v. Metropolitan Rail. Co.* [1906] 2 K. B. 55; *Owen v. Cronk* [1895] 1 Q. B. 265.

⁴) *Gurney v. Womersley* (1854) 4 E. & B. 133; *Newall v. Tomlinson* (1871) L. R. 6 C. P. 405.

⁵) *Snowdon v. Davis* (1808) 1 Taunt. 359; *In re Chapman* (1884) 13 Q. B. D. 747, C. A.; *Smith v. Sleep* (1844) 12 M. & W. 585; *Oates v. Hudson* (1851) 6 Ex. 346; *Wakefield v. Newbon* (1844) 6 Q. B. 276.

⁶) *Kleinwort v. Dunlop Rubber Co.* (1907) 97 L. T. 263, H. L.; *Cox v. Prentice* (1815) 3 M. & S. 344.

⁷) *Barlow v. Browne* (1846) 16 M. & W. 126; *Moore v. Bushell* (1857) 27 L. J. Ex. 3; *Johnson v. Roberts* (1875) L. R. 10 Ch. 505; *Williams v. Everett* (1811) 14 East, 582; *Morrell v. Wootten* (1852) 16 Beav. 197.

⁸) See *Citizens' Bank v. National Bank* (1874) L. R. 6 H. L. 352.

⁹) *Webb v. Smith* (1885) 30 Ch. D. 192, C. A.; *Brandt v. Dunlop Rubber Co.* [1905] A. C. 454, H. L.; *Rodick v. Gandell* (1852) 1 D. M. & G. 763. This is subject to any right of lien or set-off the agent may have at the time of receiving notice of the assignment or charge: *Roxburghe v. Cox* (1881) 17 Ch. D. 520, C. A.

the money on his behalf, or for his use, as the case may be, even if he has had fresh instructions from the principal not to pay the third person, or the principal has become bankrupt¹).

Public agents. No public agent is liable or accountable to any third person in respect of any money which as a public agent it is his duty to pay to such third person²). This rule applies also to the agents of foreign States³).

3. Rights of Agents against Third Persons.

To sue on contracts. An agent may sue in his own name on contracts made by him on behalf of his principal:

1. Where he contracts personally⁴).
2. Where, as in the case of factors and auctioneers, he has a special property in, or lien upon, the subject-matter of the contract, or has a beneficial interest in the completion thereof⁵).
3. In the case of insurance brokers, who may sue on all policies effected by them⁶).

Where a person who enters into a contract professedly as an agent is in fact the real principal, he may sue on the contract if it has been partly performed or otherwise affirmed by the other contracting party with the knowledge that he is the real principal⁷), or if the identity of the contracting party is not a material element in the making of the contract, provided that he gives notice to the other contracting party, before taking proceedings, that he is the real principal⁸).

Except in the cases above-mentioned, an agent cannot maintain an action in his own name on any contract made by him as agent, whether the principal is disclosed or undisclosed⁹), and even though he may be acting under a *del credere* commission¹⁰). Thus, a broker other than an insurance broker cannot, as a general rule, sue on any contract made by him in that capacity¹¹). Nor can a shipmaster sue for freight due under a bill of lading signed by him merely as agent of the shipowners¹²).

Intervention of or settlement with principal. Except where the agent has, as against the principal, a right of lien on the subject-matter of the contract, the right of an agent to sue on a contract made on behalf of his principal ceases on the intervention of the principal, and a settlement with or set-off against the principal may be set up by way of defence to an action by the agent on the contract¹³). If the agent has a right of lien on the subject-matter as against the principal, the right of the agent to sue on the contract, so long as the claim secured by the lien remains unsatisfied, has priority to the right of the principal to sue¹⁴); and a settlement with or set-off against the principal cannot be set up by way of defence to an action by the agent on the contract where such settlement or set-off would operate to the prejudice of the claim secured by the lien, unless the defendant was induced by the terms or conditions of the contract, or by the conduct of the agent, to believe, and

¹) *Robertson v. Fautleroy* (1823) 8 Moo. 10; *Crowfoot v. Gurney* (1832) 9 Bing. 372; *Walker v. Rostron* (1842) 9 M. & W. 411; *Hamilton v. Spottiswoode* (1849) 4 Ex. 200; *Griffin v. Weatherby* (1868) L. R. 3 Q. B. 753.

²) *R. v. Sec. of State for War* [1891] 2 Q. B. 326, C. A.; *Kinloch v. Sec. of State for India* (1882) 7 App. Cas. 619, H. L.

³) *Twycross v. Dreyfus* (1877) 5 Ch. D. 605, C. A.

⁴) *Cooke v. Wilson* (1856) 1 C. B. N. S. 153; *Clay v. Southern* (1852) 7 Ex. 717; *Robertson v. Wait* (1853) 8 Ex. 299. As to when an agent is deemed to contract personally, see Section 1 of this Part, *supra*.

⁵) *Williams v. Millington* (1788) 1 H. Bl. 81; *Hindle v. Brown* (1908) 98 L. T. 791, C. A.; *Fisher v. Marsh* (1865) 6 B. & S. 411.

⁶) *Provincial Insurance Co. v. Leduc* (1874) L. R. 6 P. C. 224; *Oom v. Bruce* (1810) 12 East, 225.

⁷) *Rayner v. Grote* (1846) 15 M. & W. 359.

⁸) *Schmaltz v. Avery* (1851) 20 L. J. Q. B. 228; *Harper v. Vigers* [1909] 2 K. B. 549. Compare *Sharman v. Brandt* (1871) L. R. 6 Q. B. 720.

⁹) *Evans v. Hooper* (1875) 1 Q. B. D. 45, C. A.; *Bowen v. Morris* (1810) 2 Taunt. 374; *Gray v. Pearson* (1870) L. R. 5 C. P. 568.

¹⁰) *Bramwell v. Spiller* (1870) 21 L. T. 672.

¹¹) *Fairlie v. Fenton* (1870) L. R. 5 Ex. 169; *Fawkes v. Lamb* (1862) 31 L. J. Q. B. 98.

¹²) *Repetto v. Millar's, &c. Forests* [1901] 2 K. B. 306.

¹³) *Atkinson v. Cotesworth* (1825) 3 B. & C. 647; *Rogers v. Hadley* (1861) 2 H. & C. 227.

¹⁴) *Drinkwater v. Goodwin* (1775) Cowp. 251.

did in fact believe, that the agent acquiesced in a settlement being made with the principal, or that he (the defendant) would be entitled to the right of set-off¹).

Defences available where agent sues. Where an agent sues in his own name on a contract made on behalf of his principal, any statements which he has himself made, as well as the statements of the principal, may be used in evidence against him²); and the defendant may avail himself of every defence, including that of set-off, which would have been available if he had been suing on a contract made on his own behalf, even if the defence would not have been available in an action by the principal on the contract³).

Right to sue for repayment of money paid. Where an agent pays money on his principal's behalf under a mistake of fact, or in respect of a consideration which fails, or in consequence of some fraud or wrongful act of the payee, or otherwise under such circumstances that the payee is liable to repay the money, the agent may in his own name sue the payee for its recovery⁴).

No right to sue for promised bribe. No action can be maintained by an agent for the recovery of any property or money promised to him by way of a bribe, whether he was induced by the promise to depart from his duty or not⁵).

4. Liabilities of Agents for Wrongs.

Where loss or injury is caused to any third person, or any penalty is incurred, by any wrongful act or omission of an agent while acting on behalf of the principal, the agent is personally liable therefor, whether he is acting with the authority of the principal or not, unless the principal's authority justifies the wrong⁶), to the same extent as if he were acting on his own behalf⁷). This rule applies to public agents⁸); provided that no public agent is liable for loss or injury caused to a member of any foreign State by any act authorised or ratified by the Government⁹).

Where the principal is jointly and severally liable with the agent for the wrong, a judgment against the principal, although unsatisfied, is a bar to any action against the agent in respect of the same wrong¹⁰).

An agent is not liable, as such, to any third person for loss or injury caused by the wrongful act or omission of a co-agent, not being his partner, or of a sub-agent, while acting on behalf of the principal, unless he authorised, or was otherwise party or privy to, such wrongful act or omission¹¹). Nor is a public agent liable in his official capacity for the wrongful acts of his subordinates¹²).

XII. Determination of Agency.

Agent's authority, how determined. The authority of an agent is determined:

1. If given for a particular transaction, by the completion of that transaction. Thus, a broker or auctioneer employed to sell goods is *functus officio* as soon as the sale is completed¹³).

¹) *Robinson v. Rutter* (1855) 4 E. & B. 954; *Grice v. Kenrick* (1870) L. R. 5 Q. B. 340; *Coppin v. Walker* (1816) 2 Marsh. 497; *Coppin v. Craig* (1816) 2 Marsh. 501.

²) *Smith v. Lyon* (1813) 3 Camp. 465.

³) *Gibson v. Winter* (1833) 5 B. & Ad. 96.

⁴) *Holt v. Ely* (1853) 1 E. & B. 795; *Colonial Bank v. Exchange Bank* (1885) 11 App. Cas. 84, P. C. In such cases either the principal or the agent may sue.

⁵) *Harrington v. Victoria Dock Co.* (1878) 3 Q. B. D. 549.

⁶) *Hull v. Pickersgill* (1819) 1 B. & B. 282.

⁷) *Cullen v. Thomson* (1862) 4 Macq. 424, H. L.; *Swift v. Jewesbury* (1874) L. R. 9 Q. B. 301 (fraud); *Baschet v. London Illustrated Standard Co.* [1900] 1 Ch. 73 (infringement of copyright); *Adair v. Young* (1879) 12 Ch. D. 13 (infringement of patent); *Hollins v. Fowler* (1872) L. R. 7 H. L. 757 (trover); *Consolidated Co. v. Curtis* [1892] 1 Q. B. 495 (trover); *Bennett v. Bayes* (1860) 5 H. & N. 391 (trespass to goods); *Wilson v. Moore* (1834) 1 Myl. & K. 127, 337 (breach of trust); *Magnus v. Queensland Bank* (1888) 37 Ch. D. 466, C. A. (breach of trust).

⁸) *Nireaha Tamaki v. Baker* [1901] A. C. 561, P. C.

⁹) *Buron v. Denman* (1848) 2 Ex. 167; *Salaman v. Sec. of State for India* [1906] 1 K. B. 613.

¹⁰) *Brinsmead v. Harrison* (1872) L. R. 7 C. P. 547.

¹¹) *Stone v. Cartwright* (1795) 6 T. R. 411; *Weir v. Bell* (1878) 3 Ex. D. 238, C. A.; *Bear v. Stevenson* (1874) 30 L. T. 177, P. C.

¹²) *Bainbridge v. Postmaster-General* [1906] 1 K. B. 178, C. A.

¹³) *Blackburn v. Scholes* (1810) 2 Camp. 343; *Seton v. Slade* (1802) 7 Ves. 265, 276.

2. If given for a limited period, by the expiration of that period; it may be shown that by the custom of a particular trade an authority given in general terms expires in a given period¹⁾).
3. By the destruction of the subject-matter of the agency²⁾).
4. By the happening of any event rendering the agency unlawful, or upon the happening of which it is agreed between the principal and agent that the authority shall determine. — The authority of an agent may also be determined, subject as hereinafter mentioned, by the death, lunacy, unsoundness of mind, or bankruptcy of the principal or agent, or where the principal is a corporation or incorporated company, by the dissolution of the corporation or company, or by notice of revocation given by the principal to the agent, or of renunciation given by the agent to the principal.

When authority irrevocable. Where the authority of an agent is given by deed³⁾, or for valuable consideration⁴⁾, for the purpose of effectuating any security⁵⁾, or of protecting or securing any interest of the agent⁶⁾, it is irrevocable during the subsistence of such security or interest⁷⁾. But the authority is not irrevocable merely because the agent has an interest in the exercise of it, or has a lien for advances on the subject-matter thereof, where the authority was not given expressly for the purpose of securing such interest or advances⁸⁾.

Where an agent is employed to enter into any contract, or to do any other lawful act involving personal liability, and is expressly or impliedly authorised to discharge the liability on behalf of the principal, the authority becomes irrevocable as soon as the liability is incurred by the agent⁹⁾; and where an agent is authorised to pay money on behalf of his principal to a third person, the authority becomes irrevocable as soon as the agent enters into a contract, or otherwise becomes bound, to pay or hold the money to or to the use of the third person¹⁰⁾.

Where an agent has a right to sue on a contract made on behalf of his principal, and would be entitled as against the principal to a lien on any goods, chattels, or money recovered in respect of the contract or of any breach thereof, the authority of the agent to sue and give a discharge for the goods, chattels or money recoverable, is irrevocable during the subsistence of the claim in respect of which he would be entitled to the lien¹¹⁾.

The Conveyancing Act, 1882¹²⁾, by sections 8 and 9, which are printed in the Appendix, provides that powers of attorney may in certain cases be declared irrevocable in favour of purchasers for valuable consideration¹³⁾.

In any of the above-mentioned cases in which an authority is said to be irrevocable, it is not determined by the death, lunacy, unsoundness of mind, or bankruptcy of the principal, and cannot be revoked by him without the consent of the agent.

Revocation by death or insanity. Subject to what has been said above in reference to irrevocable authorities, the authority of every agent, whether conferred by deed or otherwise, is determined by the death¹⁴⁾, lunacy or unsoundness of mind¹⁵⁾ of

¹⁾ *Dickenson v. Lilwall* (1815) 4 Camp. 279; *Lawford v. Harris* (1896) 12 T. L. R. 275.

²⁾ *Rhodes v. Forwood* (1876) 1 App. Cas. 256, H. L.

³⁾ *Gausson v. Morton* (1830) 10 B. & C. 731.

⁴⁾ *Raleigh v. Atkinson* (1840) 6 M. & W. 670.

⁵⁾ *Smart v. Sandars* (1848) 5 C. B. 895.

⁶⁾ *Kiddill v. Farnell* (1857) 3 Sm. & G. 428; *Smart v. Sandars, supra*; *Carmichael's case* [1896] 2 Ch. 643, C. A.; *Yates v. Hoppe* (1850) 9 C. B. 541.

⁷⁾ *Frith v. Frith* [1906] A. C. 254, C. A.

⁸⁾ *Raleigh v. Atkinson* (1840) 6 M. & W. 670; *Smart v. Sandars, supra*; *Taplin v. Florence* (1851) 10 C. B. 744.

⁹⁾ *Read v. Anderson* (1884) 13 Q. B. D. 779, C. A.

¹⁰⁾ *Crowfoot v. Gurney* (1832) 9 Bing. 372; *Walker v. Roston* (1842) 9 M. & W. 411; *Hamilton v. Spottiswoode* (1849) 4 Ex. 200.

¹¹⁾ *Drinkwater v. Goodwin* (1775) Cowp. 251; *Robson v. Kemp* (1802) 4 Esp. 233.

¹²⁾ 45 & 46 Vict. c. 39.

¹³⁾ The Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 47, also contains provisions for the protection of agents making payments and doing other acts under powers of attorney without knowledge of the revocation thereof. The section is printed in the Appendix.

¹⁴⁾ *Blades v. Free* (1829) 9 B. & C. 167; *Campanari v. Woodburn* (1854) 15 C. B. 400; *In re Overweg* [1900] 1 Ch. 209; *Farrow v. Wilson* (1869) L. R. 4 C. P. 744.

¹⁵⁾ *Drew v. Nunn* (1879) 4 Q. B. D. 661, C. A.

either the principal or the agent; or, where the principal is a corporation or incorporated company, by its dissolution¹). If the principal is a partnership, the authority is determined by the death of any one of the partners²).

Revocation by bankruptcy. The authority of an agent, whether conferred by deed or otherwise³), except where it is irrevocable⁴), and except in the case of an authority to do a merely formal act in completion of a transaction already binding on the principal⁵), is revoked by the first act of bankruptcy committed by the principal within the three months immediately preceding the date of the presentation of a bankruptcy petition upon which the principal is afterwards adjudicated bankrupt⁶). Provided that:

1. Where the authority is given in the course and for the protection of mutual dealings between the principal and the agent, it is not revoked by the bankruptcy of the principal, until either the agent has notice of an available act of bankruptcy, or the receiving order is made⁷).
2. Every payment or act made to or by, or done by, the agent before the date of the receiving order, is as valid as if his authority had not been revoked by the bankruptcy, with respect to any third person dealing with him for valuable consideration without notice of any available act of bankruptcy by the principal, and also with respect to the agent if at the time when the payment or act was made or done he had no notice of any such act of bankruptcy⁸).

The question whether the bankruptcy of an agent determines his authority depends upon the nature and terms of his employment⁹).

Revocation or renunciation by notice. The authority of an agent, whether conferred by deed or not, except in the case of an irrevocable authority¹⁰), is determined by the principal giving the agent notice of revocation at any time before the authority has been completely exercised¹¹), or by the agent giving the principal notice of renunciation. The authority of an auctioneer to sell goods may be revoked by the principal at any time before they are knocked down to a purchaser¹²), and that of a broker to buy or sell goods at any time before the purchase or sale is completed, even after he has made a verbal contract, in cases where writing is necessary to render the contract enforceable¹³). The authority of a broker to effect a marine insurance policy may be revoked at any time before the policy is executed, even after the underwriters have signed the slip¹⁴). Authority to pay money in respect of an unlawful transaction may be revoked at any time before the money has been paid, even if it has been credited in account¹⁵). Where an authority is given by two or more principals jointly, it is sufficient if the notice of revocation or renunciation be given by or to any one of the principals¹⁶).

The determination of the authority of an agent by notice of revocation or renunciation is without prejudice to any claim for damages the principal may have

¹) *Salton v. New Beeston Cycle Co.* [1900] 1 Ch. 43.

²) *Tasker v. Shepherd* (1861) 6 H. & N. 575.

³) *Markwick v. Hardingham* (1880) 15 Ch. D. 339, C. A.

⁴) *Supra*, p. 202.

⁵) *Dixon v. Ewart* (1817) Buck, 94.

⁶) 46 & 47 Vict. c. 52, s. 43; *Pearson v. Graham* (1837) 6 A. & E. 899; *In re Lamb* (1887) 55 L. T. 517.

⁷) *Elliott v. Turquand* (1881) 7 App. Cas. 79, P. C.; *Palmer v. Day* [1895] 2 Q. B. 618. See title "Bankruptcy", *infra*.

⁸) 46 & 47 Vict. c. 52, s. 49; *In re Pollitt* [1893] 1 Q. B. 455, C. A.; *In re Douglas* (1872) L. R. 7 Ch. 534; *Ex parte Mac Donnell* (1819) Buck, 399.

⁹) *M'Call v. Australian Meat Co.* (1870) 19 W. R. 188; *Phelps v. Lyle* (1840) 10 A. & E. 113.

¹⁰) *Supra*, p. 202.

¹¹) *Freeman v. Fairlie* (1838) 8 L. J. Ch. 44; *Bromley v. Holland* (1802) 7 Ves. 28; *Venning v. Bray* (1862) 2 B. & S. 502; *Campanari v. Woodburn* (1854) 15 C. B. 400.

¹²) *Warlow v. Harrison* (1859) 1 E. & E. 309.

¹³) *Farmer v. Robinson* (1805) 2 Camp. 338. n.

¹⁴) *Warwick v. Slade* (1811) 3 Camp. 127. This only applies to marine insurance: *Thompson v. Adams* (1889) 23 Q. B. D. 361.

¹⁵) *Edgar v. Fowler* (1803) 3 East, 222; *Taylor v. Bowers* (1876) 1 Q. B. D. 291, C. A. As to money to be paid in respect of a wager, see *Diggle v. Higgs* (1877) 2 Ex. D. 422; *Shoolbred v. Roberts* [1900] 2 Q. B. 497; C. A.; *Burge v. Ashley* [1900] 1 Q. B. 744, C. A.

¹⁶) *Bristow v. Taylor* (1817) 2 Stark. 50.

against the agent, or the agent against the principal, for breach of the contract of agency; but a contract of agency may be determined at the will of either, in the absence of agreement, express or implied, to the contrary¹).

When notice of determination to third persons necessary. Where a principal, by words or conduct, represents or permits it to be represented, that an agent is authorised to act on his behalf, he is bound by the acts of the agent, notwithstanding the determination of the authority, except where it is determined by the death or bankruptcy of the principal, to the same extent as he would have been if the authority had not been determined, with respect to any third person dealing with the agent on the faith of any such representation, without notice of the determination of his authority²).

¹) *Bovine v. Dent* (1904) 21 T. L. R. 82; *Motion v. Michaud* (1892) 8 T. L. R. 447, C. A.; *Joynson v. Hunt* (1905) 93 L. T. 470, C. A.

²) *Trueman v. Loder* (1840) 11 A. & E. 589; *Drew v. Nunn* (1879) 4 Q. B. D. 661, C. A.; *Marsden v. City & County Assurance Co.* (1865) L. R. 1 C. P. 232; *Pole v. Leask* (1862) 33 L. J. Ch. 155, H. L. As to revocation by bankruptcy, see *supra* p. 203, and as to revocation by death, see *Blades v. Free* (1829) 9 B. & C. 167. This latter case is of doubtful authority, and it is questionable whether the principle stated in the text does not apply in the case of a revocation by the death of the principal.

Title IV. Contracts.

By J. G. Pease, B. A., Barrister-at-Law.

I. Introductory.

The term "Contract" is used in two senses in English law. In its narrower sense, and that in which it is most commonly used, it is defined by an eminent writer (Sir W. Anson in his "Principles of the Law of Contract") as "an agreement enforceable at law, made between two or more persons by which rights are acquired by one or more to acts or forbearances on the part of the other or others". Contract in this sense is founded on agreement and can only come into existence as a result of agreement. But there are certain obligations a breach of which gives rise to an action of contract, and which, therefore, in the larger sense of the term are properly denominated contracts. These are

1. An obligation to pay a *debt of record*.
2. An obligation created by deed.
3. An obligation to pay money arising out of a "contract implied in law", or a "quasi-contract".

Each of these obligations has something in common with contracts founded on agreement, and the first and second may, but do not necessarily, result from an agreement, but for none of them is an agreement necessary.

Contracts of Record. The most familiar kind of debt of record is that which is created by a judgment of an English Court of Record to pay a sum of money.

The judgment creates a debt for which an action of debt may be brought and technically the obligation to pay the debt is a contract. It is called a contract of record because it derives its force from its being recorded in the Records of the Court. But the consideration of the nature of Judgments and other Contracts of Record¹) scarcely belongs to Commercial law and forms no part of this title²).

II. Contracts by agreement.

Leaving out of consideration contracts of record and implied contracts³), there are two ways in which persons may voluntarily submit themselves to contractual obligations:

First, a person may bind himself to another by a "formal contract" or promise made by deed, and second, two persons may enter into an agreement by which they make mutual promises or by which one party promises in consideration of something done or foreborne by the other. Contracts of the second kind are called "simple contracts".

Formal Contracts. A promise made by deed derives its enforceability from the observance of certain formalities. These formalities are that the promise must be in writing and the writing must be sealed by the party making the promise and delivered to the other party or to some one on his behalf. The act of sealing may be merely formal, as by touching a wafer or piece of sealing wax already attached to the document, at the same time acknowledging it as the seal of the party. The delivery need not be actual: it is enough if the party says "I deliver this as my deed" and he need not part with actual possession⁴).

Unless these formalities are complied with the instrument is not a deed and is not binding as a contract under seal.

If the formalities are performed with the intention of executing a deed presently binding, nothing more is required.

A deed, however, may be delivered so as to suspend or qualify its binding effect. The maker may declare that it shall have no effect until a certain time

¹) E. g. Recognizances, i. e. debts to the Crown acknowledged by the debtor in the presence of a Court of Record.

²) Judgments of Foreign Courts are not contracts of Record (see *post* p. 214).

³) As to implied contracts see *post* p. 213.

⁴) See *per* Blackburn, J. in *Xenos v. Wickham* (1866), L. R. 2 H. L. 296 at p. 312.

has arrived or until some condition has been performed. Such a deed is called an escrow. But when the time has arrived or the condition has been fulfilled the maker is absolutely bound by it, whether he has parted with the possession or not¹).

And even if the formalities have been complied with, the deed is wholly inoperative and void when the party who has sealed and delivered it has done so under a complete misapprehension as to the nature of the instrument. The mere fact that he does not know its contents is not enough to render it void, but if he goes through the formalities thinking he is executing a document of a wholly different nature from that which in fact he is sealing and delivering, there is no execution and it is not his deed²).

Moreover, a contract by deed, like a simple contract, is voidable in certain circumstances, if its execution was procured by fraud, misrepresentation or duress³), or if its purpose or the consideration is illegal⁴).

Almost any contract may be expressed in a deed, but in practice deeds are seldom used for ordinary commercial transactions. Articles of partnership and of apprenticeship, contracts for extensive building and engineering works, policies of insurance etc. are often, but not necessarily, expressed in deeds. Charter-parties were formerly but seldom are now.

Bonds are contracts by deed used for guaranties⁵), indemnities, and for securing the performance of contractual and other duties. The ordinary form of bond is a declaration by the obligor that he binds himself for payment to the obligee of a sum of money, followed by a condition that the bond shall be void in case the obligor or some other person does that for which the bond is security. It is sealed by the obligor and delivered by him as his deed⁶).

Contracts under seal differ from simple contracts in four respects:

1. They require no consideration to make them binding.
2. At Common Law they can only be rescinded or cancelled by deed (but see p. 231).
3. The time within which an action must be brought so as not to be barred by a Statute of Limitations is 20 years instead of 6 years as in the case of simple contracts (post p. 245).
4. Whereas upon the death of a party to a simple contract the only remedy is against his personal representatives, a contract under seal may operate in law to bind the heirs and real estate of the deceased as well as his personal estate. That is to say, that such contracts are enforceable against the heir and devisees of the real estate to the extent of the land of the deceased coming to them by intestacy or devise.

Simple Contracts. That a simple contract founded on agreement may be enforceable two conditions must be fulfilled:

1. There must be an actual agreement between the parties, and
2. Neither party is bound unless there is some consideration for his being bound.

No formalities are requisite. The agreement may be wholly expressed in a written document signed or acknowledged by the parties, or it may be contained in letters or other documents, or it may be made by word of mouth: and in some cases the agreement of the parties may properly be inferred wholly or partly from their conduct without any express words of agreement. But an actual agreement is absolutely necessary:

We shall consider:

1. What is meant by "agreement".
2. What constitutes "consideration".

¹ See Lord Cranworth, in *Xenos v. Wickham* (1866) L. R. 2 H. L., at p. 323.

² See *Hunter v. Walters* (1871), L. R. 7 Ch. 75; *Howatson v. Webb* [1908] 1 Ch. 1, and p. 219, *post*.

³ *Post*, pp. 219—221.

⁴ *Post*, p. 224.

⁵ See title "Guaranties" *infra*.

⁶ By law certain conveyances of property, including leases for more than 3 years and bills of sale, must be by deed; and contracts of corporations must in certain cases be under the common seal of the corporation (see *post* p. 216). A deed is necessary to the enforceability of all promises for which there is no consideration (*post* p. 209). And by the constitution of many companies transfers of stock or shares must be by deed.

III. Agreement: Offer and Acceptance.

An agreement may be made by offer (or proposal) and acceptance. An offer or proposal by one party is the first step in the formation of an agreement. It may be made in writing or by word of mouth or even by conduct. An order given to a tradesman to deliver goods is in effect an offer to buy the goods. So also a request to a booking clerk for a railway ticket is an offer to enter into a contract for carriage with the railway company. In either case there is no contract till the offer is accepted.

Instead of either accepting or refusing the offer, the person to whom it is made may make a counter-offer. If A offers to sell a horse to B for £50 and B says he will give £40 for it, this is a counter-offer which A in his turn may accept or refuse — or he may again make a counter-offer by offering to sell for £45, or by attaching to B's offer some condition. Any proposal to modify the terms of an offer constitutes a counter-offer: and until an offer or counter-offer made by one party is accepted absolutely and unconditionally there is no agreement. When once an offer of one party has been unconditionally accepted by the other there is an agreement.

The terms of an offer may be included in a single letter or oral communication, or may be contained in a number of separate documents, such as letters, price lists, sale-catalogues etc.

When an offer contained in a written or printed document is accepted, the party accepting cannot (in the absence of fraud) be heard to say that he did not read or understand the terms of the offer: nor can the offeror be heard to say that he did not know its contents¹).

The terms of an offer are sometimes contained in a document which is primarily and on the face of it merely an acknowledgment or receipt — as when goods are deposited at a railway cloakroom and a receipt for the goods is given, upon which there are printed the conditions on which the goods are received. To make the conditions printed on such a document part of the contract, it is enough if, at the time of the deposit, the attention of the other party is called to them. In that case by depositing the goods and taking the receipt he is deemed to have accepted the conditions as the terms of the contract. But if his attention is not called to them and he does not know that the document contains conditions, and it is of such a nature that he may reasonably assume it is only a receipt, the conditions form no part of the contract, unless the party giving it does what is reasonably sufficient to call attention to them, as by printing something on the face of the document which will call attention to conditions printed elsewhere²). The same rule applies to contracts made by passenger tickets, the ticket being primarily only a receipt for the passage money³). But it does not apply to such contracts as bills of lading, or other contracts the special terms of which would ordinarily be sought in the documents passing between the parties. In those cases neither party can be heard to say he did not read or know of the printed terms⁴).

An offer is usually addressed to a particular person, and such an offer can not be accepted by any other person⁵): but if an offer is made generally to any person who chooses to accept it, any one may accept it⁶), and if it is made to any one of a class of persons who chooses to accept, such as to any shareholder in a company, it may be accepted by any one belonging to that class⁷).

The general rule with regard to acceptance of an offer is that it must be communicated to the offeror. That is to say, the person accepting must by word of mouth, or by writing or conduct communicate to the offeror his acceptance of the offer, and until he does so there is no contract⁸).

But the offeror may by his offer dispense with the necessity of communication of acceptance. He may say that he will be satisfied if the acceptance is communicated to some third person, or if some act is performed which shows a present in-

¹) *Harris v. G. W. R.* (1876), 1 Q. B. D. 515. *Biggar v. Rock Life Assurance Co.* [1902] 1 K. B. 516.

²) *Parker v. S. E. Ry. Co.* (1877), 2 C. P. D. 416.

³) *Richardson Spence & Co. v. Rowntree* [1894] A. C. 217.

⁴) *Watkins v. Rymill* (1883), 10 Q. B. D. 178.

⁵) *Hardman v. Booth* (1863), 1 H. & C. 803.

⁶) *Gerhard v. Bates* (1853), 2 E. & B. 476.

⁷) *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256. *Johnston v. Boyes* [1899] 2 Ch. 73.

⁸) *Brogden v. Met. Ry. Co.* (1877), 2 App. Cas. 666.

tention to accept. In such cases acceptance in the manner indicated is enough to constitute an agreement¹⁾. But there must in every case be something said, written or done which shows an intention to accept. On the one hand the person to whom the offer is addressed cannot by merely making up his mind to accept, bind the other party²⁾. On the other hand it is not open to the offeror to treat the offer as accepted merely because it is not declined³⁾.

The most important exception to the necessity of communication of acceptance occurs in cases where commercial contracts are arranged by postal correspondence. In these cases, although there is no express dispensation with the necessity for communicating acceptance, it is well understood that acceptance of an offer is complete as soon as a letter of acceptance is posted⁴⁾. The moment when the parties are taken to be in agreement is the moment of posting a letter containing an unqualified acceptance of the offer: and this is so even though the letter is delayed in delivery or never reaches the addressee⁵⁾. As we shall see, it is important to fix the exact moment when the parties are agreed, because, though a revocation of the offer may be made up to that moment, it cannot be made afterwards.

An offer may be made in such a form that any one to whom it is communicated may accept it by merely acting upon it. Thus an advertisement by which an offer is made to pay money to any one who does some act may be accepted by any person by simply doing that act. The form of the offer dispenses with communication of acceptance and substitutes therefor the doing of the act for which the money is offered⁶⁾.

Again, an offer to a particular person may be made in such general terms that it may continue open and be accepted from time to time, so that each time it is accepted a new contract is made.

For instance a person may make a tender by which he offers to supply at a named price any goods of a particular description which may be ordered within a certain period of time. Each time goods are ordered there is an acceptance of this offer and a contract to supply the goods ordered and to pay for them at the price named in the tender⁷⁾. But until goods are ordered there is no contract, and there is no obligation on the one hand to order⁸⁾, or on the other hand to keep the offer open.

Offers of this kind must, however, be distinguished from invitations to make offers. When tenders are invited for the supply of goods or for executing works, the invitation to tender may be so expressed as to amount to an offer, which any one may accept by complying with certain conditions, or it may be, and usually is, so framed as to be merely an invitation to make offers. Thus if the invitation states without qualification that the lowest tender will be accepted, this is an offer to accept the lowest tender, which is accepted by the mere act of making the lowest tender. But the person inviting tenders usually protects himself by saying that he does not bind himself to accept the lowest or any tender. The invitation to tender is then only an invitation to make offers. Each tender is an offer: and there is no agreement till a tender is accepted⁹⁾.

Revocation of Offer. In general an offer may be revoked at any time before it is accepted, by any words or conduct showing a clear and undoubted intention to revoke¹⁰⁾. But the revocation must be communicated to the person to whom the offer is made and is only operative from the time when it is communicated¹¹⁾. So a revocation by letter operates from the actual receipt of the letter, not from the time when it is posted. And if a letter of revocation is not received till after a letter of acceptance has been posted, the revocation is too late¹²⁾.

¹⁾ *Ibid.* and see cases below.

²⁾ *Felthouse v. Bindley* (1862), 11 C. B. N. S. 869.

³⁾ *Russell v. Thornton* (1860), 4 H. & N. 788; 6 H. & N. 140. *In re Empire Assurance Corporation* (1871), L. R. 6 Ch. 266.

⁴⁾ *Dunlop v. Higgins* (1848), 1 H. L. C. 381.

⁵⁾ *Household Fire Insurance Co. v. Grant* (1879), 4 Ex. D. 216.

⁶⁾ *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256.

⁷⁾ *Great Northern Railway v. Witham* (1873), L. R. 9 C. P. 16.

⁸⁾ *Burton v. Great Northern Railway* (1854), 9 Ex. 507.

⁹⁾ See *Spencer v. Harding* (1870), L. R. 5 C. P. 561. cf. *Johnson v. Boyes* [1899] 2 Ch. 72.

¹⁰⁾ *Dickinson v. Dodds* (1876), 2 Ch. D. 463.

¹¹⁾ *Byrne v. van Tienhoven* (1881), 5 C. P. D. 344.

¹²⁾ *Henthorn v. Fraser* [1892] 2 Ch. 27.

A promise to keep the offer open for a certain time does not prevent the offeror from revoking within that time¹⁾ — unless there is some independent consideration for keeping the offer open²⁾. Its only effect is to limit the time within which the offer may be accepted unless previously revoked.

If a time is named within which an offer is to be accepted, an acceptance after the expiration of that time does not constitute an agreement. At most such an acceptance would be a counter-offer. And even when no time is expressly named for acceptance, an offer lapses (without express revocation) if it is not accepted within such time as is in all the circumstances reasonable³⁾.

IV. Contracts in Writing.

Though all agreements are brought about by offer and acceptance, the terms when finally agreed upon are often put into the form of a written contract. If it is the intention of the parties (as gathered from conversations or letters) that the agreement shall not be binding until it has been put into the form of a written agreement, there is no enforceable contract until this is done. But if their intention appears to be that they shall be bound as soon as the terms are agreed upon and that those terms are afterwards to be put into writing for the sake of preserving a memorial, the Courts will enforce the contract though it has not been drawn up in a written agreement⁴⁾. If the terms of the agreement are drawn up and expressed in a document signed by the parties, such document is (in the absence of fraud or of common mistake: see post p. 219) conclusive that the parties have agreed to those terms and neither party can be heard to say that he did not in fact agree to any one or more of those terms, or that he was ignorant of, or did not understand, the contents of the document⁵⁾. He may however show that he put his name to the document not for the purpose of making himself a party to the agreement, but as a witness only to the signature of another party, or that he signed it thinking it was a document of a wholly different nature from that which in fact it is⁶⁾.

V. Consideration.

An agreement or promise (not being by deed) is not enforceable unless it is made for some consideration. This means that a mere voluntary promise by one person though accepted by another is not a contract. An agreement between two persons that one shall work for the other without reward is not enforceable: but an agreement that one shall work and the other shall pay him is enforceable, the promise to pay being consideration for the promise to work.

Consideration may consist of some right, benefit or profit accruing to the party promising, or in some detriment or loss suffered, or some forbearance given or responsibility undertaken, by the other party⁷⁾.

When an agreement consists of mutual promises, such as an agreement by one to do work and by the other to pay for it, the promise of each party is consideration for the promise of the other. Each party gets the benefit of the promise of the other. But there may be sufficient consideration without any benefit received or promised. If A promises B that in consideration of B's lending C money, A will pay the debt if C does not, the consideration for A's promise is the detriment suffered by B in parting with his money and this is sufficient consideration without showing any benefit accruing to A.

The consideration for a promise must however move from the person to whom the promise is made. This means that the person to whom the promise is made must be the person who makes some reciprocal promise, or from whom the benefit or profit comes, or the person who suffers the forbearance, detriment or loss, or undertakes the responsibility. It follows from this that an agreement which consists of mutual promises cannot be enforced by a third person even though it is

¹⁾ *Grant v. Routledge* (1828), 4 Bing. 653. *Dickinson v. Dodds* (1876), 2 Ch. D. 463.

²⁾ See Pollock on Contract 7th. Ed. p. 26.

³⁾ *Ramsgate Hotel Co. v. Goldsmid* (1886), L. R. 1 Ex. 109.

⁴⁾ *Ridgway v. Wharton* (1856), 6 H. L. C. 238; *Rossiter v. Miller* (1878), 3 App. Cas. 1124.

⁵⁾ See Blackburn, J., in *Harris v. G. W. Ry. Co.* (1876), 1 Q. B. D. 515, 530.

⁶⁾ *Foster v. Mackinnon* (1869), L. R. 4 C. P. 704; *post*, p. 219.

⁷⁾ *Currie v. Misa* (1875), L. R. 10 Ex. 153, 162.

made for his benefit and he has assented to it¹). For instance if A promises to pay money to B in consideration of C's promising to do the same, and A does not pay, B cannot sue him, for there is no consideration moving from B²). So if a purchaser of a business agrees with the seller to pay the existing trade debts, a creditor cannot enforce payment against the purchaser of the business. Though the arrangement may be beneficial to him, there is no consideration moving from him to the purchaser.

It is not necessary that the consideration for a promise should be adequate. The smallest consideration is enough to support a promise, provided it has some real value and is not merely illusory³). An agreement to accept in discharge of an admitted debt, a smaller sum than is due, is not enforceable because there is no consideration for giving up the balance, and an action for the balance will lie even after payment of the smaller sum⁴). But an agreement to take a smaller sum in settlement of a disputed claim for a larger sum is good, because the settlement of the dispute is some consideration for giving up part of the claim⁵). So too an agreement to give up part of an admitted debt not immediately payable in consideration of earlier payment of the other part is good. The benefit of earlier payment is consideration for giving up part of the debt⁶).

Where the agreement consists of mutual promises each is consideration for the other. But to be good consideration a promise must be one which is itself capable of being enforced in law, otherwise its value is merely illusory. So a promise to do something illegal⁷), or something of so vague a nature that it is incapable of being enforced is insufficient⁸). Further the promise must not be of something which the party making it is already bound by contract with the other party to do. So if a servant is bound by contract with his master to do certain work for certain wages, a promise by the servant to do the work he is already bound to do is no consideration for a promise by the master to pay him extra wages for doing it⁹).

A promise made for a consideration which is wholly past at the time when the agreement is made is not enforceable — e.g. a promise to pay for services already preformed¹⁰). So if *after* the sale of goods a warranty is given, no action can be brought on the warranty unless there is some new consideration other than the sale to support it¹¹).

But a consideration which at the request of the promisor is executed simultaneously with the acceptance of the offer is sufficient. In those cases where the offer is to be accepted by doing that which will be the consideration for the promise, the execution of the consideration and the making of the agreement are necessarily contemporaneous. For instance if the offer is to pay money to any one who will give certain information, the offer is accepted by giving the information, and the giving of the information is the consideration for the promise to pay¹²).

So if A orders goods from B and B sends them, by doing so he accepts the offer to pay which is implied in A's order and at the same time executes the consideration for A's promise to pay.

Contracts of this kind are called contracts on an executed consideration. There are no mutual promises, and there is no contract at all until one of the parties has executed the consideration for the promise of the other by doing that in consideration of which the promise is made.

¹) *Price v. Easton* (1833), 4 B. & Ad. 433; *Eley v. Positive Assurance Co.* (1876), 1 Ex. D. 88.

²) *Tweddle v. Atkinson* (1861), 1 B. & S. 393.

³) *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256; *Bainbridge v. Firmstone* (1838), 8 A. & E. 743.

⁴) *Foakes v. Beer* (1884), 9 App. Cas. 605.

⁵) *Wilkinson v. Byers* (1834), 1 A. & E. 106; *Cooper v. Parker* (1855), 15 C. B. 822.

⁶) See further *post* p. 244.

⁷) See *post* p. 224.

⁸) *White v. Bluett* (1853), 23 L. J. Ex. 36.

⁹) *Stilk v. Myrick* (1809), 2 Camp. 317; *Harris v. Carter* (1854), 3 E. & B. 559.

¹⁰) *Beaumont v. Reeve* (1846), 8 Q. B. 483. An existing debt, not being a mere moral obligation, is however sufficient consideration for a promissory note or bill of exchange; see *Currie v. Misa* (1875), L. R. 10 Ex. 153 and title "Bills of Exchange" *post*.

¹¹) *Roscorla v. Thomas* (1842), 3 Q. B. 234.

¹²) *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q. B. 256; *Williams v. Carwardine* (1833), 4 B. & Ad. 621.

VI. Simple Contracts for which Writing is necessary.

Certain contracts are required by Statute to be in writing. They are simple contracts and compliance with the statutory requirement of writing does not do away with the necessity for consideration¹⁾.

The contracts which are required to be in writing are:

1. Bills of exchange and promissory notes²⁾.
2. Contracts of marine insurance³⁾.
3. Contracts for the sale of goods of £10 or upwards⁴⁾.
4. Promises to pay debts barred by the Statutes of Limitations⁵⁾.
5. Certain contracts with railway and canal companies, by which they are relieved from liability for loss of or injury to goods⁶⁾.
6. Agreements between solicitors and clients with respect to the amount and manner of payment of their costs⁷⁾.
7. The species enumerated in s. 4 of the Statute of Frauds⁸⁾.

All of these except those enumerated in the Statute of Frauds, and agreements between solicitors and clients, are dealt with in other parts of this Work.

Section 4 of the Statute of Frauds enumerates five species of contracts, namely:

1. Special agreements by executors or administrators to answer damages out of their own estate.
2. Guaranties.
3. Agreements made in consideration of marriage.
4. Contracts or sales of lands or any interest in or concerning them.
5. Agreements not to be performed within one year from the making thereof.

With regard to all these it enacts that no action shall be brought upon such contracts unless the agreement or some note or memorandum thereof is in writing signed by the party to be charged or his agent.

Of these five species guaranties are dealt with elsewhere (see title "Guaranties"), and the only other that is of frequent occurrence in commercial law is that of contracts not to be performed within one year from the making thereof.

For the Statute to apply, a period of more than one year for performance must be expressly named, or the terms of the agreement must show distinctly that such a period was contemplated or intended⁹⁾. Naming a period of time which may or may not be more than a year is not enough to bring it within the Statute — even though such period would probably be¹⁰⁾, or in fact turns out to be¹¹⁾, more than a year. Such an indefinite period, for instance, as the lifetime of one of the parties will not do¹²⁾. But if a period of years is mentioned, the agreement is none the less within the Statute because the agreement contains a provision by which it may be determined within a year¹³⁾.

The Statute has been held to apply where the agreement distinctly shows upon the face of it that the parties intended or contemplated either that its performance by both parties would extend beyond a year¹⁴⁾, or that the performance by one party would extend beyond a year and the time for performance by the other party is indefinite, the year in either case being reckoned from the making of the agreement¹⁵⁾.

But it has been held not to apply:

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- 1) *Rann v. Hughes* (1778), 7 T. R. 350n.
 - 2) See title "Bills of Exchange etc." *infra*.
 - 3) See title "Marine Insurance" *infra* and s. 22 of the Marine Insurance Act, 1906.
 - 4) S. 4 of the Sale of Goods Act, 1893; see title "Sale of Goods", *infra*.
 - 5) *Post* p. 245.
 - 6) S. 7 of the Railway and Canal Traffic Act 1854; see title "Carriage by Land" *infra*.
 - 7) Solicitors Act, 1870, s. 4: *Clare v. Joseph* [1907] 2 K. B. 369; see *post* p. 222.
 - 8) 29 Car. II., c. 3, s. 4.
 - 9) *Boydell v. Drummond* (1809), 11 East, 142.
 - 10) *McGregor v. McGregor* (1888), 21 Q. B. D. 424; *Knowlman v. Bluett* (1873), L. R. 9 Ex. 307.
 - 11) *Peter v. Compton* (1694), Skin. 353.
 - 12) *McGregor v. McGregor*, *supra*.
 - 13) *Birch v. Earl of Liverpool* (1829), 9 B. & C. 392.
 - 14) *Ibid*; *Hanau v. Ehrlich* [1912] A. C. 39.
 - 15) *Reeve v. Jennings* [1910] 2 K. B. 522.

- a) Where the time for performance by both parties is indefinite, or is for a period which may or may not be more than a year from the making of the agreement¹⁾; or
- b) Where by the terms of the agreement it is contemplated or intended that one party will perform within a year, even though it cannot be completely performed by the other party within a year²⁾.

It will be noticed that the "space of one year" runs from the making of the contract, and it has been held that in computing this period the day on which the contract is made is not to be counted. So a contract for a year's service to begin on the day on which the contract is made, or on the following day, is not within the Statute, for the year's service would in either case be completed within one year: but a contract for a year's service to begin on the second day after that on which the contract is made is within the Statute, for it cannot be completely performed within the year³⁾.

The Statute merely provides that "no action shall be brought" upon any agreement to which it applies unless there is a sufficient note or memorandum in writing. This has been construed to mean, not that the absence of writing makes such contracts void, but merely that absence of such written evidence makes them unenforceable by action. Accordingly if money is paid under a contract which is not enforceable by reason of the Statute, it is not recoverable, as it would be if paid under a void contract⁴⁾. So, too, when such a contract is in existence, acts done in performance of it will be referred thereto, and no other contract can be implied from such acts⁵⁾. Moreover, as the Statute only has the effect of making certain evidence necessary to prove the contract, it is one relating to procedure, and accordingly may be set up in defence in an action brought in this country on a contract made abroad which is governed by foreign law⁶⁾.

The "note or memorandum" in order to satisfy the requirements of the Statute must contain the whole of the agreement, that is to say the parties must be named or so described that they can be identified⁷⁾, the subject matter must be described so that it can be identified⁸⁾ and (except in the case of guaranties⁹⁾ the consideration¹⁰⁾ must be stated. If, however, the parties or subject matter are sufficiently described they may be identified by oral evidence. But oral evidence is not admissible to supply the consideration or any of the terms of the contract.

The note or memorandum need not be a simple self-contained instrument. It is sufficient if the terms of the contract are contained in several separate documents, such as a series of letters, provided they are so connected on the face of them as to show a complete contract in writing¹¹⁾. Oral evidence may be given to identify a document referred to in another; as for instance if a letter refers to an agreement, the agreement referred to may be identified by oral evidence¹²⁾, but oral evidence is not admissible to connect documents which are not on the face of them connected¹³⁾. A letter and the envelope containing it may be treated as one document. So that if the name of the addressee is found on an envelope in which a letter is proved to have been sent, this will be sufficient to identify him as a party to the contract, although his name does not appear elsewhere¹⁴⁾.

Furthermore a memorandum written *after* the making of the agreement is sufficient, provided it recognizes the agreement as existing and contains in itself, or by reference to other writings, all the terms of the contract¹⁵⁾.

¹⁾ *McGregor v. McGregor* (1888), 21 Q. B. D. 424.

²⁾ *Donellan v. Read* (1832), 3 B. & Ad. 899.

³⁾ *Smith v. Gold Coast & Ashanti Exploration Ltd.* [1903] 1 K. B. 285; *Britain v. Rossiter* (1883), 11 Q. B. D. 123.

⁴⁾ *Sweet v. Lee* (1841), 3 Man. & G. 452, 464; *Thomas v. Brown* (1876), 1 Q. B. D. 714.

⁵⁾ *Britain v. Rossiter* (1879), 11 Q. B. D. 123.

⁶⁾ *Leroux v. Brown* (1852), 12 C. B. 801.

⁷⁾ *Williams v. Jordan* (1877), 6 Ch. D. 517. *Rossiter v. Miller* (1878), 3 App. Cas. 1124, 1140.

⁸⁾ *McMurray v. Spicer* (1868), L. R. 5 Eq. 527.

⁹⁾ Mercantile Law Amendment Act, 1856, s. 3.

¹⁰⁾ *Wain v. Warlters* (1804), 5 East, 10; *Elmore v. Kingscote* (1827), 5 B. & C. 583.

¹¹⁾ *Long v. Millar* (1879), 4 C. P. D. 450.

¹²⁾ *Ridgway v. Wharton* (1857), 6 H. L. Cas. 238.

¹³⁾ *Boydell v. Drummond* (1809), 11 East, 142.

¹⁴⁾ *Pearce v. Gardner* [1897] 1 Q. B. 688.

¹⁵⁾ *Buxton v. Rust* (1872), L. R. 7 Ex. 279.

The agreement note or memorandum need not be signed by both parties. It is enough if it is signed by "the party to be charged", i. e. the party against whom it is sought to enforce the agreement: and it may be signed by him personally or by his agent¹). But the name or sufficient description of the other party to the agreement must appear in the agreement note or memorandum. The signature may be written, printed²) or stamped, and may appear in any part of the document³), provided it is put there for the purpose of attesting the document as that which contains the terms of the contract⁴). So a letter written in the third person and beginning with the name of the writer is sufficient⁵): or a contract note written on paper with the name of a firm printed at the head but without further signature⁶), or a note of the contract with the name inserted at the top by an agent for both parties⁷). But it is not enough if the name merely appears in the document and the document is intended to be incomplete until signed⁸).

VII. Implied Contracts.

Implied contracts are obligations to pay money implied by law from the relation of the parties, though there be no actual agreement to pay. In all cases the obligation is merely to pay money actually due, but not payable under any express contract.

There are four distinct causes of action which are founded on implied contracts. These actions are:

1. For money had and received.
2. For money paid to the plaintiff's use.
3. On an account stated.
4. On a judgment of a foreign Court⁹).

An action for *money had and received* may be brought when the defendant has received money which belongs to the plaintiff in circumstances which render the receipt a receipt by the defendant to the use of the plaintiff. It lies for money paid by the plaintiff to the defendant in mistake or ignorance of fact (but not for money paid in mistake or ignorance of law), or upon a consideration which has wholly failed: or for money obtained by the defendant from the plaintiff by imposition, extortion or oppression. The gist of the action is that the defendant is obliged by the ties of natural justice and equity to refund the money¹⁰).

Money paid on a consideration that has failed is only recoverable when the money was originally paid for some consideration and there has been a complete failure of that consideration. Money paid voluntarily, i. e. as a gift without consideration, is not recoverable. Nor is partial failure of consideration enough. So money paid in consideration of a future delivery of goods is repayable if none of the goods are delivered¹¹) but not where there has been only partial failure to deliver, unless the price is severable, in which case the price of the part undelivered is recoverable¹²).

So too, freight paid in advance is not recoverable if the goods are lost at sea. Though the freighter derives no benefit from his payment, the shipowner has suffered some detriment in carrying, and there has not been a complete failure of consideration¹³).

¹) *Egerton v. Matthews* (1805), 6 East, 306; *Emmerson v. Heelis* (1809), 2 Taunt. 46; *John Griffiths Cycle Corporation v. Humber* [1899] 2 Q. B. 414.

²) *Schneider v. Norris* (1814), 2 M. & S. 286.

³) *Evans v. Hoare* [1892] 1 Q. B. 593.

⁴) *Jones v. Victoria Graving Dock* (1877), 2 Q. B. D. 314; *Johnson v. Dodgson* (1837), 2 M. & W. 653.

⁵) *Lobb v. Stanley* (1844), 5 Q. B. 574.

⁶) *Schneider v. Norris* (1814), 2 M. & S. 286.

⁷) *Durrell v. Evans* (1862), 1 H. & C. 174.

⁸) *Hubert v. Treherne* (1842), 3 M. & G. 743.

⁹) As to Foreign Judgments, see post p. 249. There is a like cause of action on Judgments of English Courts not of record, but it is seldom necessary to resort to this method of enforcing them.

¹⁰) See per Lord Mansfield in *Moses v. Macferlun* (1760), 2 Burr. 1012.

¹¹) *Eicholtz v. Bannister* (1864), 17 C. B. N. S. 708; and see s. 54 of the Sale of Goods Act 1893.

¹²) *Devauz v. Conolly* (1849), 8 C. B. 640.

¹³) *Allison v. Bristol Marine Insurance Co.* (1876), 1 App. Cas. 209; Compare s. 84 of the Marine Insurance Act 1906 for cases where premiums are returnable for failure of consideration.

This form of action is available when a warehouseman or carrier refuses to deliver up goods except upon payment of exorbitant charges, and those charges have to be paid to get possession of the goods¹). But it is not available where payment has been extorted by legal process. If a writ is issued and the amount claimed is paid to avoid legal proceedings, the amount paid cannot be recovered as money had and received²).

An action for money had and received also lies against an agent who has received money for his principal³), or who has received money from his principal under a revocable authority to pay it to a third person, which authority has been revoked³). It lies against a sheriff who has received money under an execution on behalf of a judgment creditor⁴). And where the defendant has wrongfully sold the plaintiff's goods and received the price the plaintiff may generally, instead of suing in tort for conversion of the goods, sue in this form of action for the proceeds actually received⁵).

An action for *money paid* lies whenever the plaintiff has at the express request of the defendant paid money for him to a third person, or has paid money under a special or general authority given him by the defendant (as in the case of an agent authorised to make payments on the behalf of his principal)⁶). It also lies when the plaintiff has at the request of the defendant incurred a liability and has been compelled to pay money in discharge of that liability, as when one has at the request of another guaranteed that other's debt, and has been compelled to pay under his guarantee⁷).

In these cases, as the obligation to pay arises from an express request (from which a promise is implied), the contract is not strictly a contract implied in law; but there are certain cases in which an action for money paid lies although there has been no express request to pay it. Thus the action lies where one is compelled to pay another's debt, even though there is no authority or request to pay, as when his goods are lawfully seized in payment of another's debt, and he is compelled to pay the debt to recover the goods⁸).

An action on an *account stated* may be brought whenever the defendant has admitted a certain sum of money to be actually then due to the plaintiff. It is available to sue for a balance of account when the parties have met and agreed the balance due from one or the other⁹).

Enforcing foreign judgments. A final and conclusive judgment of a foreign court for payment of a certain sum of money may be enforced by action brought in England upon the judgment¹⁰). The foreign judgment is regarded as a debt which the defendant is bound by an implied contract to pay¹¹).

The original cause of action is not merged in the judgment (as is the case with an English judgment) and the plaintiff may instead of suing on the judgment sue on the original cause of action, or he may pursue both remedies concurrently¹²), but if he sues on the foreign judgment the defendant cannot claim to have the case retried on its merits¹³). He is, it seems, bound by the judgment unless he can show either:

- a) That the defendant had not sufficient notice of the proceedings to enable him to defend¹⁴); or

1) *G. W. R. v. Sutton* (1869), L. R. 4 H. L. 226.

2) *Marriot v. Hampton* (1797), 7 T. R. 269.

3) *Fletcher v. Marshall* (1846), 15 M. & W. 755.

4) *Dale v. Birch* (1813), 3 Camp. 347.

5) *Oughton v. Seppings* (1830), 1 B. & Ad. 241; *Smith v. Baker* (1873) L. R. 8 C. P. 350.

6) See the cases collected in Bullen and Leake, *Precedents of Pleading*, 6th Ed. p. 254.

7) See title "Guaranties" *infra*.

8) *Ezall v. Partridge* (1799), 8 T. R. 308; *Edmunds v. Wallingford* (1885), 14 Q. B. D. 811.

9) See *Laycock v. Pickles* (1863), 4 B. & S. 497.

10) See Notes to *Duchess of Kingston's Case*, 2 Smith's Leading Cases. *Nouvion v. Freeman* (1889), 15 App. Cas. 1, shows the judgment must be final and conclusive for a sum certain.

11) *Grant v. Easton* (1883), 13 Q. B. D. 202; *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155.

12) *Smith v. Nicolls* (1839), 5 Bing. N. C. 208, 221.

13) See *Vadala v. Lawes* (1890), 25 Q. B. D. 310, 316.

14) See Notes to *Duchess of Kingston's Case*, 2 Smith's Leading Cases; *Ferguson v. Mahon* (1839), 11 A. & E. 179; *Reynolds v. Fenton* (1846), 3 C. B. 187.

- b) That the judgment was obtained by the fraud of a party to the suit in the foreign court¹⁾; or
- c) That the foreign court had not jurisdiction over the defendant in the subject matter²⁾.

Judgments of Scotch and Irish Courts and of the Courts of British Colonies and Dependencies are regarded as foreign judgments for the purpose of enforceability in England. But it is seldom necessary to bring actions on Scotch and Irish judgments for payment of debts or damages, as such judgments may be registered in the High Court in England and enforced as judgments obtained in that Court are³⁾.

VIII. Capacity of Parties.

To the general rule that any person, natural or artificial, may bind himself by contract there are certain exceptions. The persons whose contractual capacity is limited are:

1. Corporate bodies.
2. Infants.
3. Persons of unsound mind.
4. Married women.
5. Convicted felons⁴⁾.

Corporate bodies. The capacity of corporate bodies is limited:

1. As regards the subject matter of their contracts.
2. As regards form.

A corporation may be created by charter of the King, or by special Act of Parliament or under the general powers contained in Acts of Parliament such as the Companies (Consolidation) Act 1908⁵⁾ and certain Acts regulating local government⁶⁾.

As regards the subject matter of their contracts, corporations created by charter have all the powers which natural persons have⁷⁾; but corporations created by special Act of Parliament, or under the powers contained in general Acts, can only enter into such contracts as they are empowered to enter into, expressly or by necessary implication, by the Acts of Parliament by which they are constituted⁸⁾. When a statute expressly confers on a corporation certain powers, it impliedly confers on it power to do all things which are incidental or reasonably conducive to the exercise of the powers expressly conferred⁹⁾.

In the case of trading companies incorporated under the Companies (Consolidation) Act, 1908, the matters in respect of which they may contract are those included in the objects of the company as set out in the memorandum of association¹⁰⁾. A contract made by the directors upon a matter not included in the memorandum of association is *ultra vires* and is not binding on the company¹¹⁾, and this is so even though it may have been made with the approval of all the shareholders,

¹⁾ *Abouloff v. Oppenheimer* (1882), 10 Q. B. D. 295. The defendant may raise the defence that the judgment was obtained by fraud even though the fraud alleged is such that it cannot be proved without re-trying the question adjudicated upon in the foreign court: *Vadala v. Lawes* (1890), 25 Q. B. D. 310.

²⁾ The Foreign Court is considered to have jurisdiction over the defendant, if he is a subject of the foreign country, or resident in it when the action began; when as plaintiff he has selected the forum in which he is afterwards sued; when he has voluntarily appeared; when he has contracted to submit himself to the jurisdiction and possibly if he has real estate within the foreign jurisdiction (per Fry, J. in *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371). See also *Sirdar Gurdial Singh v. Faridkote* [1894] A. C. 670.

³⁾ Judgments Extension Act, 1868, as modified by s. 76 of the Judicature Act 1873 and s. 71 of the Judicature (Ireland) Act 1877.

⁴⁾ As to felons see the Forfeiture Act, 1870, ss. 6, 7, 8 and 30.

⁵⁾ This Act consolidates the statute law relating to companies by repealing the earlier Acts and re-enacting them. Companies incorporated under the earlier Acts are now governed by the provisions of this Act.

⁶⁾ For instance the Local Government Act, 1888.

⁷⁾ See *British South Africa Co. v. De Beers* [1910] 1 Ch. 354 and cases there cited.

⁸⁾ *Baroness Wenlock v. River Dee Co.* 36 Ch. D. 675n. *London County Council v. Attorney General* [1902] A. C. 165.

⁹⁾ *Attorney General v. Great Eastern Rail. Co.* (1880), 5 App. Cas. 473.

¹⁰⁾ *Ashbury Railway Co. v. Riche* (1875), L. R. 7 H. L. 653.

¹¹⁾ *Ibid.*

or subsequently ratified by them. The shareholders cannot give to the company powers which it has not taken by its memorandum of association¹⁾.

Accordingly if a company undertakes any business outside its "objects" contracts made in relation to such business are not binding on the company²⁾: and if the company has no power, or only a limited power, to borrow money, a mortgage of the company's property to secure a loan beyond the borrowing powers of the company is void³⁾.

As regards the form in which corporations must contract so as to bind themselves, there is a distinction between trading and non-trading corporations. Non-trading corporations are such bodies as Borough and County Councils, Universities, and the like, which, though they are not incorporated primarily for profit, yet may in some cases be empowered to carry on industrial operations⁴⁾. No distinction has been drawn between their contracts made in respect of their commercial enterprises and those made by them for other purposes.

The general rule with regard to these non-trading corporations is that they can only enter into express contracts under the common seal of the corporation, except in cases of immediate necessity, constant recurrence or trifling importance⁵⁾. Such corporations may nevertheless be made liable in the same way as individuals are on contracts implied in law, as for money had and received⁶⁾.

And such corporations may be sued on an implied contract to pay a reasonable price for goods sold and delivered, when goods of a kind required for their corporate purposes have been ordered and actually supplied and accepted; or in an action for work and labour done, where work necessary for carrying into effect the purposes for which the corporation is created, has been ordered and done, and accepted by the corporation⁷⁾.

The right of a corporation to sue upon contracts not under seal is rather more extensive than their liability to be sued: generally a corporation may sue on any contract of which the other party has had the benefit by its having been wholly performed on the part of the corporation⁸⁾.

Most trading corporations (except those which are created by charter) are now governed by the provisions either of the Companies (Consolidation) Act, 1908⁹⁾: or the Companies Clauses Act, 1845.

The first named Act⁹⁾ applies to all companies formed and registered under that Act or under the repealed Companies Acts. It provides in effect¹⁰⁾ that the company's seal shall only be required in the case of those contracts for the validity of which a seal would be necessary if made by private persons¹¹⁾; and that a contract in writing signed on behalf of the company shall be sufficient in those cases where the contract if made by private persons would by law be required to be in writing¹²⁾, and that in all cases in which a contract by parol would be valid if made by an individual the company may contract by parol.

The Companies Clauses Act, 1845¹³⁾ applies only to companies established by special Acts of Parliament incorporating that Act. Section 97 contains provisions substantially the same as s. 76 of the Companies (Consolidation) Act 1908¹⁴⁾.

¹⁾ *Ibid.* and *Wenlock v. River Dee Co.* 36 Ch. D. 675 n.

²⁾ *Ashbury Railway Co. v. Riche*, *supra*.

³⁾ *Baroness Wenlock v. River Dee Co.*, *supra*.

⁴⁾ Such for instance as managing docks or tramways, supplying electric light or gas.

⁵⁾ *Arnold v. Mayor of Poole* (1842), 4 M. & G. 860, 865; *Wells v. Kingston-upon-Hull Corporation* (1875), L. R. 10 C. P. 402.

⁶⁾ *Hall v. Mayor of Swansea* (1844), 5 Q. B. 526.

⁷⁾ *Lawford v. Billericay Rural Council* [1903] 1 K. B. 772; *Nicholson v. Bradfield Union* (1866), L. R. 1 Q. B. 620.

⁸⁾ *Fishmongers Co. v. Robertson* (1843), 5 M. & G. 131; *Mayor of Kidderminster v. Hardwicke* (1873), L. R. 9 Ex. 13.

⁹⁾ Companies (Consolidation) Act 1908.

¹⁰⁾ *Ib.* s. 76.

¹¹⁾ *Ante* p. 206 note 6.

¹²⁾ See p. 211.

¹³⁾ 8 & 9 Vict., c. 16.

¹⁴⁾ Railway companies are usually incorporated by special Acts of Parliament either incorporating the clauses of the Companies Clauses Act, or containing clauses to the like effect. Special Acts passed before 1845 for incorporating companies often contained provisions similar to s. 97 of the Clauses Act.

In the case of the few trading companies to which none of these statutory provisions apply, the rule is that the company may make without seal all such contracts as are of ordinary occurrence in its trade; and the corporate seal is only required in matters of unusual and extraordinary character which are not likely to arise in the ordinary course of business¹).

Infancy. An infant (i. e. a person under 21 years of age) has only a limited capacity to bind himself by contract. There is nothing in law to prevent him from carrying on business alone or in partnership and he may generally sue on all contracts to which he is a party, but his liability to be sued is very limited.

The general rule is that an infant's contracts are voidable at his option at any time. That is to say, whether he is sued on them during infancy or after he comes of age he can set up as a defence that at the time of contracting he was an infant. And this is so even though after he has come of age he has ratified the contract or promised for some new consideration to pay a debt contracted during infancy²).

To this general rule there are certain exceptions:

1. Any contract entered into by an infant for goods supplied or to be supplied other than necessities is wholly void³). So an infant trader is not liable for the price of goods supplied to him for the purpose of trade⁴), nor for the return of the price of goods paid to him when he has failed to deliver the goods⁵).

An infant is nevertheless liable to pay a reasonable price for goods actually sold and delivered to him if such goods are necessities, that is for goods suitable to the condition in life of such infant and to his actual requirements at the time of the delivery⁶). And where goods (whether necessities or not) have been supplied to him and he has consumed or used them he cannot recover back the price he has paid for them⁷).

2. All accounts stated with infants are void⁸).
3. A contract by an infant for the repayment of money lent is void. And if after he comes of age⁹ he agrees to pay any money which wholly or in part represents a loan made to him during infancy, the contract, and any negotiable or other instrument given in pursuance of it or to carry it into effect, is void, so far as it relates to any money which represents or is payable in respect of such loan⁹).
4. An infant may after he comes of age be sued upon the following contracts, unless within a reasonable time after coming of age he has repudiated them, and disclaimed the property to which they are attached, namely, contracts attaching to shares in partnerships, shares in companies and real and leasehold property¹⁰). For instance if an infant takes shares in a company with a liability for unpaid calls attached, he is liable for calls after he comes of age unless he repudiates the contract and relinquishes the shares. If the contract is repudiated before the infant has received any real benefit from the property he can recover back money paid in respect of it¹¹).
5. An infant is bound by a contract to serve for wages or to pay for education or instruction in trade suitable to his condition in life, provided the contract is as a whole for his benefit, and the sum agreed to be paid is reasonable and he has had the education or instruction¹²).
6. An infant may bind himself apprentice to learn a trade: and though he cannot be sued on his covenant to serve¹³), yet if the articles of apprentice-

¹) *South of Ireland Colliery Co. v. Waddle* (1865), L. R. 3 C. P. 463.

²) *Infants Relief Act*, 1874, s. 2; *Smith v. King* [1892] 2 Q. B. 543.

³) *Infants Relief Act*, 1874.

⁴) *Valentini v. Canali* (1889), 24 Q. B. D. 166.

⁵) *Cowern v. Nield* [1912] 2 K. B. 419.

⁶) *Sale of Goods Act*, 1893, s. 2. *Nash v. Inman* [1908] 2 K. B. 1.

⁷) *Re Jones* (1881), 18 Ch. D. 109.

⁸) *Infants Relief Act*, 1874.

⁹) *Betting and Loans (Infants) Act* 1892, s. 5.

¹⁰) *North Western Ry. Co. v. McMichael* (1850), 5 Ex. 114; *Goode v. Harrison* (1821) 5 B. & Ald. 147; *Holmes v. Blogg* (1818), 8 Taunt. 508. See title "Partnership".

¹¹) *Hamilton v. Vaughan Sherrin Electrical Engineering Co.* [1894] 3 Ch. 589.

¹²) *Walter v. Everard* [1891] 2 Q. B. 369; *Clements v. L. & N. W. Ry. Co.*, [1894] 2 Q. B. 482; *Evans v. Ware* [1892] 3 Ch. 502.

¹³) *De Francesco v. Barnum* (1889), 43 Ch. D. 165.

ship are, taken as a whole, for his benefit¹), the contract is not void and his duty to serve may be enforced by proceedings in a court of summary jurisdiction²). And covenants for the protection of the master (e. g. as to not engaging in rival business) may be enforced against the infant after he attains his majority, provided they are usual and reasonably necessary for the protection of the master³), but such covenants cannot be enforced against him whilst he is an infant⁴).

Mental Incapacity. The contract of a person who at the time of making it is in such a state of mental disease or drunkenness that he does not understand what he is doing, is voidable by him provided his state of mind was at the time of making the contract known to the other party to the contract⁵). A person who is generally insane is bound by his contracts made in lucid intervals⁶). As the contract of a person incapable from drunkenness is voidable only, he may ratify it when sober, and if he does so he is bound⁷).

When necessities are supplied to a person who by reason of drunkenness or mental incapacity is incapable of contracting he is bound to pay a reasonable price, as on an implied contract⁸).

Married Women. A married woman is capable of entering into any contract, but her contracts do not bind her personally, they only bind her separate property⁹). The consequence is, that if judgment is obtained against her it can only be enforced by execution upon her separate property¹⁰). She cannot be made bankrupt upon a bankruptcy notice¹¹), nor can she be imprisoned for non-compliance with an order to pay a judgment debt¹²). And even with regard to her separate property, if it is settled upon her in such a way that she has not power of anticipating the income the execution creditor can only attach the income due at the date of the judgment¹³).

Wife's ante-nuptial debts and contracts. At common law when a woman married her liability for her ante-nuptial debts ceased on her marriage and was transferred to her husband, who thereupon became liable to the whole extent of his property. This rule has been altered by successive Acts of the legislature, and now, in the case of a woman married since the 31st of December 1882, the husband only becomes liable for his wife's ante-nuptial debts and on her ante-nuptial contracts to the extent of any property which he acquires from her after deducting any payments made by him and any sums for which judgment may have been bona fide recovered against him in respect of any such debts or in respect of moneys for which she was liable before marriage; and the wife remains liable to the extent of her separate property. Husband and wife may be sued jointly, or either may be sued severally¹⁴).

IX. Mistake.

When one party enters into a contract under a mistake of fact induced by the other party the contract is usually voidable on the ground of misrepresentation (post p. 220), but the mistake of one party not induced by the other is no ground for avoiding a contract. So, for instance, if one buys specific goods in the mis-

¹) *De Francesco v. Barnum* (1890), 45 Ch. D. 430.

²) Employers and Workmen Act 1875 ss. 5 & 6; *Corn v. Matthews* [1893] 1 Q. B. 310.

³) *Evans v. Ware* [1892] 3 Ch. 502; *Leng v. Andrews* [1909] 1 Ch. 763; *Bromley v. Smith* [1909] 2 K. B. 235.

⁴) *Gylbert v. Fletcher* (1629), Cro. Car. 179; *De Francesco v. Barnum* (1889), 43 Ch. D. 165; see *Gadd v. Thompson* [1911] 1 K. B. 304.

⁵) *Matthews v. Baxter* (1873), L. R. 8 Ex. 132; *Molton v. Camroux* (1849), 4 Ex. 17; *Imperial Loan Co. v. Stone* [1892] 1 Q. B. 599.

⁶) *Hall v. Warren* (1804), 9 Ves. 605.

⁷) *Matthews v. Baxter*, *supra*.

⁸) Sale of Goods Act 1893, s. 2; see title "Sale of Goods", *infra*.

⁹) Married Women's Property Act 1882, s. 1. ditto, 1893, s. 1.

¹⁰) *Scott v. Morley* (1887), 20 Q. B. D. 120.

¹¹) *Re Hannah Lynes* [1893] 2 Q. B. 113; see further as to bankruptcy of married women, title "Bankruptcy", *infra*.

¹²) *Per Lopes, L. J. in Pelton v. Harrison* [1891] 1 Q. B. at p. 120.

¹³) *Bolitho v. Godley* [1905] A. C. 98.

¹⁴) Married Women's Property Act, 1882, ss. 13—15, s. 25; *Beck v. Pierce* (1889), 23 Q. B. D. 316.

taken belief that they are of a particular quality, this is no ground for avoiding the sale, even though the seller knows that the purchaser is mistaken¹).

And the same rule applies where both parties are under a common mistake as to some collateral matter²): but where there is a common mistake as to the existence of some fact which is the basis of the contract itself, there is no enforceable contract. This rule has been applied to cases where the parties have contracted for the purchase and sale of a thing which was believed by them to be, but in fact was not, in existence at the time of the contract³), and to a case in which a party contracted to take a lease of property of which he was in fact the owner, both parties believing it belonged to the other party⁴).

There is another kind of mistake which vitiates contracts, namely, where the mistake is such that the parties are not *ad idem*, as where there is a mistake as to the identity of the subject matter, or of the parties themselves. For example if A agrees with B to buy the cargo of a named ship, and there are two ships of that name, and A intends to buy the cargo of one of those ships, whilst B intends to sell the cargo of the other, there is clearly no contract⁵). And the same rule applies where A contracts with B, thinking B is C. There is no contract with B or C, at all events in cases where personal considerations (such as the skill or solvency of the party) enter into the contract⁶).

The mistake of one party may also vitiate a contract where that party purports to sign a contract, thinking it is an instrument of a wholly different kind from that which in fact it is. As if he by mistake puts his name to a bill, thinking he is signing a guarantee or witnessing the signature of some other person to some instrument. In that case there is no contract at all, as the signature is written with no intention of entering into the contract contained in the instrument he signs⁷).

Another kind of mistake is that which occurs in reducing the terms of a contract to writing.

If it can be clearly shown that the instrument in which a contract is drawn up does not truly express the agreement really made between the parties, the Courts may set aside the contract, or rectify the instrument and enforce it as rectified⁸): but (except in the case of mere clerical errors, obvious on the face of the instrument⁹), the Courts will not go behind a written contract, unless a common mistake is clearly proved¹⁰). The Courts can only rectify so as to make the instrument express the actual agreement and cannot alter the terms actually agreed upon¹¹).

X. Fraud and Misrepresentation.

Non-disclosure. Except in the case of contracts of insurance and some other contracts of a special nature¹²) there is no duty on the part of either party to make disclosure of facts which might influence the other party in entering into the contract. Each party is entitled to be silent even as regards material facts which would

¹) *Smith v. Hughes* (1871), L. R. 6 Q. B. 597.

²) *Balfour v. Sea Insurance Co.* (1857), 3 C. B. N. S. 300.

³) See Sale of Goods Act, 1893, s. 6; *Scott v. Coulson* [1903] 2 Ch. 249 (contract for sale of a life policy, the life having dropped at the time).

⁴) *Cooper v. Phibbs* (1867), L. R. 2 H. L. 149.

⁵) *Raffles v. Wichelhaus* (1864) 2 H. & C. 906.

⁶) *Smith v. Wheatcroft* (1878), 9 Ch. D. 223, 230; *Cundy v. Lindsay* (1878), 3 App. Cas. 459.

⁷) *Foster v. Mackinnon* (1869), L. R. 4 C. P. 704; *Carlisle v. Cumberland Banking Co.* [1911] 1 K. B. 489. If a person negligently puts his name to a bill thinking it is some other instrument he may be estopped from setting this up as against a bona fide holder for value, and so may be liable in spite of his mistake.

⁸) See *Druiff v. Lord Parker* (1865), L. R. 5 Eq. 131 (rectification of a bill of exchange); *Collett v. Morrison* (1851), 9 Hare, 162 (rectification of a policy of insurance); cf. *Mackenzie v. Coulson* (1869), L. R. 8 Eq. 368 (rectification of marine policy refused).

⁹) See *Burchell v. Clark* (1876), 2 C. P. D. 88.

¹⁰) *Duke of Sutherland v. Heathcote* [1892] 1 Ch. 475.

¹¹) See *Mackenzie v. Coulson*, *supra*, at p. 374.

¹²) See title "Marine Insurance". The other special contracts include contracts between Principal and Agent (see title "Agency", *supra*), between company promoters and shareholders (see title "Companies"); solicitor and client, trustee and cestui que trust and contracts relating to family arrangements.

operate on the mind of the other party and of which he knows the other party is ignorant¹).

The only general exception to this rule is that where in the course of negotiating a contract one party has unintentionally misled the other by stating what at the time he believed to be true, or what was true at the time he made the statement, he is bound to correct the statement if, before the contract is concluded, he discovers that the statement is untrue, or the facts have altered. If he does not do so, he is deemed guilty of misrepresentation by continuing to represent what he knows to be untrue²).

Moreover the Courts will refuse the special equitable relief of specific performance to a person who has snapped at an offer which he must have known was made by mistake. Such a contract may be good in law, but the party who has taken advantage of the other's mistake is not entitled to equitable relief³).

Nevertheless, though a party may as a rule remain silent, he is not entitled actively to misrepresent facts during negotiations for a contract.

Misrepresentation. A contract induced by the misrepresentation of some material facts on the part of one party is voidable at the option of the other party. As regards the voidability of the contract it matters not whether the misrepresentation is fraudulent (that is, known by the party making it to be false and made with intent to deceive) or innocent. But if the misrepresentation is fraudulent, the innocent party is entitled also to damages for deceit, whether he chooses to affirm or to disaffirm the contract: whereas if the misrepresentation is innocent his only remedy is to disaffirm the contract and to have restored to him any money or goods he has transferred under the contract⁴).

In either case the right to avoid or disaffirm a contract, or to sue for rescission is lost if with knowledge of the misrepresentation the injured party has by words or conduct manifested his election to affirm it, or if before the contract has been avoided an innocent third party has acquired an interest in property passing under the contract⁵).

So if a contract for the sale of goods is procured by misrepresentation on the part of the buyer, the seller may avoid the contract when he discovers the untruth of the representation. But if he has thereafter shown his election to affirm the sale (as by suing for the price⁶) or if the goods have been resold to an innocent third party who buys thinking the buyer has a good title, it is too late to disaffirm the contract⁷), and the seller's only remedy is, if the misrepresentation was fraudulent, an action for damages. If it was innocent he has no remedy.

Furthermore when a contract is avoided the parties are entitled to be restored to their *status quo ante*, and if this cannot be done the right of rescission is lost. So if goods passing under the contract have been consumed, as the buyer cannot make restitution, he cannot rescind⁸).

There can be no misrepresentation without some words or conduct amounting to an active misstatement of the truth. But though mere silence can never amount to misrepresentation, yet a partial statement of the truth may. A number of true but incomplete statements may be so made as to give a wholly false impression, and a document containing such a statement will be regarded as untrue although no specific statement therein may be untrue⁹). Misrepresentation to avoid a contract must generally be of an existing fact, but misrepresentation as to present intentions or ability is sufficient¹⁰). A buyer of goods in the ordinary course of business impliedly represents that he intends to pay for them, and if in fact he has no such intention, the contract is voidable¹¹). Every one is deemed to know the law

¹ *Smith v. Hughes* (1871), L. R. 6 Q. B. 597; *Turner v. Green* [1905] 2 Ch. 205.

² See *Fry, J. in Davies v. London and Provincial Marine Insurance Co.* (1878), 8 Ch. D. 469, 475; *Reynell v. Sprye* (1852), 1 De G. M. & G. 656.

³ *Webster v. Cecil* (1861), 30 Beav. 62; see *Tamplin v. James* (1880), 15 Ch. D. 215.

⁴ *Adam v. Newbigging* (1888), 13 App. Cas. 308.

⁵ See *Clough v. L. & N. W. Rail Co.* (1871), L. R. 7 Ex. 26; *Seddon v. North Eastern Salt Co.* [1905] 1 Ch. 326.

⁶ *Ferguson v. Carrington* (1829), 9 B. & C. 59; cf. *Damers v. Harness* (1875), L. R. 10 C. P. 166.

⁷ *White v. Garden* (1850), 10 C. B. 919.

⁸ See *Clarke v. Dickson* (1858), E. B. & E. 148.

⁹ See *Aaron's Reefs v. Twiss* [1896] A. C. 273.

¹⁰ *Edgington v. Fitzmaurice* (1885), 29 Ch. D. 459.

¹¹ *Ferguson v. Carrington* (1829), 9 B. & C. 59.

and misrepresentation of law is not enough¹), except in cases where it is made by a person who knows the law to one who is ignorant of it and relies on the knowledge of the other²).

The fact that the party to whom the representation is made has the means of knowing that it is false is no answer if he has not actual knowledge, and relies on the misrepresentation³).

Misrepresentation by a person who is not a party to the contract is no ground for disaffirming the contract, unless such person is an agent of one of the parties to make it or the party has ratified the misrepresentation⁴), e. g. by adopting the contract⁵).

XI. Duress, and Undue Influence.

An agreement which is procured by the duress⁶) or undue influence⁷) of one party is voidable at the option of the other party. Duress means actual or threatened violence to the person or imprisonment⁸). Undue influence includes any influence by which the exercise of free and deliberate judgment is excluded. It can seldom be established except in cases where the party exercising the influence stands in a confidential relation to the other, such as that of spiritual adviser, or parent or guardian, trustee, medical adviser or solicitor, and in that capacity induces the other to contract without independent advice. But the rule is not limited to cases of this kind⁹). It has been applied where a party has been induced to make an agreement by a threat of criminal proceedings against the husband or son of the party¹⁰).

XII. Contracts which are unenforceable unless fair and reasonable.

The Money Lenders Act, 1900. This Act was passed to prevent extortion by money lenders. Its main provisions are:

1. That "money lenders" (i. e. persons whose business is that of money lending, or who hold themselves out as carrying on that business, other than pawn-brokers, bankers, bodies incorporated by special Act of Parliament and registered Friendly Societies etc.) must be registered and must carry on business only in their registered names and at their registered addresses; and
2. That the Courts have power to re-open transactions of money lenders.

Contracts with respect to the advance and repayment of money by a "money lender" other than in his registered name are illegal contracts, as also are such contracts when made by any person who ought to be, but is not, registered as a "money lender"¹¹) or by a registered money lender who carries on business at a place which is not his registered address¹²).

Where a "money lender" takes proceedings for the recovery of money lent or the enforcement of any agreement or security made or taken in respect of money lent the Court may re-open the transaction and take an account between the parties and give relief to the person sued.

The Court can only grant relief if it is satisfied by evidence:

¹) *Lewis v. Jones* (1825), 4 B. & C. 506, 512.

²) See Channell J. in *British Workmen's Insurance Co. v. Cunliffe*, 18 T. L. R. 425.

³) *Redgrave v. Hurd* (1881), 20 Ch. D. 1; and see *G. Pearson & Son v. Dublin Corporation* [1907] A. C. 351.

⁴) *Clough v. L. & N. W. R.* (1871), L. R. 7 Ex. 26; *Wheulton v. Hardisty* (1857), 8 E. & B. 232.

⁵) *Murray v. Mann* (1848), 2 Ex. 538.

⁶) See *Cumming v. Ince* (1847), 11 Q. B. 112; *Kaufman v. Gerson* [1904] 1 K. B. 591.

⁷) *Williams v. Bayley* (1866), L. R. 1 H. L. 200.

⁸) See *Atlee v. Backhouse* (1838), 3 M. & W. 633.

⁹) See *Williams v. Bayley*, *supra*.

¹⁰) *Ibid.* and *Kaufman v. Gerson*, *supra*.

¹¹) *Bonnard v. Dott* [1906] 1 Ch. 740. As the prohibition is intended for the protection of the borrower, he may recover any securities he has given, though the money-lender cannot recover the money lent. But the borrower can only recover the securities upon the terms of making restitution of the amount lent; *ibid.*; *Lodge v. National Investment Co.* [1907] 1 Ch. 300.

¹²) *Ex parte Carden* (1908), 52 Sol. J. 209; *Lazarus v. Gardner* (1909), 25 T. L. R. 499. But this does not mean that every stage and every incident of every piece of the money-lending business must be transacted at the registered address. If a money-lender really deals with a borrower at his registered address, whether by interview or correspondence, he may without infringing the Act transact negotiations or conclude transactions elsewhere (*Kirkwood v. Gadd* [1910] A. C. 422).

1. That the amount claimed for interest or other charges (such as amounts charged for expenses, inquiries, fines, bonus, premium etc.) is excessive; and

2. That the contract is harsh and unconscionable.

The Court, taking into consideration all the circumstances, may grant relief by re-opening the transaction, relieving the person sued from payment of any sum in excess of what the Court, having regard to the risk and all the circumstances, may adjudge reasonable, ordering repayment if anything has been paid in excess, and setting aside, revising or altering any security given or agreement made in respect of money lent by the money lender¹).

This section extended the power formerly exercised by Courts of Equity to give relief to expectant heirs who had been induced by their necessities to borrow on harsh terms on the security of their reversions or expectations²).

Contracts with Railway Companies. Apart from special contract railway companies as common carriers of goods are liable for any damage to or loss of goods in their custody for carriage, unless caused by the Act of God, the King's enemies, or inherent unfitness for carriage of the goods themselves³). This liability may be varied by agreement⁴); but by section 7 of the Railway and Canal Traffic Act 1854 an agreement by which a railway or canal company seeks to relieve itself of liability for loss of, or injury to, animals or other goods in receiving, forwarding or delivering them occasioned by the neglect or default of the company or its servants⁵), is not enforceable by the company unless it is in writing, signed by the party to be bound or the person delivering the animals or goods for carriage, and unless the conditions limiting liability and incorporated in such contract are just and reasonable.

It must be noted that this provision has no application to contracts for the carriage of persons, or for the warehousing of goods. In those cases there are no statutory limitations to the ability of the parties to contract: and a contract may be proved by offer and acceptance without writing⁶).

Whether the conditions in such a contract are just and reasonable is a question of law for the Courts and it is for the company setting up the contract to make out that the conditions are so. Generally speaking the Courts will regard as just and reasonable a condition which gives the customer some compensating advantage in exchange for the liability of the company, as by carrying at a reduced rate, provided the customer has the option of retaining the liability of the company by payment of a charge not exceeding the maximum rate which they are entitled to charge⁷).

Agreements with Solicitors as to Costs. In the absence of special agreement the amount which a solicitor is entitled to charge his client for costs and charges for work done, is regulated by several statutes⁸). Solicitors' bills of costs are subject to "taxation" (i. e. assessment by officers of the Court). But, subject to certain provisions, a solicitor may make an agreement with his client with respect to the amount and manner of remuneration. Such agreements were before 1870 looked on by the Courts with suspicion and were not enforced unless they were fair and reasonable.

Agreements of this kind are now not enforceable against the client unless they are in writing⁹). As against the solicitor, if they relate to the costs in contentious business, they are enforceable although not in writing¹⁰); but in non-contentious business they are not enforceable against either party unless signed by such party or his

¹) S. 1 of the Money Lenders Act, 1900. The leading case on the interpretation of this section is *Samuel v. Newbold* [1906] A. C. 461.

²) See *Samuel v. Newbold supra*.

³) For Statutory exceptions see the Carriers Act, 1830 (1 Will IV, c. 68); and see title "Carriage by Land", *infra*.

⁴) See the Carriers Act, 1830, ss. 4 & 6.

⁵) This does not include theft by the company's servants: *Shaw v. G. W. Ry. Co.* [1894] 1 Q. B. 373. *Van Toll v. S. E. Railway Co.* (1862), 12 C. B. N. S. 75.

⁶) See *Parker v. S. E. Ry. Co.* (1877), 2 C. P. D. 416; *Richardson v. Rowntree* [1894] A. C. 218.

⁷) See *Peek v. North Staffordshire Railway Co.* (1863), 10 H. L. C. 473; *Manchester, Sheffield and Lincolnshire Rail. Co. v. Brown* (1883), 8 App. Cas. 703; *Lewis v. G. W. Rail. Co.* (1877), 3 Q. B. D. 195. And see title "Carriage by Land", *infra*.

⁸) See specially, the Solicitors Acts, 1843, 1860, and 1870, and the Solicitors Remuneration Act, 1881.

⁹) Solicitors Act 1870, s. 4. Solicitors Remuneration Act, 1881, s. 8.

¹⁰) *Clare v. Joseph* [1907] 2 K. B., 369.

agent¹⁾, and in either kind of business the agreement is not enforceable against the client if upon examination by the proper officer of the Court the agreement does not appear fair and reasonable²⁾).

XIII. Agreements of Imperfect Obligation.

There are certain contracts which are not unlawful in any sense but yet are of such a kind that no action can be brought upon them.

Among these are included:

1. Contracts for which the remedy is lost by reason of a Statute of Limitation.
2. Contracts which are defective under the Statute of Frauds, or by reason of the absence of a seal, or other statutory requirement; and
3. Contracts which are defective for want of a stamp.

These are dealt with elsewhere³⁾.

But in addition to these there are the following:

The Tippling Acts. There are certain Acts aimed at discouraging credit being given upon the sale of excisable liquors by which it is provided⁴⁾:

1. That no action can be brought or maintained to recover any debt or sum of money alleged to be due in respect of the sale of any ale, porter, beer, cider or perry which was consumed on the premises where sold or supplied or in respect of any money or goods lent or supplied or of any security given for, in or towards the obtaining of any such ale, porter, beer, cider or perry⁵⁾.
2. That no action can be brought or maintained to recover any debt contracted for spiritous liquors unless *bona fide* either contracted at any one time to the amount of 20 shillings and upwards (wherever consumed) or sold to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser in quantities not less at any one time than a reputed quart⁶⁾.

Gaming Contracts. The Gaming Act 1845, as amended by the Gaming Act 1892, makes void all contracts or agreements by way of gaming or wagering, and provides that no action can be brought to recover any money due on a wager or deposited in the hands of a stakeholder to abide the event of a wager, or by a betting agent for commission or for repayment of money expended by him in paying gaming losses. This Act applies not only to agreements which are in the form of bets or wagers, but to all agreements which are so in substance, though they may take the form of contracts for the sale of goods or of stock or shares⁶⁾. The essence of gaming and wagering is that one party is to win and the other lose upon a future event which at the time of the contract is of an uncertain nature. That is to say, if the event turns out one way A will lose to B, but if it turns out the other way B will lose to A⁷⁾. Transactions on the stock exchange, where there is no real intention that the property in stock or shares shall pass by delivery and the parties only intend that differences shall be paid, are gaming and wagering agreements within the Act⁸⁾. But where a broker is employed to make actual contracts of purchase and sale, in each case to be completed by delivery and payment, these transactions are not by way of wagering, even though the object of the principal is speculation and not investment⁹⁾.

The Gaming Acts do not however make contracts by way of gaming or wagering illegal, and they were not illegal at common law; hence an action may be brought for any cause of action arising out of a bet or wager, except those which are expressly forbidden by the Acts.

Accordingly, if securities are deposited by one party to a gaming transaction with the other party to secure the payment of losses, they are recoverable as they are not deposited "to abide the event of a wager"¹⁰⁾; but money deposited with one

¹⁾ Solicitors Remuneration Act, 1881, s. 8: *In re Frappe* [1893] 2 Ch. 284.

²⁾ Solicitors Act, 1870, s. 9; Solicitors Remuneration Act, 1881, s. 8.

³⁾ See as to (1) p. 245, as to (2) pp. 211, 215, as to (3) p. 246.

⁴⁾ S. 182 of the County Courts Act 1888.

⁵⁾ 24 Geo. II. c. 40, s. 12 and 25 & 26 Vic., c. 38.

⁶⁾ *Thacker v. Hardy* (1878), 4 Q. B. D. 685, 695.

⁷⁾ *Brogden v. Marriott* (1851), 3 Bing. N. C. 88.

⁸⁾ *Universal Stock Exchange Ltd. v. Strachan* [1896] A. C. 166.

⁹⁾ *Forget v. Ostigny* [1895] A. C. 318.

¹⁰⁾ *Universal Stock Exchange v. Strachan* [1896] A. C. 166.

party "to abide the event" cannot be recovered whatever the event of the wager¹). Again if money is deposited with a stakeholder to abide the event of the wager, the person so depositing it may at any time before it has been paid over by the stakeholder revoke his authority and recover the money as money had and received²). And an agent who receives winnings may be sued by the person on whose behalf he receives them³), or if he receives money to pay losses, his principal may revoke his authority and recover the money⁴).

But the Gaming Acts prevent an action being brought:

1. By the winner against the loser for money won.
2. By the winner against the stakeholder for money won⁵).
3. By an agent against his principal:
 - a) For money paid for losses at his request⁶);
 - b) For commission or other reward⁷).

Counsel and solicitors. A barrister cannot sue his client for fees for litigious work, even if there is an express contract to pay⁸). A solicitor cannot sue for business done by him unless at the time when the work was done his certificate was in force⁹). Nor can he bring an action for his charges until one month after the time when he has delivered to the party to be charged a signed bill of costs¹⁰).

Medical Practitioners. No person can recover any charge for any medical or surgical advice or attendances or for any medicine which he shall have both prescribed and supplied unless he is a duly qualified medical practitioner, i. e. a person registered under the Medical Act, 1858, as having one of the qualifications recognized by that Act¹¹). Similarly an apothecary cannot recover his charges unless he has a certificate from the Apothecaries Society¹²).

XIV. Unlawful Agreements.

There are some contracts which, though they satisfy the general conditions as to enforceability, are not enforceable by reason of the unlawfulness of their object, i. e. because either the consideration or the promise itself involves doing something which is prohibited or discouraged by law. Sir F. Pollock classifies unlawful agreements as illegal, immoral and against public policy, according as the matter or purpose of them is:

Contrary to positive law (*illegal*).

Contrary to positive morality recognized as such by law (*immoral*).

Contrary to the common weal as tending:

To the prejudice of the state in external relations.

To the prejudice of the state in internal relations.

To improper or excessive interference with the lawful actions of individual citizens (*against public policy*).

Within the first class, i. e. illegal agreements, fall all agreements:

Which involve doing something criminal¹³); or

Which involve doing something expressly or impliedly prohibited by law; or

Which are made with the object of defrauding other persons.

So, agreements to publish an obscene libel¹³), or to cause such an obstruction

¹) *Strachan v. Universal Stock Exchange* [1895] 2 Q. B. 697; *Richards v. Stark* [1911] 1 K. B. 296.

²) *Burge v. Ashley & Smith Ltd.* [1900] 1 Q. B. 744; *O'Sullivan v. Thomas* [1895] 1 Q. B. 698.

³) *Per Wright, J. in O'Sullivan v. Thomas* [1895] 1 Q. B. 698; *Bridger v. Savage* (1885), 15 Q. B. D. 363.

⁴) Gaming Act, 1845, s. 18.

⁵) *Ibid.*

⁶) *Tatam v. Reeve* [1893] 1 Q. B. 44; *Saffery v. Mayer* [1901] 1 Q. B. 11.

⁷) Gaming Act 1892.

⁸) *Kennedy v. Broun* (1863), 13 C. B. N. S. 677. Apparently there is nothing to prevent a barrister from suing for his fees in conveyancing work (*Mostyn v. Mostyn* (1870), L. R. 5 Ch. 457). And he can sue for work done by him in any other capacity than that of barrister, e. g. as arbitrator: see per Erle, C. J. in *Kennedy v. Broun*, and *Egan v. Kensington Union* (1841), 3 Q. B. 935 n.

⁹) 6 & 7 Vict., c. 73, s. 26.

¹⁰) *Ibid.* s. 37.

¹¹) 21 & 22 Vict., c. 90, s. 32. 49 & 50 Vict., c. 48, s. 6.

¹²) 55 Geo III, c. 194, s. 21.

¹³) *Popplett v. Stockdale* (1825), R. & M. 337.

of a highway as would constitute a public nuisance¹⁾, or to erect a building in contravention of statutory building regulations²⁾ are illegal.

Upon the same principle contracts of insurance where the assured has no insurable interest are illegal, as being in contravention of statutes³⁾, so too are agreements with respect to the advance and repayment of money in the course of his business as a money lender by a person who ought to be but is not registered as a money lender, or an agreement made by a registered money lender otherwise than in his registered name⁴⁾.

So also are contracts made on Sunday in contravention of the Sunday Observance Act, 1677. This Act however does not make illegal all contracts made on Sunday. It enacts that no tradesman, artificer, workman, labourer or other person shall do or exercise any worldly labour, business or work of *their ordinary callings* upon Sunday. So though a horse dealer cannot maintain an action upon a contract of sale of a horse made by him on a Sunday, there is nothing to prevent any person making a valid contract of sale on Sunday of goods which he does not sell in the course of "his ordinary calling"⁵⁾.

Among agreements which are illegal as being in fraud of third persons are agreements between promoters of companies made with the object of defrauding shareholders⁶⁾, agreements to rig the market so as to defraud purchasers of shares⁷⁾, and all secret agreements by which under a composition scheme one creditor seeks to get an advantage over other creditors, or by which the debtor himself seeks to obtain some advantage not disclosed to the creditors generally⁸⁾.

In the second class is included agreements for irregular sexual intercourse⁹⁾.

The third class of unlawful contracts, those which are against public policy, requires somewhat fuller treatment.

Contracts which tend to the prejudice of the State in its external relations include all those contracts entered into by a domiciled British subject which may be detrimental to the interests of his own country¹⁰⁾. Trading with an enemy without license from the Crown is illegal, and accordingly contracts for the purchase by a domiciled British subject of goods in an enemy's country are unlawful, as also are insurances of goods so purchased¹¹⁾.

So too a contract for shipments (even in a neutral vessel) of cargo from an enemy's port *prima facie* is unlawful as involving a trading and dealing with the enemy¹²⁾.

When a contract of this kind is in force at the outbreak of war, and the performance thereby becomes unlawful, the contract is dissolved and both parties are absolved from further performance¹³⁾, unless it is of such a kind that it may be suspended during hostilities and enforced upon the restoration of peace¹⁴⁾.

¹⁾ *Mayor of Norwich v. Norfolk Rail Co.* (1855), 4 E. & B. 397.

²⁾ *Stevens v. Gourley* (1859), 7 C. B. N. S. 99; see also *Mellis v. Shirley & Freemantle Local Board* (1885), 16 Q. B. D. 446, where a contract was held to be illegal which was made in contravention of a statute imposing a penalty on any officer of a local board who was concerned in any contract with the board.

³⁾ See *Harse v. Pearl Life Assurance Co.* [1904] 1 K. B. 558 (illegality under the Life Assurance Act, 1774) and compare s. 4 of the Marine Insurance Act, 1906.

⁴⁾ *Bonnard v. Dott* [1906] 1 Ch. 740, and the Money Lenders Act, 1900; see ante p. 21.

⁵⁾ *Fennell v. Ridler* (1826), 5 B. & C. 406; *Scarfe v. Morgan* (1838), 4 M. & W. 270. The Act however is nearly obsolete and is seldom relied on in practice. A bill of exchange is not invalid by reason of its being dated on a Sunday (Bills of Exchange Act, 1882, s. 13).

⁶⁾ *Begbie v. Phosphate Sewage Co.* (1875), L. R. 10 Q. B. 491, 1 Q. B. D. 679.

⁷⁾ *Scott v. Brown Doering McNah & Co.* [1892] 2 Q. B. 724.

⁸⁾ *Blacklock v. Dobie* (1876), 1 C. P. D. 265; *Higgins v. Pitt* (1849), 4 Ex. 312. *Mallalieu v. Hodgson* (1851), 16 Q. B. 689.

⁹⁾ Such as a promise to pay money in consideration of future illicit cohabitation: *Walker v. Perkins* (1764), 1 W. Bl. 517, and see *Ayerst v. Jenkins* (1873), L. R. 16 Eq. 275. A promise to pay money for past cohabitation is not illegal, but cannot be enforced for want of consideration unless made by deed (*Beaumont v. Reeve*, (1846), 8 Q. B. 483. *Vallance v. Blagden* (1884), 26 Ch. D. 353).

¹⁰⁾ *Esposito v. Bowden* (1857), 7 E. & B. 763; *Bell v. Reid* (1813), 1 M. & S. 726.

¹¹⁾ *Potts v. Bell* (1880), 8 T. R. 548. See further as to insurances against capture: *Furtado v. Rodgers* (1802), 3 B. & P. 191; *Kellner v. Le Mesurier* (1803), 4 East, 396; *Janson v. Driefontein Consolidated Gold Mines* [1902] A. C. 484 and cases there cited.

¹²⁾ *Esposito v. Bowden* (1857), 7 E. & B. 763.

¹³⁾ *Ibid.*

¹⁴⁾ *Ex parte Bousmaker* (1806), 13 Ves. 71.

Among contracts which tend to the prejudice of the State in its internal relations we may specially notice:

Agreements to interfere with the course of criminal proceedings;
 Agreements in the nature of champerty and maintenance; and
 Agreements in restraint of trade¹).

Agreements not to prosecute. Agreements not to prosecute a criminal offence or to compromise, or interfere with the ordinary course of, criminal proceedings, are illegal and no action can be brought to enforce such an agreement or upon any bill, note or security given in consideration thereof²). This rule applies not only to felonies, but to all misdemeanours except those which are of a merely private character and for which there is an alternative remedy by an action for damages, such as a libel³). Accordingly an agreement to compromise criminal proceedings for infringement of a trade mark is not illegal and may be enforced, this being an offence for which the injured party has an alternative remedy by action for damages⁴).

On the same principle agreements which tend to interfere with the proper course of justice in proceedings of a quasi criminal character or which may result in defrauding other persons of their rights are illegal.

Thus although no person is bound to appear and oppose an application made by a bankrupt for his discharge, persons ought not to contract themselves out of an opportunity of so doing. So an agreement not to appear at a bankrupt's public examination or oppose his order of discharge is illegal⁵), as also are agreements by which it is sought to interfere with the proper course of proceedings in bankruptcy⁶) or winding up companies⁷).

Champerty. Any bargain whereby one party is to assist the other in recovering property by litigation and is to share in the proceeds is illegal. Such bargains are called champertous. The ground of illegality is that they tend to litigation. A bona fide assignment of a contract or of property the subject of a pending suit is not illegal, but the purchase of a mere right of action is illegal. There is nothing illegal in a contract to pay for information given or other assistance in prosecuting a suit, unless the bargain is such as to give an interest in the result by the payment being dependent on the success of the proceedings⁸).

Agreements in Restraint of Trade. Certain agreements are illegal as being in restraint of trade. These agreements are generally of one of two types.

The first type includes covenants by sellers of businesses not to compete with the purchasers, by partners or retiring partners not to compete with the firm, and by agents, servants or apprentices not to compete with their employers after the termination of the agency or term of service or apprenticeship.

An agreement of this sort is legal and enforceable if it is made for some consideration and the restraint is only such as to afford a fair and reasonable protection to the interests of the party in whose favour it is given, and not so large as to

¹) Agreements which interfere with freedom of choice in marriage and with parental and marital duties are also void as against public policy: but the subject is not so nearly connected with commercial transactions as to require particular notice. Among the more important cases on these points are *Lowe v. Peers* (1768), 4 Burr. 2225; *Herman v. Charlesworth* [1905] 2 K. B. 123; *Wilson v. Wilson* (1846), 1 H. L. C. 538; *Clark v. Clark* (1885), 10 P. D. 188; *Westmeath v. Salisbury* (1831), 5 Bli. N. S. 339; *Agar Ellis v. Lascelles* (1878), 10 Ch. D. 49; *Humphreys v. Polak* [1901] 2 K. B. 385; *Wilson v. Carnley* [1908] 1 K. B. 729. As to an agreement not to enter the naval or military service: see *In re Beard: Beard v. Hall* [1908] 1 Ch. 383. Such an agreement is clearly against public policy.

²) *Collins v. Blantern* (1767), 2 Wils. 341; *Jones v. Merionethshire Building Society* [1892] 1 Ch. 173; *Windhill Local Board v. Vint* (1890), 45 Ch. D. 551; *Consolidated Exploration Co. v. Musgrave* [1900] 1 Ch. 37.

³) *Keir v. Leeman* (1844), 6 Q. B. 308, 321.

⁴) *Fisher v. Apollinaris Co.* (1875), L. R. 10 Ch. 297.

⁵) *Kearly v. Thomson* (1890), 24 Q. B. D. 742. See also *Hope v. Hope* (1857), 8 De. G. M. & G. 731, (agreement not to oppose divorce proceedings); *Coppock v. Bower* (1838) 4 M. & W. 361 (agreement not to proceed with election petition).

⁶) *Mallalieu v. Hodgson* (1851), 16 Q. B. 689.

⁷) *Elliott v. Richardson* (1870), L. R. 5, C. P. 744.

⁸) See *Hutley v. Hutley* (1873), L. R. 8 Q. B. 112; *Sprye v. Parker* (1856), 7 E. & B. 58; *Simpson v. Lamb* (1857), 7 E. & B. 84; *Prosser v. Edmonds* (1835), 1 Y. & C. Ex. 481; *Stanley v. Jones* (1831), 7 Bing. 369.

interfere with the interests of the public¹). If the restraint imposed does not fulfil these conditions the agreement is illegal, as it is contrary to public policy that persons should be restrained more than is reasonably necessary from pursuing their vocations. No definite rules can be laid down as to what is a reasonable restraint. The Court has to take into consideration in each case the nature of the business, the length of time and the area over which the restraint is imposed, and all the circumstances, always keeping in mind the guiding principle that the restraint must not be greater in time or area than is necessary for the protection from unfair competition of the person in whose favour it is imposed²). A small retail business may be sufficiently protected if the vendor or retiring partner is restrained from setting up on his own account within a few miles, and in such a case a restraint over a larger area will be illegal³). But a business with world-wide connections may require protection over an indefinite area⁴). Generally speaking any covenant which merely restrains the person bound from soliciting the customers of his late firm will be enforced⁵). But a covenant not to set up *any business* will not be enforced. To be reasonable and enforceable the restraint should be limited to businesses of a kind which would compete with that for which the protection is sought⁶), and should not impose a greater restraint as regards space and time than is reasonably necessary.

The other type of contracts in restraint of trade are those by which workmen surrender their individual freedom of action by agreeing to be bound by the decision of a majority or of some committee or other body as to whether they shall work or not. Agreements of this sort are the foundation of trades unions on their militant side; and though a trade union is not necessarily an illegal association at common law⁷), it is so if its rules are such that the members are bound to strike work whenever called upon so to do by the executive body⁸). The same principle applies to associations of employers⁹). But there is nothing illegal in a combination by which a number of persons bind themselves to regulate prices so as to avoid competition *inter se* and exclude trade rivals by underselling them. Associations of this sort formed with the object of promoting and extending the trade of the members by lawful means are not in restraint of trade and are not illegal¹⁰). So too an agreement by which traders agree between themselves to divide work so as to avoid competition is enforceable¹¹).

Trade Unions are now to a large extent legalized and regulated by statute¹²), and the question of the illegality of their objects only arises when members are suing the Unions to enforce their rights as members. Actions of this sort are not maintainable if the association is illegal at common law¹³). The Acts also provide that whilst agreements of the following kinds are not unlawful they cannot be enforced in a court of law, viz:

1. Any agreements between members of a trade union concerning the conditions on which they shall sell goods, transact business or employ or be employed.
2. Agreements for the payment of penalties or subscriptions.
3. Agreements as to the application of the funds of a trade union for providing benefits to members, contributing to non-members and paying fines.
4. Agreements made between one trade union and another; or
5. Bonds to secure the performance of any of those agreements¹⁴).

¹) *Nordenfjelt v. Maxim-Nordenfjelt Co.* [1894] A. C. 535; *Dowden v. Pook* [1904] 1 K. B. 45.

²) *Dowden v. Pook* [1904] 1 K. B. 45.

³) See *Green v. Price* (1845), 13 M. & W. 695.

⁴) *Nordenfjelt v. Maxim Nordenfjelt Co* [1894] A. C. 535; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351.

⁵) See *Nicholls v. Stretton* (1847), 10 Q. B. 346; *Baines v. Geary* (1887), 35 Ch. D. 154.

⁶) *Perls v. Saalfeld* [1892] 2 Ch. 149.

⁷) *Gozney v. Bristol Trade Provident Society* [1909] 1 K. B. 901.

⁸) *Russell v. Amalgamated Society of Joiners* [1910] 1 K. B. 506.

⁹) *Hilton v. Eckersley* (1856), 6 E. & B. 47.

¹⁰) *Mogul Steamship Co v. McGregor Gow & Co.* [1892] A. C. 25.

¹¹) *Collins v. Locke* (1879), 4 A. C. 674.

¹²) See Trade Union Acts, 1871 & 1876; Trade Disputes Act, 1906.

¹³) *Rigby v. Connol* (1880), 14 Ch. D. 482; *Gozney v. Bristol Trade Society* [1909] 1 K. B. 901; *Russell v. Amalgamated Society of Carpenters and Joiners* [1901] 1 K. B. 506.

¹⁴) Trade Union Act, 1871, s. 4.

Effect of Illegality. The illegality of a contract may generally be proved by extrinsic evidence, and may be set up in defence to any action brought on the contract. But though a defendant may set up the illegality as a defence, a plaintiff cannot generally set it up in order to set it aside or get relief. If, for instance, money has been paid, or goods have been delivered, or securities given, under an illegal contract, they cannot be recovered. The Court will not lend its assistance either to enforcing the contract, or to giving relief from it, and will refuse its help to either party who has been guilty of illegality¹).

A contract which is not unlawful in itself may be unlawful because one party intends to apply its subject-matter to some unlawful purpose, as for instance a contract for the sale of goods which the buyer intends to apply to an unlawful purpose, such as defrauding the revenue, or promoting immorality. In such a case if the other party knows at the time of the contract of the unlawful intention he cannot sue on the contract, but if he only discovers it afterwards, he may refuse to be further bound by it and may sue for anything to which he became entitled before he discovered the illegal purpose²).

Again a contract may become illegal by the way it is carried out. If one party performs his part, or a condition on his part to be performed, by doing an illegal act, he cannot take advantage of his own illegal act to give him rights under the contract³).

So too a contract which is lawful at the time when it is made may become unlawful by reason of its performance becoming illegal by some change of the law or of circumstances. A contract, for instance, to load a cargo in a foreign country may become illegal before the time of loading by reason of an outbreak of war. In such a case, as we have seen, further performance is excused so long as the illegality continues⁴).

XV. Assignability of Contracts.

At common law contracts were not assignable, i. e. no persons other than the original parties could sue or be sued on a contract: but this rule has been largely modified by statute, by the adoption of mercantile custom as part of the law.

Contractual rights and (to a less extent) contractual liabilities may now pass from the original parties to other persons either by act of law, as on the death or bankruptcy of one of the parties, or by act of parties, as when a creditor assigns his debt to another.

Moreover certain mercantile contracts are negotiable or assignable, such as bills of exchange and promissory notes, by negotiation (see title "Bills of Exchange"), bills of lading (see title "Maritime Law"), shares in limited companies and debentures payable to bearer (see title "Companies"), policies of marine insurance (see title "Marine Insurance") and policies of life insurance. Covenants in leases and conveyances of land are in certain cases enforceable by or against assignees of the land or of the lessees' interest. Thus upon assignment of a lease many of the lessee's covenants contained therein are binding on the assignee and upon an assignment of the reversion are enforceable by the successive owners of the reversion. So too the lessor's covenants may generally be enforced by successive assignees of the lease against the lessor and those to whom his interest is conveyed. But this subject is outside the scope of this Work.

¹) *Taylor v. Chester* (1869), L. R. 4 Q. B. 309. To this rule there are three exceptions: 1. Where money has been paid or goods delivered for an unlawful purpose which has not been carried out, and the party seeking to recover repudiates the unlawful purpose (*Taylor v. Bowers* (1876) 1 Q. B. D. 291); 2. Where the parties are not *in pari delicto*, one having been imposed upon by the other (*Smith v. Cuff* (1817), 6 M. & S. 160); 3. Where the contract is illegal by a Statute passed for the protection of a class likely to be oppressed or imposed on, and the money has been paid by one of that class (*Barclay v. Pearson* [1893] 2 Ch. 154; *Bonnard v. Dott* [1906] 1 Ch. 740).

²) *Pearce v. Brooks* (1866), L. R. 1. Ex. 213; *Clay v. Yates* (1856), 1 H. & N. 73; *Cowan v. Milbourne* (1867), L. R. 2 Ex. 230.

³) *Amicable Assurance Society v. Bolland* (1830), 4 Bl. N. S. 194; *Cleaver v. Mutual Reserve Fund Life Association* [1892] 1 Q. B. 147. The effect of these cases is that no person who has feloniously brought about the death of a person whose life is insured can take the benefit of the insurance.

⁴) *Esposito v. Bowden* (1857), 7 E. & B. 763.

We propose therefore to limit ourselves to:

1. Assignment of debts and other legal choses in action by act of parties.
2. Assignment by operation of law, or devolution upon the death or marriage of a party. Assignment on bankruptcy is dealt with elsewhere (see title "Bankruptcy")¹).

Assignability by Act of the Party. When a contract has been wholly executed on one side and nothing remains to be done by the other but payment, the benefit of the contract, that is the right to payment, may always be assigned. To enable the assignee to sue on the contract without joining the assignor as plaintiff the assignment must be made in writing under the hand of the assignor and express notice of the assignment must be given to the debtor²).

An absolute assignment made in this way has the effect of completely transferring to the assignee from the date of the notice the rights in the contract, and he alone can sue for, or give a good discharge for, the debt. He takes it, however, subject to any right of set-off, or any equities which would have been available against the original creditor³).

In the same way the benefit of an executory contract may be assigned, such as a contract for the sale of goods or other property. The person who has contracted to buy goods may assign his right, so that the assignee has the right to insist on performance, and may bring an action for damages for breach of the contract⁴).

There is however a general exception in the case of executory contracts. When the contract is of such a kind that it is made in consideration of the skill or judgment or the character or credit of one party and something remains to be done by that party, he cannot without the consent of the other party assign the benefit of the contract so as to deprive the other party of the benefit of his skill or judgment, character or credit⁵). So, for instance, agreements between authors and publishers for publication of books are not assignable without the consent of the author⁶). The author relies on the skill and judgment of the publisher and he cannot without his consent have another publisher substituted for the one he has chosen. So too in all cases where the substitution of one party for another would throw on the other an increased or a different burden the contract is not assignable⁷), unless at the time of entering into it the parties have expressly or by implication agreed that it should be⁸). So a contract by A to supply to B all the goods of a particular kind that B might require in his business, cannot be assigned by B to C, for C's requirements may be different from B's⁷).

Devolution by Death. Upon the death of any person his rights and liabilities under all contracts, with certain exceptions, pass to his personal representatives. Personal representatives are either executors named in the will of the deceased or administrators appointed by the Courts. It is their duty to pay the debts and testamentary expenses of the deceased out of his estate and to distribute the balance of his estate in accordance with the directions (if any) given by will, and in default of directions by will in accordance with law.

The personal representatives⁹) are liable for the debts of the deceased to the extent of his estate, and to the same extent are liable for all breaches of contract committed by him in his lifetime (except for those breaches of contracts which import damage to the person or feelings only of the deceased, such as contracts to marry).

They also take upon themselves the burden and the benefit of all the executory contracts of the deceased, except:

¹) As to the vesting of rights of action in an administrator upon conviction of felony or treason see the Forfeiture Act, 1870 (33 & 34 Vic. c. 23) ss. 6—10 & 30.

²) Judicature Act 1873 (36 & 37 Vic. c. 66) s. 25 (6). This section only applies to absolute assignments, not to assignments by way of security.

³) See *Brice v. Bannister* (1878), 3 Q. B. D. 569; *Newfoundland Government v. Newfoundland Rail. Co.* (1888) 13 App. Cas. 199.

⁴) *Torkington v. Magee* [1902] 2 K. B. 427.

⁵) See *per* Collins, M. R. in *Tolhurst v. Associated Portland Cement Co.* [1902] 2 K. B. 660, 668.

⁶) *Hole v. Bradbury* (1879), 12 Ch. D. 886; *Griffith v. Tower Publishing Co. Ltd.* [1897] 1 Ch. 21.

⁷) *Kemp v. Bearseman* [1906] 2 K. B. 604.

⁸) *Tolhurst v. Associated Portland Cement Co.* [1903] A. C. 414.

⁹) As we have seen the heir and devisees of real estate are also liable to the extent of the lands of the deceased coming to them in the case of covenants and contracts under seal unless the contrary is expressed (see *ante* p. 206).

1. Those which by express agreement, or by implication, are determined by death, such as contracts for personal services (which are determined by the death of master or servant).
2. Covenants relating to real estate, which run with the land and the benefit of which passes to the heir or devisee of the land.

XVI. Joint and Several Contracts.

Not only may a contract be made between two persons or bodies corporate, promisor and promisee, but several persons may join as promisors and the promise may be made to several persons as promisees.

When a number of individuals enter into a contract as promisors they may bind themselves by a joint promise, or by several promises, or by joint and several promises.

Thus if A and B promise to pay C £100 they may jointly promise to pay the whole sum, or each severally may promise to pay a portion, or each severally and the two jointly may promise to pay the whole.

If they bind themselves *severally* for part, each by a separate promise agrees to pay a certain proportion of the whole sum and no more, and neither is liable directly or indirectly for more than the proportion he has agreed to pay. And we need hardly add that payment of his part by one does not discharge the other. This is the form in which underwriters to Lloyd's Policies usually bind themselves. Each underwriter agrees to pay in certain events a certain fixed sum and no more; and the whole sum assured is made up of the total of the sums underwritten by the several underwriters.

But A and B may bind themselves jointly or jointly and severally to pay the whole sum of £100.

If they bind themselves *jointly* there is one debt of £100 and only one cause of action for non-payment of that debt¹).

As there is only one debt, if that debt is discharged either by payment by one, or by accord and satisfaction with one, or by deed of release given to one of the joint debtors, the whole debt is discharged, and the other joint debtor is thereby released²).

Moreover as there is only one cause of action for non-payment of the debt, there can be only one judgment. Accordingly, if either debtor is sued to judgment, no judgment can subsequently be obtained against the other. The cause of action is said to be extinguished or merged in the judgment, and this is so whether the joint debtors are sued in one action or separately³) and though the judgment against one is by consent⁴).

To avoid these technicalities A and B may bind themselves jointly and severally to pay the £100. The effect of this is that the debt is both the joint debt of A and B and the several debt of each. There is only one debt, but there are three causes of action, one against A and B jointly, one against A, and another against B.

Now, as there is only one debt, both A and B are released as in the case of a joint debt, if that debt is discharged by payment or accord and satisfaction or by deed of release⁵). But as there are several causes of action for that debt a mere judgment without satisfaction obtained against one of two joint and several debtors does not discharge the others. For the cause of action against B on his several contract

¹) *King v. Hoare* (1844), 13 M. & W. 494.

²) *Per Cur. in Duck v. Mayeu* [1892] 2 Q. B. 511, 513; *Nicholson v. Revill* (1836), 4 A. & E. 675; *Walters v. Smith* (1831), 2 B. & Ad. 634. Taking a cheque or bill of exchange from one of joint or joint and several debtors does not discharge the others; for the cheque or bill does not discharge the debt but only suspends the remedy, and an unsatisfied judgment on the cheque or bill does not release the others, for the cause of action is not the same as on the debt itself (*Drake v. Mitchell* (1803), 3 East, 251; *Wegg Prosser v. Evans* [1895] 1 Q. B. 108). Nor are co-debtors released by a covenant or agreement for consideration made with one not to sue him (*Hutton v. Eyre* (1815), 6 Taunt, 289; *Walters v. Smith, supra*), and a release given to one reserving the remedy against the others is construed as a covenant not to sue (*Buteson v. Gosling* (1871), L. R. 7 C. P. 9. A discharge of one joint debtor in bankruptcy does not release the others (Bankruptcy Act, 1883, s. 29: see title "Bankruptcy," *infra*).

³) *King v. Hoare* (1844), 13 M. & W. 494; *Kendall v. Hamilton* (1879), 4 App. Cas. 504.

⁴) *McLeod v. Power* [1898] 2 Ch. 295.

⁵) *In re E. W. A.* [1901] 2 K. B. 642; *Nicholson v. Revill* (1836), 4 A. & E. 675.

is not merged in a judgment obtained against A¹). Judgment and satisfaction by one, however, releases the others because satisfaction of the judgment is equivalent to payment²).

As between joint or joint and several debtors there is (in the absence of an express agreement to the contrary) a contract implied by law on the part of each to contribute his share of the debt, and if one is compelled to pay the whole he may sue the others for contribution on this implied contract³).

Another peculiarity of a joint contract is that on the death of one of several joint debtors the liability of the contract passes to the survivors and ultimately becomes the several liability of the last survivor and on his death passes to his personal representatives⁴). But if the liability is joint and several the several liability of each passes to his personal representatives. Thus if A, B and C are jointly liable and A dies, the debt becomes the joint liability of B and C, and on B's death, C is alone liable. But if A, B and C are jointly and severally liable and A dies, the joint liability becomes the joint liability of B and C, and the several liability of A passes to his personal representatives⁵).

In the same way the right of suing on a joint contract passes to the survivors on the death of one of the persons jointly entitled⁶).

XVII. Discharge of Contract before Breach or Performance.

A contract may be discharged by:

1. Rescission or cancellation.
2. Alteration.
3. Novation.
4. Renunciation.
5. Failure of condition.
6. Bankruptcy⁷).
7. Performance.

Rescission. At any time before breach a contract may be rescinded or cancelled by agreement for good consideration⁸). Where there are mutual obligations, each party's giving up his rights is consideration for the other party giving up his.

No particular formalities are necessary for rescinding a contract. An agreement to rescind may be made orally or may be inferred from conduct⁹). Even a contract which the law requires to be in writing may be rescinded by oral agreement¹⁰), though parol evidence is not admissible to vary its terms¹¹).

Strictly, a contract by deed can only be rescinded or cancelled by a deed: but as a parol agreement to rescind or cancel a deed, if made for valuable consideration, is generally enforceable in equity, such an agreement is for most purposes as effective as an actual cancellation by deed¹²).

Alteration. An immaterial alteration in a deed or written instrument does not avoid the contract¹³). But a material alteration made with the privity of one

¹) *In re Davison* (1884), 13 Q. B. D. 50.

²) Per Bayley, J. in *Lechmere v. Fletcher* (1833), 1 Cr. & M. 623, 635.

³) *Edger v. Knapp* (1843), 5 M. & G. 753; *Batard v. Hawes* (1853), 2 E. & B. 287. The obligation of each is to pay an aliquot part proportioned to the number originally liable without reference to the number liable at the time of payment. (*ib*).

⁴) *Godson v. Good* (1816), 5 Taunt, 587, 594.

⁵) *ib*; *Read v. Price* [1909] 1 K. B. 577. The personal representatives of the deceased are not jointly liable with the survivors (*ib*).

⁶) *Anderson v. Martindale* (1801), 1 East, 497. But if the interests of the parties are really several, the personal representatives of one who is deceased may sue in respect of that interest (*Withers v. Bircham* (1824), 3 B. & C. 254).

⁷) As to discharge on bankruptcy see title "Bankruptcy", *infra*.

⁸) As to the right of one party to rescind without the consent of the other party see *ante* p. 220, and *post* p. 232.

⁹) See *Davis v. Bomford* (1860), 6 H. & N. 245.

¹⁰) See *Vezey v. Rashleigh* [1904] 1 Ch. 634.

¹¹) *ib*; *Goss v. Nugent* (1833), 5 B. & Ad. 58, 65.

¹²) See *Steeds v. Steeds* (1889), 22 Q. B. D. 537.

¹³) *Aldous v. Cornwell* (1868), L. R. 3 Q. B. 573; *In re Howgate's Contract* [1902] 1 Ch.

party without the consent of the other party avoids the whole contract, or at least prevents the party who has made the alteration from relying on it¹).

If an alteration is made by a stranger without the privity or consent of either party, the contract is enforceable as originally drawn²).

Every alteration which affects the legal effect of the contract is material, whether it be inserting³) or striking out⁴) words of contract, or adding a seal to a contract in writing so as to make it appear as a contract by deed⁵).

An alteration which does not alter the legal effect of the contract is generally immaterial, as for instance filling in the true date of execution or the correct description of the parties⁶). But an alteration which does not affect the contract between the parties may be material if it alters the instrument in a material way, as by altering the number on a bank note⁷).

Novation. Novation is the name given to a tripartite agreement whereby with the consent of one party to a contract the other party is released in consideration of a third party's undertaking the obligation. Where, for instance, the partners constituting a firm are changed, a person who has a contract with the firm may agree to release the retiring partner in consideration of an incoming partner's accepting liability under the contract of which he was not an original party⁸). When a firm becomes by incorporation a limited company, the firm may assign to the company their assets and the benefit of all contracts and the company may agree with the firm to pay all debts of the firm and indemnify them against liability. This does not constitute novation. As between the firm and third parties, the liability of the firm is unaltered. But if the third parties agree to accept the liability of the company instead of that of the firm, and to release the firm in consideration of the company's becoming directly liable, and the company accepts liability in consideration of the release of the firm, that is novation⁹).

The effect of novation is to discharge the original contract and to substitute a new contract.

The transaction can only be carried out with the assent of all three parties. There must be a release of one party with the consent of the other party given in consideration of the new party's undertaking the obligation of the party released¹⁰).

XVIII. Discharge by Breach.

A contract is broken:

1. If it is not performed according to its tenor.
2. If before the time for performance a party renounces.

In either case the breach is a cause of action, and in some cases a breach by one party releases the other from his obligation. Before considering the remedies by action for a breach it will be desirable to consider the effect of a breach by one party in releasing the other party.

If before the time for performing one party to a contract repudiates liability he thereby breaks the contract. A breach of this kind is called an anticipatory breach. Repudiation may consist in the party's absolute refusal to perform his part, or in his incapacitating himself from performing, or in conduct which evinces a clear intention not to be bound¹¹). There may also be an anticipatory breach in the course of performance, where one party having partly performed his obligation repudiates further liability by refusal, or by incapacitating himself, or by conduct showing an intention not to be further bound¹²).

¹) *Ellesmere Brewery v. Cooper* [1896] 1 Q. B. 75; *Pattinson v. Luckley* (1875), L. R. 10 Ex. 330. As to alteration of negotiable instruments, see s. 64 of the Bills of Exchange Act, 1882.

²) *Henfree v. Bromley* (1805), 6 East, 305.

³) *Croockewit v. Fletcher* (1857), 1 H. & N. 893; *Ellesmere Brewery Co. v. Cooper* [1896] 1 Q. B. 75.

⁴) *Pattinson v. Luckley* (1875), L. R. 10 Ex. 330.

⁵) *Davidson v. Cooper* (1844), 13 M. & W. 343.

⁶) *In re Howgate's Contract* [1902] 1 Ch. 451.

⁷) *Suffell v. Bank of England* (1882), 9 Q. B. D. 555.

⁸) See *Lyth v. Ault* (1852), 7 Ex. 669.

⁹) See *Conquest's Case* (1875), 1 Ch. D. 334; *Miller's Case* (1876), 3 Ch. D. 391.

¹⁰) *Cochrane v. Green* (1860), 9 C. B. N. S. 448.

¹¹) *Hochster v. De la Tour* (1853), 2 E. & B. 678; *Frost v. Knight* (1872), L. R. 7 Ex. 111; *Stone v. Stone* (1846), 8 Q. B. 358.

¹²) *Cort v. Ambergate Railway* (1851), 17 Q. B. 127.

When one party has been guilty of an anticipatory breach the other party may elect to treat the contract as at an end. If he elects to take this course he need not wait till the time for performance has arrived: but may at once bring an action for damages¹). But if he elects to treat the contract as at an end, he must treat it as at an end for all purposes except that of being sued on.

And the other party is accordingly released from his further obligations under the contract²). Conversely if the party who has the right of election continues to take the benefit of the contract as an existing obligation he cannot sue for damages for an anticipatory breach, but must wait till there has been an actual breach by non-performance³).

On the other hand he may elect instead of treating the contract at an end to keep it open and wait for the time of performance, and then hold the other party responsible for all the consequences of non-performance. If he elects to take this course the contract remains operative for all purposes. The party who has refused to perform, may still do so if he can: or he may avail himself of any grounds for discharge which may arise before the time for performance arrives⁴).

Though a mere breach by one party of some stipulation in the contract does not necessarily amount to a repudiation of the whole contract, a breach in something essential, i. e. in some stipulation which goes to the root of the contract, does. Accordingly in contracts for forward delivery of goods by instalments, a failure to deliver or to pay for one instalment is not a repudiation of the contract, unless upon the construction of the contract the delivery of such instalment is of the essence of the contract, so that failure to deliver that instalment makes performance of the whole contract in accordance with its terms impossible or the circumstances are such as to show a repudiation of the contract⁵).

A breach which goes to the foundation of the contract is well illustrated by cases on charter-parties. If the shipowner agrees to bring the ship to the port of loading without specifying a date for so doing he is bound to bring her there and have her in a seaworthy condition ready to load within a reasonable time, and a failure so to do is a breach of a term in the contract, for which at least an action for damages will lie⁶). But, further, it is of the essence of the contract that a seaworthy ship should be provided at the port of loading within such time as will not deprive the charterer of the whole benefit of the charter or entirely frustrate the objects of the adventure, and accordingly if the delay is so great as to do that the charterer may treat this as a repudiation and refuse to load⁷).

The wrongful dismissal of a servant, i. e. dismissal before completion of the term of service and without just cause, is a familiar instance of anticipatory breach. By dismissing the servant the master refuses to further perform his part of the contract and this gives the servant an immediate right of action for damages. On the other hand wilful disobedience of the servant is a repudiation by him of his obligations which justifies the master in electing to treat the contract as at an end, and so justifies him in dismissing the servant without notice.

XIX. Discharge by Failure of Condition.

A contract may be made in such terms that it only becomes obligatory upon the fulfilment of a condition (in that case called a condition precedent) or so that after it has become operative it ceases to be obligatory upon a condition not being fulfilled (condition subsequent). And the fulfilment of a condition may consist merely in the happening of some event or in the doing or not doing of something by one of the parties.

¹) See cases in the two preceding notes.

²) *General Bill Posting Co. v. Atkinson* [1909] A. C. 118; *Danube & Black Sea Co. v. Xenos* (1861), 13 C. B. N. S. 825.

³) *Johnstone v. Milling*, (1886) 16 Q. B. D. 460.

⁴) *Frost v. Knight*, *supra*; *Avery v. Bowden* (1853), 5 E. & B. 714; *Johnstone v. Milling*, (1886), 16 Q. B. D. 460.

⁵) See *Simpson v. Crippin* (1872), L. R. 8 Q. B. 14; *Withers v. Reynolds* (1831), 2 B. & Ad. 882; *Mersey Steel & Iron Co. v. Naylor* (1884), 9 App. Cas. 434; *Honck v. Müller* (1881), 7 Q. B. D. 92; *Hoare v. Rennie* (1859), 5 H. & N. 19.

⁶) *MacAndrew v. Chapple* (1866), L. R. 1 C. P. 643.

⁷) *Stanton v. Richardson* (1874), L. R. 9 C. P. 390.

A condition may be such that both parties are discharged if without the default of either it is not fulfilled, or it may be a condition the failure of which gives one party the right to renounce, but of which the other party cannot take the benefit.

As an example of the former class of conditions we may instance a contract for purchase and sale of land provided a certain Bill in Parliament passes¹⁾, or a charter-party which is conditional on peace being made between two countries or upon its being possible for a ship to reach the port of loading in time for the contemplated voyage²⁾.

A condition of this sort will be implied whenever from the circumstances of a contract the Court is of opinion that the parties must have intended the contract to be subject to such a condition.

Thus it may be laid down as a general rule that whenever from the circumstances in which a contract is made it can be inferred that the parties must have contemplated as the sole foundation of the contract the continuance of a certain state of things, or the happening of some future event, the law will imply a condition that the contract is only to be in force as long as the state of things contemplated continues, or will cease to be operative if the contemplated future event does not happen³⁾.

According to this principle if a contract is made in relation to a specified subject-matter, such as one for the sale of specific goods⁴⁾ or for repairs to a specific ship⁵⁾, if the goods or the ship perish without the default of either party before the time for performance the contract is dissolved. This rule is incorporated in s. 7 of the Sale of Goods Act, 1893⁶⁾.

It has also been applied in a series of cases arising out of the postponement of the coronation of King Edward VII. In expectation of that event many contracts were made for letting seats to view the procession, and it was held that as the procession did not take place, those contracts of which it could properly be inferred that the procession was the *sole foundation* were thereby dissolved⁷⁾.

The rule however only applies where the destruction of the subject-matter, or non-happening of the event contemplated, has taken place without the fault of either party⁸⁾. A party cannot avoid liability on a contract by destroying the subject-matter. In such a case he would have himself broken the contract by making performance impossible⁹⁾.

In these cases the rules as to incidence of loss have been clearly laid down. The rule is that when the contract is dissolved without the fault of either party the loss remains where it lies at the moment when the contract is dissolved. No action can be brought to recover money rightly paid under the contract, or for work done in partial performance. But rights of payment accrued at the time of the dissolution are not lost and are enforceable. And as both parties are discharged from further performance, neither can bring an action against the other except for any subsequent breach¹⁰⁾.

Another class of cases to which the same rule is applied is that of contracts for personal services and apprenticeship, which are made subject to an implied condition that they shall continue in force only so long as both parties are alive and not permanently incapacitated from performing the contract either permanently or during the period of the employment¹¹⁾. Accordingly, by the death of either party the contract is dissolved and the personal representatives are not liable except for

¹⁾ Compare *Preston v. Liverpool, etc., Ry. Co.* (1856), 5 H. L. C. 605.

²⁾ See *Jackson v. Union Marine Insurance Co.* (1874), L. R. 10 C. P. 125, 144.

³⁾ *Taylor v. Caldwell* (1863), 3 B. & S. 826; *Chandler v. Webster* [1904] 1 K. B. 493.

⁴⁾ *Howell v. Coupland* (1876), 1 Q. B. D. 258; *Scott v. Coulson* [1903] 2 Ch. 249.

⁵⁾ *Anglo Egyptian Navigation Co. v. Rennie* (1875), L. R. 10 C. P. 271; *Appleby v. Myers* (1867), L. R. 2 C. P. 651.

⁶⁾ See title "Sale of Goods".

⁷⁾ *Chandler v. Webster* [1904] 1 K. B. 493; *Krell v. Henry* [1903] 2 K. B. 740. Distinguish *Herne Bay SS. Co. v. Hutton* [1903] 2 K. B. 683.

⁸⁾ Compare s. 7 of the Sale of Goods Act, 1893.

⁹⁾ See *Jackson v. Marine Insurance Co.* (1874), L. R. 10 C. P. at p. 144, 145.

¹⁰⁾ The cases above cited establish these propositions. See also *Civil Service Co-operative Society Ltd. v. General Steam Navigation Co.* [1903] 2 K. B. 756.

¹¹⁾ *Farrow v. Wilson* (1869), L. R. 4 C. P. 744; *Boast v. Firth* (1868), L. R. 4 C. P. 1; *Robinson v. Davison* (1871), L. R. 6 Ex. 269.

liabilities which have accrued at the time of the death. The personal representatives of the master are not bound to continue the employment of the servant or pay wages not due at the death¹).

And if the master of an apprentice dies during the term of the apprenticeship, the apprentice is not bound to serve the personal representatives of the master²), nor (in the absence of agreement to the contrary) are they bound to repay any part of the premium³).

In those cases where by its terms the condition is one to be performed by one party only, the party by whom the condition is to be fulfilled cannot enforce the contract unless he has strictly performed the condition — or in other words the non-performance gives the other party the right to rescind. A condition must be exactly fulfilled, and the right to rescind does not depend on the effect of the breach in the particular circumstances⁴).

But the party entitled to renounce may always waive the right to renounce and may elect to treat the condition as a term of the contract a breach of which sounds in damages only. And if he has once elected to waive the condition, or taken any substantial benefit under the contract this is his only remedy. He cannot afterwards renounce the contract⁵).

The question whether any particular stipulation in a contract is a condition upon the non-performance of which by one party the other is at liberty to renounce the contract or whether it amounts to a term of the agreement only, the breach whereof is to be recompensed by damages, is to be ascertained by the intention of the parties. In the case of written contracts such intention must be determined by the Court upon the construction of the contract. The parties may by using appropriate language make any stipulation a condition. When the language of the contract is not clear, the Court will, having regard to the nature of the contract, the materiality of the stipulation in question and the surrounding circumstances, ascertain what must have been the intention⁶).

One of the tests most frequently applied is the materiality of the stipulation, i. e. whether or not it goes to the root of the transaction. If it is one a breach of which might deprive the other party of the whole benefit of the contract, or might have the effect of substituting a substantially different contract from that intended, the stipulation will be treated as a condition, the non-fulfilment of which gives the other party the right to renounce. So a stipulation in a charter-party that the vessel shall be ready to load at a particular date is generally construed as a condition⁷).

It follows from this that where mutual promises go to the whole consideration on both sides they are mutual conditions and each party's right to sue is conditional upon his having performed, or being ready and willing to perform, his part⁸). So if A agrees to sell goods to B in consideration of B's selling other goods to A, A cannot sue B. for non-delivery unless he is ready and willing to deliver the goods he has agreed to sell to B⁸).

In some contracts the mutual promises are so interdependent that neither party can maintain an action on the contract unless he can show that he has performed or is ready and willing to perform his part. Each party's right to enforce the contract is conditional on his performance. These are called concurrent conditions. Generally when two acts are to be done at the same time neither party can maintain an action without showing that he has performed or has offered to perform his part. So where goods are sold for payment on delivery, or freight is payable on delivery of cargo, an action for the price or the freight will not lie unless there has

1) *Farrow v. Wilson*, *supra*.

2) *Baxter v. Burfield* (1746), 2 Stra. 1266.

3) *Whincup v. Hughes* (1871), L. R. 6 C. P. 78.

4) See *Bentsen v. Taylor* [1893] 2 Q. B. 274.

5) See *Bentsen v. Taylor* [1893] 2 Q. B. 274; *Bostock & Co. v. Nicholson & Sons* [1904] 1 K. B. 725. Where a contract provides that upon breach of a condition by one party the contract shall be "void", this will usually be construed only as making it voidable at the election of the other party, and the breach of condition may be waived: see *Wing v. Harvey* (1854), 5 De. G. M. & G. 265; *Davenport v. The Queen* (1877), 3 App. Cas. 115, 128.

6) See *Bentsen v. Taylor* [1893] 2 Q. B. 274; *Barnard v. Faber* [1893] 1 Q. B. 340; *Behn v. Burness* (1863), 3 B. & S. 751.

7) *Glaholm v. Hays* (1841), 2 M. & G. 357.

8) *Atkinson v. Smith* (1845), 14 M. & W. 695.

been delivery or an offer to deliver on payment, nor will an action for non-delivery lie without proof of payment or tender of the price or of the freight¹).

Conditions which are to be fulfilled by one party may take the form of representations of fact made by one party in the contract or at the time of entering into it.

Such a condition is broken if the representation is not in fact exactly true, whether the party knew it to be untrue or not²).

Whether or no the truth of a representation of fact made in a written contract is a condition is a matter of construction for the Courts. The parties may expressly agree that the truth of any representation of fact shall be a condition, and if they do so the representation must be exactly true however immaterial it may be³). If, however, there is no express agreement it is for the Court to consider whether the parties must have intended the contract to be conditional upon the truth of the representation, and if the representation is as to something which is essential, something which goes to the root of the contract, it will be construed as a condition⁴). When the representation is not a condition it may still be construed as a warranty, that is a collateral agreement the breach of which may be compensated in damages⁵).

As in the case of other conditions the party who has the right to rescind the contract on the ground of failure of a condition as to the truth of a representation may elect to waive the condition and treat it as a warranty only, that is to say as a collateral agreement a breach of which gives a right of action for damages. And if he has once waived the condition or has taken any substantial benefit under the contract this is his only remedy⁶).

XX. Suing on a Quantum Meruit.

When by the terms of an express contract the right to payment is conditional upon performance, so long as the express contract is not performed nothing is due.

So if it is expressly agreed that a certain sum of money shall be paid for work to be done, or other services rendered, nothing is due until the work is completely done or the services are wholly rendered⁷).

The principle of this rule is that whilst there is a special contract in existence the plaintiff's only rights are under that contract, and if, by reason of non-performance, he cannot frame a cause of action on the contract he cannot sue at all: he cannot sue on an implied contract for reasonable remuneration for services rendered, as he might do if there were no express contract in existence⁸).

Accordingly, where by the terms of a contract of service, payment is to be made upon completion of the term of service, nothing is payable if for any reason the term of service contracted for is not completed⁹).

But this rule does not apply where work has been done or services have been rendered under a special contract and the contract has come to an end; in such cases the plaintiff is not prevented from suing on an implied contract and for payment of a reasonable sum for work actually done. Nor does it apply where the plaintiff has been wrongfully prevented by the defendant from completely performing his contract. Accordingly when work has been done under an express contract, and the contract has been rescinded by the party who has done the work on the ground that the other has either repudiated or has refused to perform or rendered himself incapable of performing, an action may be brought upon an implied contract to pay

¹ *Morton v. Lamb* (1797), 7 T. R. 125; *Paynter v. James* (1867), L. R. 2 C. P. 348; Sale of Goods Act, 1893, s. 28.

² See *Behn v. Burness* (1863), 3 B. & S. 751; *Thomson v. Weems* (1884), 9 App. Cas. 671.

³ *Anderson v. Fitzgerald* (1854), 4 H. L. C. 484; *Thomson v. Weems* (1884), 9 App. Cas. 671.

⁴ See *Bentsen v. Taylor* [1893] 2 Q. B. 274.

⁵ *Id.*; and see *De Lassalle v. Guildford* [1901] 2 K. B. 215.

⁶ *Bostock v. Nicholson & Sons* [1904] 1 K. B. 725; *Bentsen v. Taylor* [1893] 2 Q. B. 274; and see The Sale of Goods Act, 1893, s. 11. See further as to conditions and warranties, titles "Sale of Goods", "Maritime Law", and "Marine Insurance".

⁷ *Cutter v. Powell* (1795), 6 T. R. 320; *Sumpter v. Hedges* [1898] 1 Q. B. 673.

⁸ *Cutter v. Powell*, *supra* *Forman v. He Liddesdale* [1900] A. C. 190.

⁹ *Cutter v. Powell* (1795), 6 T. R. 320, a case in which it was held that the administrator of a sailor who was engaged for a voyage and was to be paid a sum on completion of the voyage and who died before completion of the voyage, was entitled to nothing for the uncompleted portion of the voyage; and see *Sinclair v. Bowles* (1829), 9 B. & C. 92 (action on a contract to make a chandelier complete; nothing due as work was not completed).

a reasonable sum, or *quantum meruit*, for the work actually done at the request of the defendant¹). So where a publisher contracted with an author to pay him a sum of money on completion of a work to be published in parts, and after publishing some parts refused to publish any more, the author was entitled to sue on a *quantum meruit* for work and labour in writing the portions he had written before the publication was abandoned¹).

Upon the same principle if a servant is wrongfully dismissed he may sue for wages proportioned to the time actually served, although he has not completed the period in respect of which wages are payable under the contract of service²).

Moreover it sometimes happens that the express contract is rescinded by mutual agreement in such circumstances that it may properly be inferred that it was the intention of the parties to substitute an agreement for payment of a reasonable sum for work done before the rescission, or for work done in substitution for that originally agreed upon, and such an agreement will generally be inferred when one party having the ability to perform his part refrains from doing it, or does something else instead at the request of the other party. Thus if a shipowner, having the ability to carry cargo to its destination (and so earn the agreed freight), consents at the request of the cargo-owner to deliver it at an intermediate port, an agreement to pay *pro rata* freight proportionate to the services performed may properly be inferred; and the shipowner may recover freight *pro rata* instead of the full amount agreed to be paid upon delivery at the port of discharge³).

Further there is a rule, which is perhaps an exception to the principal rule above stated, that where work has been done or goods delivered in pursuance of an express contract, but not in strict accordance with its terms, if the goods or work are accepted and the party accepting them has derived some benefit from them, he is bound to pay a sum equivalent to the value received⁴).

It is upon this principle that where goods sold do not comply with a warranty given upon their sale the buyer, if he accepts the goods, is only required to pay their actual value, or in other words he may set up the breach of warranty in diminution or extinction of the price⁵).

Lastly if one party has by his wrongful act prevented the other party from fulfilling his part, so as to entitle him to sue on the special contract, the other party may sue for damages for that wrongful act, and will generally recover as damages the amount he would have been entitled to if he had not been prevented from performing. Thus if a commission agent is prevented from earning his commission by the principal's wrongfully revoking his authority, though he cannot sue for his commission, he may recover damages equivalent thereto⁶).

XXI. Performance.

A contract must be performed in accordance with its terms, and unless so provided, no notice or demand is necessary, except in cases where performance is to take place upon the happening of some event which is within the knowledge of the promisee only, or of some event which is perfectly indefinite and at the option of the promisee⁷). So if money is to be paid at one of several places to be selected by the creditor, he must make a demand for payment at one of these places⁸), and if a chartered ship is to be discharged at a port to be named by the charterer he must name a port of discharge in a reasonable time, and his refusal to do so may amount to such a breach of contract as will entitle the shipowner to damages⁹).

Where the contract provides for alternative modes of performance and there is no provision as to either party's right to elect, the right of election is with the party who first has to act upon it¹⁰). So where a charter-party authorizes the loading of

¹) *Planché v. Colburn* (1831), 8 Bing. 14; *Prickett v. Badger* (1856), 1 C. B. N. S. 296.

²) *Lilley v. Elwin* (1848), 11 Q. B. 742, 755.

³) *Christy v. Row* (1808), 1 Taunt. 300; *Vherboom v. Chapman* (1844), 13 M. & W. 238.

⁴) *Farnsworth v. Garrard* (1807), 1 Camp. 38.

⁵) *Street v. Blay* (1831), 2 B. & Ad. 456; Sale of Goods Act, 1893, s. 53.

⁶) *Simpson v. Lamb* (1856), 17 C. B. 603.

⁷) *Per Parke, B. in Vyse v. Wakefield* (1840), 6 M. & W. 442, 453; *Makin v. Watkinson* (1870), L. R. 6 Ex. 25.

⁸) *Thorn v. City Rice Mills* (1889), 40 Ch. D. 357.

⁹) *Sieveling v. Maas* (1856), 6 E. & B. 670; *Stewart v. Rogerson* (1871), L. R. 6 C. P. 424.

¹⁰) *Reed v. Kilburn Co-operative Society* (1875), L. R. 10 Q. B. 264.

several articles, unless there is a stipulation to the contrary, the charterer has an option to load any of the several articles without reference to the convenience of the shipowner¹).

Where no time for performance is named in the contract each party must use due diligence to perform his part in such time as in the circumstances is reasonable, and delay caused by circumstances outside his control is excused²). But where a time for performance is named, such time must be strictly adhered to³), and to this rule there is no exception in the case of mercantile contracts⁴). In the case, however, of contracts for the sale and purchase of land time is not regarded as of the essence of the contract unless otherwise agreed, and accordingly a failure to complete by the agreed date, though it is a breach sounding in damages, is not regarded as a ground for rescission or for refusing specific performance if the party in default is willing and able to complete at a later date⁵).

Where a day is named for performance the party who has to perform has the whole day up till midnight⁶). This is the common law rule, but it has been modified by statute in its application to the sale of goods and to bills of exchange⁷).

A contract may generally be performed by the party's procuring that the thing promised to be done shall be done by some third person.

Personal performance is only necessary in the case of contracts the due performance of which involves the exercise of the personal skill or qualifications of the promisor. So a contract for personal services cannot usually be performed by a deputy, but a contract for the supply of goods, or for the doing of work not involving personal skill or judgment, may be⁸).

Impossibility of Performance. In the case of an unconditional promise⁹) impossibility does not excuse performance¹⁰) unless the contract is originally impossible in law or becomes impossible by reason of some change in English law¹¹). A change in foreign law making the performance abroad impossible does not excuse¹²). But when an Act of Parliament makes it impossible in law for the contract to be performed the Act of Parliament is held to excuse performance¹¹). This may happen when an Act of Parliament gives compulsory powers of acquiring land for public purposes and the company or local authority is empowered to use the land in a way which but for the empowering Act would be a breach of some covenant restricting the use of the land¹³); so too when by reason of an outbreak of war it becomes illegal to carry out trading contracts with the subjects of the enemy, performance is excused¹⁴).

Performance is also excused where the party who would otherwise be entitled to demand it has by his own conduct made performance by the other party impossible¹⁵). In such cases the promisee may be taken to have dispensed with performance¹⁶), and the other party may bring an action for damages, claiming the sum he would be entitled to if he had not been prevented from performing his part¹⁷).

¹) *Moorsom v. Page* (1814), 4 Camp. 103.

²) *Mc Andrew v. Adams* (1834), 1 Bing. N. C. 29; *Ford v. Cotesworth* (1868), L. R. 4 Q.B. 127; *Hick v. Raymond* [1893] A. C. 22.

³) *Glaholm v. Hays* (1841), 2 M. & G. 257.

⁴) *Reuter v. Sala* (1879), 4 C. P. D. 239, 249.

⁵) *Patrick v. Milner* (1877), 2 C. P. D. 342; *Hatten v. Russell* (1888), 38 Ch. D. 334.

⁶) *Startup v. Macdonald* (1843), 6 M. & G. 593.

⁷) As to the sale of goods see Sale of Goods Act, 1893, s. 29 (4), and as to presentment for payment of bills of exchange see Bills of Exchange Act, 1882, s. 45 (3).

⁸) Per *Collins, M. R.* in *Tolhurst v. Associated Portland Cement Manufacturers* [1902] 2 K. B. 660, 669; *British Waggon Co. v. Lea & Co.* (1880), 5 Q. B. D. 149; *Robson v. Drummond* (1831), 2 B. & Ad. 303.

⁹) As to implied conditions excusing performance when impossible see ante p. 234.

¹⁰) *Hills v. Sughrue* (1846), 15 M. & W. 253; see *Clifford v. Watts* (1870), L. R. 5 C.P. 577.

¹¹) *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180.

¹²) *Blight v. Page* (1801), 3 Bos. & P. 295n.

¹³) *Baily v. De Crespigny* (1869), L. R. 4 Q. B. 180.

¹⁴) *Esposito v. Bowden* (1857), 7 E. & B. 763.

¹⁵) *Raymond v. Minton* (1866), L. R. 1 Ex. 244; *Learoyd v. Brook* [1891] 1 Q. B. 431.

¹⁶) *Ibid.*

¹⁷) *Oriental Steamship Co. v. Tylor* [1893] 2 Q. B. 518; *Stewart v. Rogerson* (1871), L. R. 6 C. P. 424.

Payment. A contract for the payment of money can only be performed strictly by payment of the full amount in legal tender at the time and place agreed (if any). Silver to an amount not exceeding forty shillings is legal tender, as also is bronze to an amount not exceeding one shilling. Bank of England notes are legal tender for any amount exceeding five pounds¹⁾.

Bills of exchange and promissory notes (except Bank of England notes) are not legal tender and if given and accepted in payment only operate as conditional payment, that is, the right of action is suspended but not extinguished. If the bill or note is dishonoured by non-payment, the original debt revives and the creditor may sue either on the original cause of action or on the dishonoured bill or note, or on both alternatively²⁾. A bill or note may, nevertheless, operate to discharge the debt by way of accord and satisfaction if it is the intention of the parties that it shall so operate³⁾.

If no place is fixed for payment, it is the duty of the debtor to seek for the creditor and pay him wherever he is, provided he is in England. If the creditor is not in England, the debtor is not bound to seek him⁴⁾.

If a place is named for payment it must be made there: and if the payee has an option of selecting one of several places, there is no default in payment till he has selected the place and required payment to be made at that place⁵⁾.

If the creditor expressly or by implication from conduct requests the payment to be made by posting a cheque, the debtor is discharged by posting a cheque for the amount, although it never reaches the creditor⁶⁾, but in the absence of such a request a debtor who sends a cheque in payment by post does so at his own risk⁷⁾.

Payment can only be made by the debtor himself, or by some one previously authorized by him, or whose payment is subsequently ratified, and it must be made to the creditor himself or to some agent duly authorized to receive payment or held out by the creditor as such agent⁸⁾.

Payment in full made at any time before action and at any place, if accepted, though not strictly performance of the contract, discharges the debt by accord and satisfaction⁹⁾, and may be pleaded in defence as payment.

Tender. Tender of the amount due before action brought is a good defence to a claim for a liquidated demand, provided the defendant with his plea of tender pays the full amount into Court with an admission of liability⁹⁾. If the debt is payable on a particular day, tender must have been made on that day¹⁰⁾, and the sum tendered must be the full amount in legal tender, and must have been offered unconditionally. It is not good tender if change or a receipt is asked for as a *condition* of payment¹¹⁾. Informal tender, as by offering a cheque, is good if the person to whom the offer is made does not object at the time to the form, but only to the amount¹²⁾. The money must be actually produced unless the payee intimates that even if produced it will not be accepted¹³⁾.

Appropriation of payments. A debtor who is indebted to the creditor in several different accounts may, if he pays a sum insufficient to discharge his total indebtedness, specifically appropriate his payment to any particular debt or debts, pro-

¹⁾ 33 Vict. c. 10, s. 4; 3 & 4 Will. IV, c. 98, s. 6.

²⁾ *Belshaw v. Bush* (1851), 11 C. B. 191; *Cohen v. Hale* (1878), 3 Q. B. D. 371.

³⁾ See post p. 244.

⁴⁾ This is the strict rule of the Common Law. In practice payments are usually made by cheque or other negotiable instrument and the difficulty of finding the creditor seldom arises. See *Thorn v. City Rice Mills* (1889), 40 Ch. D. 357; *Robey v. Snaefell Mining Co.* (1889), 20 Q. B. D. 152.

⁵⁾ *Thorn v. City Rice Mills* (1889), 40 Ch. D. 357.

⁶⁾ *Thairlwall v. Great Northern Railway* [1910] 2 K. B. 509; *Norman v. Richetts* (1886), 3 T. L. R. 182.

⁷⁾ *Pennington v. Crossley & Sons* (1897), 13 T. L. R. 513; *In re Lloyd Edwards* (1891), 61 L. J. Ch. 22.

⁸⁾ *Walter v. James* (1871), L. R. 6 Ex. 124; *Kemp v. Balls* (1854), 10 Ex. 607; *Offley v. Clay* (1840), 2 Man. & G. 172. See title "Agency", *supra*.

⁹⁾ Order XXII, rule 12.

¹⁰⁾ *Dobie v. Larkan* (1885), 10 Ex. 776.

¹¹⁾ *Betterbee v. Davis* (1811), 3 Camp. 70; *Laing v. Meader* (1824), 1 C. & P. 257; *Cole v. Blake* (1793), Peake N. P. C. 238.

¹²⁾ *Polglass v. Oliver* (1831), 2 C. & J. 15; *Jones & Arthur* (1840), 8 Dowl. 442.

¹³⁾ *Ex parte Darch* (1855), 24 L. J. Bk. 75; *Harding v. Davis* (1825), 2 C. & P. 77.

vided he so appropriates it at the time of payment either by express words or in such other way as clearly indicates his intention¹). And if there is such an appropriation the creditor is bound by it and cannot apply the payment to the discharge of any other debt. So, too, if payment is expressly appropriated to a particular purpose the payee must apply it, if at all, to that purpose. He cannot keep it and apply it to another purpose than that for which it was paid²).

If the debtor does not make any appropriation at the time of payment, the right of appropriation devolves on the creditor, and he may make his appropriation at any time, even in the witness box at the trial of an action³). He may make his appropriation in express terms or in any other way which makes his intention clear⁴). Having once made his appropriation and communicated it to the debtor, he is bound by it and cannot afterwards alter it⁵).

When current accounts are kept between parties, as between bankers and their customers, so that all the monies paid in on one side form one blended fund, if there is no appropriation by the payer at the time of payment, or subsequently by the payee, and no arrangement between them as to how payments shall be appropriated, the accounts rendered are evidence that the payments in on one side are appropriated to the payments out on the other side in the order in which they take place, i. e. that the first item on the debit side is discharged or reduced by the first item on the credit side⁶).

Finally it has been laid down that where there are two debts, one of which arises out of an illegal transaction and the other out of a lawful contract, the law will, in the absence of any appropriation by either party, appropriate the payment to the latter⁷). But there is nothing to prevent a creditor from appropriating a payment which the debtor has not specifically appropriated, to an unenforceable demand or to one the remedy for which is statute barred⁸).

XXII. Remedies for Breach of Contract.

The remedy at common law for breach of a contract other than a contract to pay money is an action for damages. In appropriate cases the plaintiff may have alternatively to, or in addition to, damages one of the equitable remedies, namely an injunction to restrain further breaches or a judgment for specific performance.

For every breach of contract (not being a contract for payment of money only) there is *prima facie* a right of action for at least nominal damages. When no substantial damage is proved, nominal damages are recoverable⁹).

Accordingly in an action for not delivering goods pursuant to a contract of sale, even though the price has fallen and the plaintiff might buy against the contract for less than the contract price, the plaintiff is entitled to nominal damages (a shilling or some other nominal sum) for the wrong committed¹⁰).

To entitle himself to more than nominal damages the plaintiff must prove that he has suffered substantial damage in a pecuniary sense as a consequence of the breach of contract complained of. A plaintiff cannot recover anything for vexation or annoyance or for injured feelings or loss of reputation, or as punishment for the bad faith of the defendant¹¹).

The only exceptions to this rule are:

¹) *Newmarch v. Clay* (1811), 14 East, 239; *Peters v. Anderson* (1814), 5 Taunt, 596; *Shaw v. Picton* (1825), 4 B. & C. 715.

²) *Croft v. Lumley* (1856), 5 E. & B. 648; (1857), 6 H. L. C. 672.

³) See *The Mecca* [1897] A. C. 286, 293; *Seymour v. Pickett* [1905] 1 K. B. 715; *Simpson v. Ingham* (1833), 2 B. & C. 65; *Peters v. Anderson* (1814), 5 Taunt, 596; *Philpott v. Jones* (1834), 2 A. & E. 41; *Mills v. Fowkes* (1839), 5 Bing. N. C. 455.

⁴) *Ibid.*

⁵) *Friend v. Young* [1897] 2 Ch. 421.

⁶) *Clayton's Case* (1816), 1 Mer. 572: and see per Lord Macnaghten in *The Mecca* [1897] A. C. 286.

⁷) *Philpott v. Jones* (1834), 2 A. & E. 41; *Seymour v. Pickett* [1905] 1 K. B. 715.

⁸) *Mills v. Fowkes* (1839), 5 Bing. N. C. 455.

⁹) *Marzetti v. Williams* (1830), 1 B. & Ad. 425; *Brace v. Calder* [1895] 2 Q. B. 253.

¹⁰) *Valpy v. Oakeley* (1851), 16 Q. B. 941.

¹¹) See *Addis v. Gramophone Co.* [1909] A. C. 488; *Hamlin v. G. N. Ry. Co.* (1856), 1 H. & N. 408.

1. Actions for breach of promise of marriage, in which the jury may give damages for the plaintiff's chagrin and disappointment¹).
2. Actions against bankers for wrongfully refusing to cash a customer's cheque — in which the plaintiff may recover not only actual pecuniary loss resulting but also substantial damages for loss of credit²).

Moreover in no case of breach of contract is the plaintiff necessarily entitled to recover the whole sum of the pecuniary loss which he has suffered by the defendant's breach of contract. He can only recover "such damages as may fairly and reasonably be considered as arising naturally, i.e. according to the ordinary course of things, from the breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it"³).

It will be observed that there are two branches to this rule. The first enables a plaintiff to recover such damages as naturally flow from the breach where there are no special circumstances known to the parties at the time of entering into the contract. For instance the natural consequence of not delivering goods pursuant to a contract of sale is that the purchaser has to buy against the contract, and if the market price has risen, the difference between the contract price and the market price on the day when the goods ought to have been delivered is the measure of damages⁴). But the purchaser is not entitled to recover in respect of loss of profits which he expected to make by contracts he had with third parties⁵). These would be damages not ordinarily flowing from the breach, but losses only resulting in the special circumstances of the contract, and would be recoverable if at all under the second branch of the rule.

If however at the time of making the contract the purchaser gives notice to the seller that he requires the goods for a special purpose, or that his ability to perform his own contracts with third persons depends on the due delivery of the goods, the damages naturally resulting from a breach in these circumstances, i. e. the loss which the plaintiff would suffer by reason of his not having the goods for the special purpose, or of his inability to perform his contracts with third persons, would be recoverable, at any rate if the contract was made in such circumstances that it may be inferred that the defendant contracted on the basis of being liable for them if he broke his contract⁶).

It must be pointed out also that a party who complains of a breach of contract must himself act reasonably and is not entitled by his own conduct to inflate the damage. Thus a purchaser of goods must on failure of delivery purchase other goods in their place, if he can do so, and if by doing so he will suffer less loss than by doing without the goods: and a servant who is wrongfully dismissed must use reasonable efforts to find other employment, and if he can at once get suitable employment at the same wages he is only entitled to nominal damages⁷).

Liquidated damages and penalty. The parties to a contract may by one of its terms agree that an ascertained sum shall be paid for a breach of the contract, but they cannot by agreement impose penalties as punishment for breaches of agreement. If a sum is agreed as liquidated or ascertained damages, that sum and no other is recoverable: but if the parties agree that a sum shall be payable as a penalty for breach of a contract such agreement is unenforceable and the party complaining of a breach is left to prove his damages and is entitled to recover only such damages as he can prove⁸).

Whether any sum agreed to be paid is really in the nature of liquidated damages or of penalty does not depend entirely on the name given to it by the parties. *Prima facie* when the parties use the term "penalty" they mean it⁹), and when they use

¹) *Berry v. Da Costa* (1866) L. R. 1 C. P. 331.

²) *Rolin v. Steward* (1854), 4 C. B. 595; *Prehn v. Royal Bank of Liverpool* (1870), L. R. 5 Ex. 92.

³) *Hadley v. Baxendale* (1854), 9 Ex. 341, 354.

⁴) Sale of Goods Act, 1893, s. 51: *Gainsford v. Carroll* (1824), 2 B. & C. 624.

⁵) *Williams v. Reynolds* (1865), 6 B. & S. 495.

⁶) *Elbinger Actien Gesellschaft v. Armstrong* (1874), L. R. 9 Q. B. 473; *Grébert-Borgnis v. Nugent* (1885), 15 Q. B. D. 85; *Hydraulic Engineering Co. v. Mc Haffie* (1879), 4 Q. B. D. 670.

⁷) *Brace v. Calder* [1895] 2 Q. B. 253.

⁸) 8 & 9 Will. III, c. 11. s. 8.

⁹) *Smith v. Dickenson* (1804), 3 Bos. & P. 630.

the term "liquidated damages" they mean that¹). But the language used is not conclusive, and the Court will look at the whole agreement to ascertain the real nature of the sum agreed to be paid, and will enforce payment if it is really liquidated damages, and refuse to do so if it is really penal in its nature. In considering this question the Court must construe the contract as a whole with a view to determining whether the agreement was really a bona fide attempt by the parties to ascertain the damages previously, so as to avoid the necessity of a complex and expensive inquiry; and if the Court so determines, the sum will be held to be recoverable as liquidated damages. Among the usual tests applied in determining this question are these: The agreed sum will be regarded as a penalty:

1. If it is excessive and out of all proportion to the damages which would result from the breach²).
2. If one sum is agreed for several different breaches, some of which may occasion serious, and others less serious damage³).
3. If the sum is payable in the event of a breach by non-payment of a smaller sum⁴).

But where a sum of money is made payable for the breach of one particular stipulation in an agreement and the sum named is proportioned to the amount or the rate of non-performance of that stipulation — for instance if it is so much per acre for ground which has been spoilt by mining, or if it is so much per week during the whole time for which nondelivery of goods beyond the contract time is delayed — then it is inferred that *prima facie* the parties intend the amount to be liquidated damages and not a penalty; unless the amount is so exorbitant and extravagant that it could not possibly have been regarded as damages for any possible breach which was in the contemplation of the parties⁵).

But the question whether the agreed sum is excessive or not is to be considered with reference to the point of time at which the stipulation is made, not with reference to the damage that has been actually suffered by the breach. Evidence as to the damage actually suffered is never admitted upon the question whether or not the sum agreed is liquidated damages⁶). If, however, it is decided that the sum is penal in its nature, evidence of damage actually suffered is necessarily admitted, as that becomes the measure of the unliquidated damages recoverable.

Valuation. Instead of agreeing to a fixed sum or rate as liquidated damages the parties may agree that the damages shall be assessed by some particular person and that only such sum as he shall find to be due shall be recoverable. When there is such an agreement, assessment or valuation by the person agreed is a condition precedent to any right of action⁷).

Equitable Remedies. An action for damages was the only remedy at Common Law for a breach of contract. But Courts of equity before the fusion of law and equity had jurisdiction to order specific performance and to restrain threatened breaches of contract by injunction: and now any Court may order specific performance either in substitution for or in addition to damages, and may grant injunctions in proper cases⁸).

When the Court orders specific performance it thereby orders the party in default to do specifically that which he has contracted to do. An injunction is an order restraining the party from committing a threatened breach. Both these remedies may be enforced by imprisonment, the defaulter being usually kept in confinement until he makes submission. These remedies are not granted as of right, the Court having a judicial discretion to grant or refuse them; and they are not granted where to do so would be oppressive or inconvenient or would result in great hardship amounting to injustice. On this principle equitable relief is refused where damages would

¹) *Pye v. British Automobile Syndicate Limited* [1906] 1 K. B. 425.

²) *Clydebank Engineering Co. v. Don Jose Ramos* [1905] A. C. 6, 16.

³) *Kemble v. Farren* (1829), 6 Bing. 141; *Magee v. Lavell* (1874), L.R. 9 C. P. 107, 111; *Willson v. Love* [1896] 1 Q. B. 626.

⁴) *Thompson v. Hudson* (1869), L. R. 4 H. L. 1.

⁵) *Clydebank Engineering Co. v. Don Jose Ramos* [1905] A. C. 6.

⁶) *Ibid.*

⁷) *Scott v. Avery* (1856), 5 H. L. C. 811; *Elliot v. Royal Exchange Assurance Co.* (1867), L. R.

2. Ex. 237, 245.

⁸) Judicature Act, 1873, s. 24.

be sufficient compensation¹⁾, or where compliance with the order of the Court could not be enforced at all or without the constant supervision of the Court²⁾. Contracts of service and agency and all contracts involving personal skill and qualifications cannot be effectively enforced by the Court. Hence in the case of such contracts specific performance is not ordered³⁾; but a negative term in such a contract, such as an agreement restraining a servant from entering other employment so as to compete with his master, will (if not illegal as being in restraint of trade) be enforced by injunction⁴⁾.

Nor will specific performance or an injunction be granted where the plaintiff has by acquiescence or unreasonable delay⁵⁾ disentitled himself to relief, or where the contract has been procured by unfair means, as when one party has snapped at an offer which he knew the other party had made by mistake⁶⁾. And specific performance will be refused where the performance of the contract would expose the party performing to criminal proceedings⁷⁾.

Moreover the Courts will not enforce by equitable remedies contracts in which no valuable consideration moves from the party seeking performance, even though the contract is under seal⁸⁾, or in which there is no mutuality, such as a contract with an infant, a breach of which may enable him to sue for damages though it is not enforceable against him⁹⁾.

When the contract provides for liquidated damages a plaintiff is put to his election whether he will have liquidated damages or an injunction. He cannot have both¹⁰⁾.

Interest. The remedy for breach of a contract to pay a sum of money is an action on the contract for the sum payable, and no damages for non-payment are recoverable¹¹⁾. Interest however on the sum due from the date when it became payable till judgment may be payable either by contract or by statute; but unless it is due in one of these ways it is not recoverable. A contract to pay interest may be express, or may be implied from the usage of trade or a course of dealing between the parties. So when it has been regularly paid in a series of transactions, a contract to pay upon debts arising out of similar transactions between the same parties may be inferred¹²⁾. By statute interest is payable:

1. Upon bills of exchange and promissory notes¹³⁾.
2. Upon moneys payable upon policies of insurance¹⁴⁾.
3. Upon judgment debts¹⁵⁾.

And by the Civil Procedure Act 1833¹⁶⁾ the jury (or a judge when the action is tried without a jury¹⁷⁾ may if they think fit allow interest on debts,

1. From the time when the debt is payable, if the debt is payable by some written instrument at a certain time, or
2. From the time when demand of payment has been made in writing, if such demand gives notice to the debtor that interest will be claimed from the date of the demand.

Arbitration. When the parties by a term of the contract or by an independent agreement have agreed in writing to submit differences to arbitration, the Court may, on the application of the defendant, stay any action brought on the contract.

¹⁾ *Ryan v. Mutual Tontine Westminster Chambers Association* [1893] 1 Ch. 116, 125.

²⁾ *Ibid*; *Wolverhampton & Walsall Rail Co. v. L. & N. W. Ry. Co.* (1873), L. R. 16 Eq. 433.

³⁾ *Lumley v. Wagner* (1852), 1 De G. M. & G. 604; *Johnson v. Shrewsbury & Birmingham Ry.* (1853), 3 De G. M. & G. 914.

⁴⁾ *Lumley v. Wagner*, *supra*: see *Clegg v. Hands* (1890), 44 Ch. D. 503.

⁵⁾ *Levy v. Stogdon* [1899] 1 Ch. 5.

⁶⁾ *Webster v. Cecil* (1861), 30 Beav., 62; *Tamplin v. James* (1880), 15 Ch. D. 215.

⁷⁾ *Hope v. Walter* [1900] 1 Ch. 257.

⁸⁾ *Jefferys v. Jefferys* (1841), Cr. & Ph. 138.

⁹⁾ *Flight v. Bolland* (1825), 4 Russ. 298.

¹⁰⁾ *General Accident Assurance Corporation v. Noel* [1902] 1 K. B. 377.

¹¹⁾ See *L. C. & D. Ry. Co. v. S. E. Ry. Co.* [1893] A. C. 429.

¹²⁾ See *In re Anglesey* [1901] 2 Ch. 548.

¹³⁾ Bills of Exchange Act, 1882, ss. 57, 89.

¹⁴⁾ 3 & 4 Will IV, c. 42, s. 29.

¹⁵⁾ 1 & 2 Vic. c. 110, s. 17.

¹⁶⁾ 3 & 4 Will IV, c. 42.

¹⁷⁾ See *In re Roberts* (1880), 14 Ch. D. 49.

The agreement to refer to arbitration cannot be pleaded as a defence, and a defendant who desires to stay an action must apply before taking any steps in the action, and must show that he is himself willing to submit to arbitration and do everything necessary thereto¹).

XXIII. Discharge after Breach.

A debt or other cause of action for breach of contract may be discharged:

1. By Deed of Release.
2. By Accord and Satisfaction.
3. By Merger.
4. By the Statutes of Limitations.
5. By an order in Bankruptcy²).

Deed of Release. A release of a cause of action otherwise than by accord and satisfaction must be by deed. The only exception is in the case of bills of exchange and promissory notes, the right to sue on which may be discharged by the holder, by his renouncing his rights in writing or, if he gives up the bill or note, by word of mouth³).

Accord and Satisfaction. If the party entitled to a debt or other cause of action agrees to accept in satisfaction of his right something to be done for or given to him, there is an "accord". But accord without satisfaction does not effect a discharge. When that which he has agreed to accept in satisfaction is done for, or given to, him, there is a complete discharge by accord and satisfaction⁴).

There must be some consideration for the agreement, or accord. Accordingly payment by the debtor of anything less than the whole amount of a liquidated debt then due, even though accepted in discharge, does not discharge the debt, and the creditor may at once sue for the balance, as there is no consideration for his relinquishing it⁵). But payment of a less sum than the whole, if accepted in discharge, is good accord and satisfaction, where the liability of the debtor or the amount of the debt is bona fide disputed (the consideration being the settlement of the dispute), or if the lesser sum is accepted in consideration of its being paid before the debt is due⁶).

As the Court will never inquire into adequacy of consideration the giving of something different in kind, though of less value than the debt, may be satisfaction of a debt if accepted as such. So, giving a negotiable instrument for part of the amount of a debt, if accepted in satisfaction, is sufficient, although payment of the same sum in cash cannot be⁷).

Whether a bill or note is accepted in satisfaction, or only as conditional payment, is a question of fact to be determined by the conduct of the parties⁸).

Liability of third party accepted. A debt is discharged by accord and satisfaction if the creditor agrees to accept the liability of a third person in the place of the debtor, and that third person undertakes liability⁹).

So, upon a change in the constitution of a firm, if a creditor of the firm agrees to discharge the joint liability of the old firm in consideration of the new firm's undertaking liability, there is accord and satisfaction and an outgoing partner is released¹⁰).

If a stranger sends in cash or by cheque a sum less than the whole debt, which he offers in settlement, the creditor's keeping it is strong evidence from which an agreement may be found that he does so on the terms on which it is offered, so that the debt is discharged¹¹).

¹) Arbitration Act, 1889, s. 4.

²) See title "Bankruptcy" *post*.

³) *Foster v. Dawber* (1851) 6 Ex. 839; Bills of Exchange Act, 1882, s. 62. See title "Bills of Exchange" *post*.

⁴) *Hall v. Flockton* (1851) 16 Q. B. 1039.

⁵) *Underwood v. Underwood* [1894] P. 204; *Foakes v. Beer* (1884) 9 App. Cas. 605.

⁶) *Cooper v. Parker* (1855) 15 C. B. 822; *Wilkinson v. Byers* (1834) 1 A. & E. 106.

⁷) *Sibtree v. Tripp* (1846) 15 M. & W. 23; *Goddard v. O'Brien* (1882) 9 Q. B. D. 37.

⁸) *Day v. McLea* (1889) 22 Q. B. D. 610.

⁹) *Per Buller, J. in Tatlock v. Harris* (1789) 3 T. R. 174; *Cochrane v. Green* (1860) 9 C. B. N. S. 448.

¹⁰) *Lyth v. Ault* (1852) 7 Ex. 669.

¹¹) *Bidder v. Bridges* (1887) 37 Ch. D. 406; *Hirachand Punamchand v. Temple* [1911] 2 K. B. 330.

Merger. Merger takes place when a contract debt is extinguished by a debt of a higher nature. If a bond or covenant is entered into by a debtor to pay a simple contract debt, the latter is merged in the specialty, provided the parties are the same, the debts are identical and the bond or covenant is not intended merely as collateral security¹).

A judgment debt or debt of record is a debt of a higher nature than a simple contract debt or specialty debt. Hence when the debtor obtains a judgment of record for his debt, the original debt is extinguished or merged in the judgment²).

The Statutes of Limitations. The Statutes of Limitations are various Acts of Parliament by which a right of action on a contract is imperilled if it is not enforced within the statutory period. The effect of the statutes is not to destroy the cause of action, but to enable the defendant to set up the lapse of time as a good defence to an action. As the statutes relate to procedure, they are applicable to contracts made abroad which are to be interpreted according to foreign law, equally with English contracts, irrespective of the period of limitation (if any) applicable in accordance with the law governing the contract³).

The period of limitation in the case of all simple contracts is six years, and that period begins to run generally from the time when the cause of action arises, that is from the breach of contract in respect of which the action is brought, or in the case of a debt, from the time when it becomes due and payable⁴).

In the case of actions on contracts under seal the period is twenty years after the cause of action arose⁵).

If the plaintiff is at the time of the right of action first accruing an infant or *non compos mentis* the respective periods of six years and twenty years run from his coming of age or becoming sane⁶).

If the defendant is, at the time of the cause of action accruing, beyond the seas (i. e. outside the British Isles and Channel Islands) the periods run from the time of his first returning from beyond the seas⁷), and the plaintiff's ignorance of his return does not prevent the statutory time from running⁸).

In the case of a debt by simple contract, if the defendant has at any time made in writing an unconditional promise to pay, or a conditional promise the condition of which has been fulfilled, or if he has made in writing an acknowledgment of the debt from which a promise to pay may be implied, such writing being signed by him or his agent, or if he (or his authorized agent), has made any payment on account of the debt from which a promise to pay can be implied, such promise, express or implied, is treated as a new contract to pay (though made without any consideration other than the existing debt), and the statute begins to run therefrom, so that an action may be brought at any time within 6 years thereof, or 6 years from the removal of any disability then existing⁹), and this is so even though the debt is already statute barred at the time when the promise, acknowledgment or part payment is made¹⁰).

In the case of contracts under seal the statute runs from any acknowledgment in writing signed by the party or his agent (even though a promise to pay cannot be implied therefrom), or a promise to pay in writing signed by the party liable or his duly authorized agent, or from any acknowledgment by part payment on account of principal and interest made by the party or his agent¹¹).

¹) *Price v. Moulton* (1851) 10 C. B. 561; *Commissioners of Stamps v. Hope* [1891] A. C. 476.

²) See *King v. Hoare* (1844) 13 M. & W. 494.

³) *British Linen Co. v. Drummond* (1830), 10 B. & C. 903; *Huber v. Steiner* (1835), 2 Bing. N. C. 202.

⁴) Limitation Act, 1623 (21 Jac. 1 c. 16) s. 3

⁵) Civil Procedure Act, 1833 (3 & 4 Will IV, c. 42).

⁶) 21 Jac. 1 c. 16, s. 7 and 3 & 4 Will. IV, c. 42, s. 4, as amended by the Mercantile Law Amendment Act, 1856, (19 & 20 Vic. c. 97), s. 19.

⁷) 4 & 5 Anne, c. 3, s. 19; 4 & 5 Will IV, c. 42, ss. 4, 7.

⁸) *Gregory v. Hurrill* (1826), 5 B. & C. 341.

⁹) *Tanner v. Smart* (1827), 6 B. & C. 603; *Rew v. Pettet*, (1834), 1 A. & E. 196; Lord Tenterden's Act (9 Geo IV, c. 14, s. 1); Mercantile Law Amendment Act (19 & 20 Vic. c. 97), s. 13. Payment on account to be effective must be made to the person entitled and not to a third party (*Stamford, Spalding & Boston Banking Co. v. Smith* [1892] 1 Q. B. 765.

¹⁰) *Channell v. Ditchburn* (1839), 5 M. & W. 494; *Spichernell v. Hotham* (1854), Kay, 669.

¹¹) 3 & 4 Will. IV, c. 42, s. 4: 19 & 20 Vic. c. 97, s. 10.

When two or more persons are jointly liable for a simple contract debt, an acknowledgment by one in writing or by part payment on his own behalf only prevents the statute running against him, and does not deprive those jointly liable with him of its benefit¹). In the case of specialty debts an acknowledgment in writing by one of several persons jointly liable is sufficient to prevent the statute running against all the persons liable: but a part payment or payment of interest by one only affects the person making it, and does not deprive the others of the benefit of the statute²).

XXIV. Proof of Contracts.

This topic belongs properly to the law of evidence and it is proposed to deal with it only very shortly in this title.

The general rule (subject as we shall see to some exceptions) is that when a contract has in fact been reduced to writing the terms of the contract must be proved by production of the writing and no oral evidence is admissible to prove the terms. Production of the original is however excused:

1. When it is proved to have been lost or destroyed.
2. When it is in the possession of the other party and he refuses to produce it at the trial after having had formal notice to do so³). In these circumstances secondary evidence may be given of the contents, either by production and proof of a copy or draft, or by oral evidence of a witness who has read it and can speak to its terms from memory.

When a contract in writing is produced, its due execution and authenticity must (unless admitted) be proved. If the contract is under seal a witness must be called who can prove the sealing and delivery of the parties, or if (as is usual) the document is signed as well as sealed, can prove the signatures of the parties. Upon proof of the signatures, sealing and delivery will be presumed if the attestation clause is in the usual form⁴).

When the contract is under hand only and signed by the parties, proof of the signatures must be given (unless admitted) by a witness who saw the party whose signature is in question sign or who knows his handwriting, or by comparison with documents proved or admitted to be written by the same person⁵).

When a contract is wholly or partly contained in correspondence the letters must be proved in the same way.

Stamp. For Revenue purposes the legislature has enacted that most contracts shall be stamped at, or before, or shortly after, execution, with an Inland Revenue stamp, and to enforce this duty it is enacted that an instrument which ought to be stamped and is not stamped, or is insufficiently stamped, cannot be given in evidence for any purpose whatever⁶). If, therefore, a written contract which ought to be stamped and is not, is tendered in evidence, it will be rejected, unless it is a contract of a kind which may be stamped after execution upon payment of a penalty and the party is willing to pay the penalty and have it stamped.

The rejection of the written contract does not, however, let in oral evidence of the agreement.

Admissibility of Oral Evidence. As a general rule oral evidence is not admissible to contradict or to add to, vary or substract from, the terms of a written contract. But there are certain extrinsic and collateral matters which may be proved by oral evidence or by writings other than the contract itself.

The matters which may be so proved are:

1. The contractual capacity or incapacity of the parties, e. g. infancy, lunacy.
2. The fact that a party contracts as agent for an undisclosed principal, but not so as to discharge a person who on the face of the document contracts personally (see title "Agency", *supra*).

¹) 9 Geo IV, c. 14 s. 1; 19 & 29 Vict. c. 97, s. 14. *In re Tucker* [1894] 3 Ch. 429.

²) 19 & 20 Vict. c. 97, s. 14; *Read v. Price* [1909] 2 K. B. 724.

³) See Rules of Supreme Court, Order XXXII r. 8.

⁴) Criminal Procedure Act, 1865, (28 & 29 Vic. c. 18, ss. 1-7). See Phipson on Evidence pp. 478, 484.

⁵) 28 & 29 Vic. c. 18, s. 8.

⁶) Stamp Act 1891, ss. 1 and 14. The Stamp Duty varies according to the nature of the contract. In all cases not otherwise specially dealt with it is 10s if the agreement is under seal and 6d if under hand only.

3. To prove an independent collateral agreement amounting to a condition or warranty made before or at the same time as the contract itself, provided it is not inconsistent with the terms of the written contract¹⁾.
4. To prove fraud, mistake, duress, undue influence, illegality, or absence or failure of consideration. Where no consideration is shown in the document itself, the consideration may be proved by oral evidence unless the contract is one which is invalid unless in writing.
5. To prove subsequent alteration or rescission.

The construction of written contracts is entirely for the judge and no extrinsic evidence as to the intention of the parties is admissible, nor can the negotiations leading up to the contract be looked at. The Court will however receive evidence of the surrounding circumstances, that is of the circumstances in which the contract was made, the identity of the parties and their relation, the nature and identity of the subject matter and the knowledge of the parties of those facts, in order to arrive at the intention of the parties from the words used by the parties in the contract made in those circumstances²⁾.

Evidence of local or mercantile custom is admissible to explain or add to the terms of a contract with reference to which it was made, but not to contradict its express terms³⁾, and for this purpose evidence may be given as to the meaning of technical, local or foreign words and phrases used in contracts⁴⁾.

XXV. Actions on Foreign Contracts.

Speaking generally English Courts will entertain an action on a contract although the contract may have been made or broken abroad and though the parties to it are aliens, provided service of process has been effected in accordance with the rules of the English Courts⁵⁾. The only exception seems to be that the Court will not generally entertain actions of a purely local character, that is those which involve trying the title to land situate abroad⁶⁾.

Moreover it is a general rule that contracts governed by foreign law are not enforceable in this country unless they are both enforceable according to the law by which they are governed and consistent with English law⁷⁾.

Accordingly the English Courts will not enforce a contract made abroad and governed by the *lex loci contractus*, even though it is valid according to that law, if it is in contravention of an essential principle of justice or morality⁸⁾, or if there is any English statute applicable to the contract which renders such a contract unenforceable in England⁹⁾. Nor will they enforce a contract made abroad and lawful in the country where made, but to be performed in this country, if it is of such a nature that according to English law it is contrary to public policy as being, for instance, in restraint of trade¹⁰⁾.

But when a contract is made abroad and there is nothing to show that the rights of the parties are to be ascertained by reference to English law, and the contract would be enforceable in the country where it is made, it is enforceable by action in this country, although an English statute prohibits the making of such a contract in England¹¹⁾.

Where however a contract though made abroad is, in accordance with the principles hereinafter explained, governed by English law, its legality is determined by English law and it will not be enforced if it is a contract of a kind which is illegal

¹⁾ *Lindley v. Lacey* (1864), 17 C.B. N. S. 578; *De Lassalle v. Guildford* [1901] 2 K. B. 215; *Erskine v. Adeane* (1873), L. R. 8 Ch. 756; *Pym v. Campbell* (1856), 6 E. & B. 370.

²⁾ See *Bentzen v. Taylor* [1893] 2 Q. B. 274, at pp. 278, 283; *Burges v. Wickham* (1863), 3 B. & S. 669.

³⁾ See notes to *Wigglesworth v. Dallison*, 1 Smith's Leading Cases 10th ed. p. 528.

⁴⁾ *Ibid.*

⁵⁾ See notes to *Mostyn v. Fabrigas*, 1 Sm. L. C.; *Buenos Ayres Rail Co. v. Northern Rail Co. of Buenos Ayres* (1877), 2 Q. B. D. 210.

⁶⁾ *Graham v. Maney* (1883), 23 Ch. D. 743; *British S. Africa Co. v. Com. de Mocambique* [1893] A. C. 602.

⁷⁾ *Hope v. Hope* (1857), 8 De G. M. & G. 731.

⁸⁾ *Kaufman v. Gerson* [1904] 1 K. B. 591.

⁹⁾ See *Santos v. Illidge* (1860), 8 C. B. N. S. 861.

¹⁰⁾ Per Fry J. *Rousillon v. Rousillon* (1880), 14 Ch. D. 351; *Grell v. Levy* (1864), 16 C. B. N. S. 73.

¹¹⁾ *Saxby v. Fulton* [1909] 2 K. B. 208.

or unenforceable according to English law¹): and if consistent with English law it will be enforced here even though it would be void by the law of the country where it was made²).

By what law foreign contracts are governed. When a contract is made abroad, or between parties one (or both) of whom is a foreigner, or the subject-matter of which is situate abroad, questions arise as to the law which will be held to govern the contract in the event of its being litigated in England.

Subject to the exceptions dealt with hereafter, the rule is that the contract is governed by the law by which the parties at the time of contracting intend that it shall be governed³). The parties may in express terms agree that the law of some named country shall apply to the contract. When they do so, no difficulty arises, except that in order to put itself in a position to interpret and enforce the contract an English Court must receive evidence as to the foreign law applicable to the questions arising for decision. More difficulty arises when the parties do not expressly agree by what system of law the contract is to be governed. The Court must then endeavour to ascertain the intention of the parties from the contract itself and the surrounding circumstances. To ascertain what is the intention of the parties certain rules of construction have been laid down, which prevail in the absence of any clear intention to the contrary⁴).

And the first of these is that there is a *prima facie* presumption that the *lex loci contractus* prevails⁵).

But this presumption does not prevail when there are surrounding circumstances from which a contrary intention may be inferred. The surrounding circumstances from which the intention of the contracting parties is to be inferred are composed of ingredients varying in each particular contract. Judicial weight has been given to the following matters as forming material facts on which a Court will rely in construing a contract so as to ascertain the intention of the parties.

That the contract refers to land situate abroad is an operative fact indicating an intention of the parties that their contract should be governed by the *lex situs* and not by the *lex loci contractus*⁶).

That the subject-matter is a ship is one indication of the intention of the parties that the law of the ship's flag should govern the contract⁷).

The circumstance that the contract would be valid under one system of law and invalid under another is one from which an inference may be drawn that the parties intended the contract to be governed by the law which recognizes its validity⁸). And if a contract is to be carried out wholly in another country than that in which it is made it is presumed that the parties intended it to be carried out wholly according to the law of that country (the *lex loci solutionis*); but if it is to be carried out partly in another country than that in which it is made, that part which is to be carried out in that other country, unless something appears to the contrary, is taken to have been intended to be carried out according to the laws of that country⁹).

For it is not necessary for a contract to be governed entirely by one set of laws. If it is clear that it was the intention of the parties that the law of one country should prevail as regards one part of their contract and that the law of some other country should prevail as regards another part of their contract, the Court will give effect to such intention¹⁰).

¹) *Moulis v. Owen* [1907] 1 K. B. 746.

²) *In re Missouri Steamship Co.* (1889), 42 Ch. D. 321.

³) *Hamlyn v. Talisker Distillery* [1894] A. C. 202; *Lloyd v. Guibert* (1866), L. R. 1 Q. B. 115; *Surman v. Fitzgerald* [1904] 1 Ch. 573 at p. 587.

⁴) Per Swinfen Eady J. in *British South Africa Co. v. De Beers* [1910] 1 Ch. 354, 381.

⁵) *Peninsular & Oriental Steam Navigation Co. v. Shand* (1840), 3 Moo. P. C. 272; *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.* (1883), 10 Q. B. D. 521, 540; *Jacobs v. Crédit Lyonnais* (1884), 12 Q. B. D. 589.

⁶) Per Cur. in *Lloyd v. Guibert* (1866), L. R. 1 Q. B. 115, p. 122.

⁷) *Lloyd v. Guibert* (1866), L. R. 1 Q. B. 115; *The August* [1891] P. 328, 342; *The Industrie* [1894] P. 58; *In re Missouri S. S. Co.* (1889), 42 Ch. D. 321.

⁸) *In re Missouri S. S. Co.* *supra*; *Hamlyn v. Talisker Distillery* [1894] A. C. 202.

⁹) Per Lord Esher in *Chatenay v. Brazilian Submarine Telegraph Co.* [1891] 1 Q. B. 79, 83.

¹⁰) *Chamberlain v. Napier* (1880), 15 Ch. D. 614, 631.

But whatever be the law which governs the interpretation of a contract, the mode of suing and the time within which the action must be brought are governed by the law of the country where the action is brought, i. e. the *lex fori*¹⁾. So in all matters of procedure and evidence the English law is followed if the action is brought in England²⁾.

According to this principle statutes of limitations which merely bar the remedy and do not destroy the right (as is the case with the English statutes of limitations applicable to actions for breaches of contract) are part of the *lex fori*. So to an action upon a foreign contract the English statute of limitations may be pleaded in this country³⁾. But it seems that any statute of limitations or other provision which according to the *lex loci contractus* destroys the right and does not merely bar the remedy may also be pleaded⁴⁾.

Similarly it has been held that the 4th section of the Statute of Frauds is applicable to foreign contracts, as the provisions of that statute do not affect the validity of a contract but merely the right to sue on it, or the evidence necessary to prove the contract⁵⁾.

XXVI. Actions on Foreign Judgments.

We have seen that in general a judgment of a foreign court for payment of money creates an obligation which may be enforced by action in this country upon an implied contract to pay. A foreign judgment without satisfaction does not merge or extinguish the original cause of action, as does a judgment of an English Court of Record, though such a judgment followed by payment in satisfaction of the judgment debt by the defendant is a conclusive bar to an action in this country against the defendant for the same cause⁶⁾.

If the foreign judgment has not been satisfied by payment, an action may be brought here either on the judgment or on the original cause of action, or the plaintiff may sue alternatively on both causes of action⁷⁾.

But a judgment of a foreign court of competent jurisdiction deciding a question cognisable by the law of the foreign country is conclusive on the merits if the same question arises between the same parties here, provided:

1. The parties were within, or subject to, the jurisdiction of the foreign court;
2. The judgment is a final and conclusive one on the merits, and
3. The proceedings do not offend against English views of substantial justice⁸⁾.

It follows from this principle that if an action is brought on a foreign judgment, the defendant cannot dispute the merits of the judgment or plead any defence which was, or might have been, pleaded in the original action⁹⁾, nor can he set up that the foreign Court applied a wrong principle of law in construing a contract, even though it purported in so doing to be applying rules of English law¹⁰⁾.

Though the defendant cannot ask to have the merits of the case retried he is not in every case absolutely bound by the foreign judgment, and there are several defences available in an action brought upon such a judgment. Thus he may show that he was never summoned and had no opportunity of defending the action in the foreign Courts¹¹⁾, or that the judgment was obtained by fraud¹²⁾, or that the judges who tried the case were interested parties in the litigation¹³⁾. Moreover an English Court will not enforce a judgment obtained in an action in which the foreign Court had not jurisdiction either over the person of the defendant or over the subject matter of the suit, when the defendant has not appeared or otherwise submitted to the jurisdiction¹⁾. A foreign Court has no jurisdiction over a person who is not

¹⁾ Per Tindal, C. J. in *Trimbey v. Vignier* (1834), 1 Bing. N. C. 151.

²⁾ *Bullock v. Caird* (1875), L. R. 10 Q. B. 276; *Brown v. Thornton* (1837), 6 A. & E. 185.

³⁾ *British Linen Co. v. Drummond* (1830), 10 B. & C. 903.

⁴⁾ See *Huber v. Steiner* (1835), 2 Bing N. C. 202; *Ellis v. McHenry* (1871), L. R. 6 C. P. 228.

⁵⁾ *Leroux v. Brown* (1852), 12 C. B. 801.

⁶⁾ *Barber v. Lamb* (1860), 8 C. B. N. S. 95.

⁷⁾ *Smith v. Nicolls* (1839), 5 Bing. N. C. 208, 221.

⁸⁾ *Pemberton v. Hughes* [1899] 1 Ch. 781.

⁹⁾ *Schibbsby v. Westenholz* (1870), L. R. 6 Q. B. 155; *Nouvion v. Freeman* (1889), 15 App. Cas. 1.

¹⁰⁾ *Goddard v. Gray* (1870), L. R. 6 Q. B. 139.

¹¹⁾ *Ferguson v. Mahon* (1839), 11 A. & E. 179.

¹²⁾ *Vadala v. Lawes* (1880), 25 Q. B. D. 310.

¹³⁾ *Price v. Dewhurst* (1837), 8 Sim. 279.

a subject of the country to which the Court belongs and is not domiciled or resident in that country¹), unless he has agreed to submit to the jurisdiction²).

Lastly the English Courts will not enforce a judgment for payment of a sum of money obtained in an action brought to enforce penalties in favour of the foreign State and not to enforce in the plaintiff's interest a liability imposed for the protection of his own private rights³).

If any of these grounds of defence are established the plaintiff fails in his action on the judgment and is thrown back on the original cause of action. When he is sued on the original cause of action the defendant may avail himself of all defences which would have been open to him if no proceedings had been taken in a foreign Court⁴).

¹) *Schibsby v. Westenholz* (1870), L. R. 6 Q. B. 155; *Rousillon v. Rousillon* (1880), 14 Ch. D. 351, 371; *Singh v. Rajah of Faridkote* (1894] A. C. 670.

²) *Copin v. Anderson* (1875), 1 Ex. D. 17.

³) See *Huntingdon v. Attrill* [1893] A. C. 150.

⁴) See *Smith v. Nicolls* (1839), 5 Bing. N. C. 208, 221.

Title V. Bills of Exchange, Promissory Notes, Cheques and other Negotiable Instruments.

By Walter J. Barnard Byles, Barrister-at-Law.

I. Historical Review.

Early instruments probably rather notes than bills. It will presumably always be a matter of controversy to what date to ascribe the introduction of bills and notes into England. Essentially of foreign origin, they were the inevitable outcome of increasing trade between England and the Continent. It has indeed been suggested that their use may be traced as far back as 1307, when money was remitted to the Pope by way of exchange (*per viam cambii*)¹). As early at any rate as the statute 3 Richard 2, chap. 3 (1379), bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English merchants²). Originally these instruments seem to have been made payable to bearer only. The practice of making them payable to order, and transferring them by indorsement, does not appear to have been adopted till early in the 17th century³). As regards their form, these early instruments were probably far more in the nature of notes than bills, they were "promises to pay" rather than "orders to pay". The so-called Arnold's Chronicle, first published apparently in 1502, contains what is probably the earliest known example of such an instrument. It is styled a "Lettre of Exchange", but it contains no suggestion of a drawer's signature, though there is an indirect reference to such a party. It is made payable to "A or the bringer of this"⁴). Malyne's *Lex Mercatoria*, a work first published in 1622, which has therefore some title to be regarded as the earliest work extant in the English language on the subject of mercantile law, deals at length with the so-called "bill obligatory", in other words a promissory note, but, according to one authority⁵), makes no mention of *inland* as distinguished from *foreign* bills. A different view has on the other hand been expressed as to the purport of these observations, in as much as Malyne is represented as stating that notes were not in use in England though in frequent use abroad⁶). At any rate the statement frequently met with⁷) that notes only date from the 17th century as far as the employment of them in England is concerned, must, under the circumstances, be regarded as a distinctly controversial one. It seems however not unreasonable to ascribe to this period their much increased user, synchronising, as it does, with the introduction of the system of banking into England, to which the date 1640 has been assigned⁸). The actual term "promissory note" was almost certainly not employed before the Statute of Anne (see *post*). A note was in fact often described as an "inland bill". Indeed, as Lord Mansfield has pointed out⁹) in reference to the cases imme-

¹) Daniel, *Negotiable Instruments*, 4th. ed. para. 3.

²) Per Cockburn, C. J., *Goodwin v. Roberts* (1875) L. R. 10 Ex. at p. 347.

³) See the authorities cited by Cockburn, C. J., *Goodwin v. Roberts*, *supra* at p. 348.

⁴) Equally so a somewhat later form (dated 1589) given in Lawson's *History of Banking* (ed. 1850) and described as a bill, is rather a note. These instruments known as "bills obligatory", "single bills" &c. appear to have been in common use as early as the reign of Edward IV (1461 to 1483).

⁵) See Cranch's *American Reports*, vol. I Appendix at p. 383, dealing at length with the history of bills and notes; Story J., *Promissory Notes*, 7th. ed. p. 10 refers to this Appendix as of great minuteness and apparent accuracy.

⁶) Macleod, Introduction p. XXV to "Specimen of a Digest of the Law of Bills of Exchange" (London, 1868), referred to by Cockburn, C. J., in *Goodwin v. Roberts* (1875) L. R. 10 Ex. at p. 347. Malyne's 3rd. ed. (1686) has a chapter (p. 74) headed "Of the nature of Bills Obligatory beyond the Seas and in England", which scarcely seems compatible with this view, but it may be a later addition.

⁷) See Story, *Promissory Notes*, 7th. ed. para. 6; Daniel, 4th. ed. para. 5; see also the view of Lord Holt in *Buller v. Crips* (1703) 6 Mod. 29, referred to *post* p. 252.

⁸) Macleod, *Practice of Banking*, 5th. ed. vol. I p. 433.

⁹) *Grant v. Vaughan* (1764) 3 Burr. at p. 1525; see also Daniel, 4th. ed. para. 5, Story, *Promissory Notes*, 7th. ed. para. 6.

diately preceding the Statute of Anne, it is extremely difficult to tell in most instances whether the action was brought on a bill or on a note.

Originally employed only in trade with foreign countries. Whatever may have been the exact character of these early instruments, it is at least clear that they owed their origin solely to foreign trade, and that much stress was laid on this circumstance.

Any disputes that might arise in connection therewith were tried in the Court of the Staple, and, since cases so dealt with were never reported, this may be considered, it has been suggested, to account for the fact that no reported case relating to a bill is to be met with before 1603¹⁾. The gradual evolution of the law relating to these instruments was thus succinctly summed up in 1697 by Treby C. J.²⁾: "bills of exchange at first were extended only to merchant strangers trading with English merchants, and afterwards to inland bills between merchants trading one with another here in England, and after that to all traders and dealers, and of late to all persons trading or not". The earliest reported case, that of *Martin v. Boure* in 1603³⁾ relates to a *foreign* bill. The first case to deal with an undoubtedly *inland* bill is that of *Edgar v. Chut* in 1663⁴⁾, though doubtless there were earlier cases which have not been reported, for *inland*, as distinguished from *foreign* bills, probably first came into habitual use about 1640⁵⁾. The case of *Woodward v. Rowe* in 1666⁶⁾ seems to have finally settled that actions on bills could be brought by persons other than traders.

The Statute of 1704. Thus it may be said that, roughly speaking, by the end of the seventeenth century the use of bills and notes, both inland and foreign, had become well established. A check was for a time imposed on the further employment of notes at any rate, by what may not be unreasonably described as the arbitrary judgments of Lord Holt⁷⁾, holding these instruments not to be negotiable. Apart from the doubtful accuracy of his remarks in *Buller v. Crips* to the effect that promissory notes had only been introduced somewhat over thirty years previous to the date of that case (1703), it is evident that, even at that time, the correctness of Lord Holt's judgment on this subject was distinctly questioned, for it is remarkable that the Statute of 1704 (3 & 4 Anne, chap. 8, also numbered chap. 9), which was passed to get over the difficulty involved by these decisions, uses, in the preamble, the significant words "*it has been held that notes in writing . . . are not assignable or indorsible over*". Lord Mansfield many years later (1764) stated that the Statute was passed expressly and on purpose to obviate these doubts⁸⁾, and, inasmuch as he expressly states that the cases in the reign of William III, including therefore the decisions of Lord Holt, were founded on mistaken principles⁹⁾, he would appear to regard the passing of the Statute as almost superfluous¹⁰⁾.

Subsequent history. Whether the Statute of Anne was necessary or no, it at least had the effect of once and for all ending the confusion between bills and notes. Henceforth an order to pay = a bill, and a promise to pay = a note. It now at last became possible for the principles relating to these instruments to be definitely settled, and, during the latter half of the eighteenth century, especially the period (1756—1788) when Lord Mansfield was Chief Justice of the King's Bench, the law gradually assumed its present form, and the number of instruments held to be negotiable was slowly added to. Thus in *Miller v. Race* in 1758¹¹⁾ the negotiability of *bank notes* was definitely acknowledged. Lord Mansfield there refers to a case de-

¹⁾ Blackburn on Sale, 3rd. ed.^r p. 346.

²⁾ *Bromwich v. Lloyd*, 2 Lutwyche 158.

³⁾ 1 Cro. Jac. 6.

⁴⁾ 1 Keble, 592.

⁵⁾ Cf. Cranch, p. 381, who deduces this date from Marius's "Advice concerning Bills of Exchange", the second edition of which work (*circa* 1670) contains a preface stating that the author, a notary public, had been for twenty four years in the practice of protesting "*inland and outland instruments*"

⁶⁾ 2 Keble, 105.

⁷⁾ *Buller v. Crips* (1703) 6 Mod. 29; *Clerke v. Martin* (1701) 2 Ld. Raym. 757.

⁸⁾ *Grant v. Vaughan*, 3 Burr. at p. 1526.

⁹⁾ See report of *Grant v. Vaughan* in 1 W. Bla. at p. 486.

¹⁰⁾ Clearly Cockburn, C. J., in *Goodwin v. Roberts* (1875) L. R. 10 Ex. at p. 350, considered the Statute of Anne to be merely declaratory of the decisions prior to the time of Lord Holt. He also (*ibid* p. 349) talks of Lord Holt's "narrow minded view of the matter"

¹¹⁾ 1 Burr. 452.

cided in 1699 as being "in the infancy of bank notes"¹⁾, and their first recorded use in England seems to have been about 1673²⁾. The very cognate instrument, the *cheque*, though there are recorded instances of such instruments as early as 1683³⁾, does not appear to have come into common use till *circa* 1769, when London bankers first began to issue cheque books to their customers⁴⁾, but the two instruments seem in fact to have been to a great extent indistinguishable previous to that date, for bank notes were, it is stated, not printed till 1720, and even then the amount and the payee's name were left blank⁵⁾, so that, presumably, the holder could fill in the amount, as in the case of the drawer of an ordinary cheque. A long interval now elapsed before the list of negotiable instruments was further added to, and then statute law intervened to create a negotiable instrument (the only instance, apart from the Act of 1882, of such a case in English law), when a statute of 1811 (51 Geo III c. 64 s. 4) made the East India Company's bonds transferable by delivery. In 1820 exchequer bills were held to be negotiable instruments, if the blank place for the payee's name was not filled in⁶⁾, and a little later, in 1824, the bonds of foreign princes and governments⁷⁾. These two latter cases may perhaps be regarded as the first indications of the modern tendency to extend the list of negotiable instruments, a tendency which has been so markedly conspicuous in recent times, but the subject will be referred to again later.

The Bills of Exchange Act 1882 (45 & 46 Vict. c. 61). Up to the date of the passing of the Act of 1882 the English law was almost entirely case law. Whatever legislative enactments there were, were of an extraordinarily piecemeal character. The Statute of Anne, for instance, only dealt with one particular point, and did not venture to define a promissory note as such, but left that question to be decided by the Courts. The tentative and inconclusive character of the legislation previous to 1882 becomes very evident if the titles of the acts, 17 in number, contained in the second schedule to the Act of 1882, are noted. These acts, or certain sections thereof, are all repealed by the Act of 1882, and, inasmuch as practically all the points they deal with are now covered by that Act, it seems superfluous to refer further to them. Their mere existence, however, emphasised the necessity for the codification of the law, since it was manifestly illogical to have certain points, not necessarily by any means the more important ones, covered by legislation, while the vast majority required for their elucidation the study of some 2500 cases⁸⁾. These 2500 cases are indeed to all intents and purposes the basis of the Act; in other words the Act is but a codification of the case law as it existed in 1882, in addition to what may have been retained of previous legislation, the latter, as already suggested, a very negligible quantity. The Act of 1882 professedly effected no radical changes, and it may be more than doubted whether, had it aspired to be anything more than a mere Code, it would ever have passed into law⁹⁾. The Act is indeed no landmark in the history of negotiable instruments in England, but simply affords a readier means than was previously available of discovering the law on any particular point. It seems to have fully justified its existence; but few of its sections have required judicial interpretation, and but one amendment, rather than alteration, of its provisions has been necessitated in the course of over thirty years¹⁰⁾. Finality seems in fact to have been well nigh attained as regards English exchange law.

¹⁾ 1 Burr. at p. 458, referring to Anon (1699) 1 Salk. 126, where Lord Holt held that the course of trade created a property in the assignee or bearer of these instruments.

²⁾ Macleod's Dictionary of Political Economy, *sub. tit.* Bank Note.

³⁾ See specimens of such instruments taken from the records of Messrs. Childs Bank, and set out Macleod, Banking, 5th. ed. vol. I 281.

⁴⁾ Macleod's Dictionary of Political Economy, *sub tit.* Cheque.

⁵⁾ Macleod Banking, 5th. ed. vol. I 283.

⁶⁾ *Wookey v. Pole* (1820) 4 B. & Ald. 1.

⁷⁾ *Gorgier v. Mieville* (1824) 3 B. & C. 45. *Attorney-General v. Bouvens* (1838) 4 M. & W. 171. Such instruments, to be regarded as negotiable, must be negotiable by custom in England, and it must not be necessary to do any act out of England to render their transfer valid.

⁸⁾ See Chalmers, Bills, Preface to 3d ed., who also, *ibid.*, gives an account of the proceedings which led up to the passing of the Act of 1882.

⁹⁾ See Parliamentary Debates, Feb. 20th. 1882, vol. 266, p. 1202, and July 25th. 1882, vol. 272 p. 1671.

¹⁰⁾ See the Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. VII. c. 17.)

II. Character of Negotiability.

Meaning of the term. The negotiable character of bills and notes is nowhere explicitly stated in the Act of 1882, nor does there appear to be any definite statement to that effect to be found in the cases on which the Act was founded. The reason probably arises from the fact that their negotiable character is of the essence of bills and notes, and it has in consequence always been regarded as superfluous to define what the very essence of the term "bill" or "note" *prima facie* connotes. It is true that a definite statement of the meaning of the term "not negotiable" is to be found in sec. 81, whereby a person taking a crossed cheque bearing thereon the words "not negotiable", "shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had", and this somewhat terse definition may perhaps be regarded as sufficient, but it is not, *prima facie*, intended to apply to other instruments than crossed cheques. The following more lengthy definition, which has received judicial approval, defines a negotiable instrument as follows¹). "It may therefore be laid down as a safe rule that, where an instrument is by the custom of trade transferable in this country, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, there it is entitled to the name of a negotiable instrument, and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in market overt"²). This definition further lays stress on the necessity for both these requisites to be present. Thus an instrument accustomably transferable, but in its nature incapable of being put in suit by the person holding it *pro tempore*, will not be negotiable³), and in the converse case equally so.

Extension of principle of negotiability to other instruments besides bills, notes and cheques. As already mentioned (*ante* p. 253) the principle of negotiability was, early in the last century, extended to East India Company bonds, exchequer bills, and the bonds of foreign princes and governments. Circular notes have also been held to be negotiable instruments⁴). Possibly the Courts were becoming alarmed at the growing tendency to increase the number of negotiable instruments, and in 1873 a decided check was for a time imposed on their further increase by the decision in the well known case of *Crouch v. Crédit Foncier*⁵). This case dealt with a debenture issued by an English company in England, which by usage was treated as negotiable, but the Court of Queen's Bench held that the instrument, being of recent introduction, no custom relating thereto could be part of the law merchant forming part of the law of which the Courts take notice. The Court, it is true, did not attempt, in this case, to impugn the negotiable character of instruments issued by foreign governments as decided in earlier cases⁶), but confined their judgment strictly to the case before them, viz. that of an English instrument made by an English company in England. The result, however, of the decision was far reaching, since it directly prevented the issue thenceforth of negotiable instruments by English companies in England, unless it could be shown that the negotiability of the instruments was of immemorial origin, thus in fact confining the case to instruments which came within the definition of bills, notes or cheques. This manifestly unsound view of the law, as it has been described⁷), was soon directly chal-

¹) This definition is taken from the notes to *Miller v. Race* (1758) in Smith's Leading Cases, 11th. ed. vol. I, p. 473, but an identical definition appears to be found in all earlier editions of that well known treatise, beginning with the first edition of 1837. The passage is referred to with approval in the judgment of the Court in *Crouch v. Crédit Foncier* (1873) L. R. 8 Q. B. at p. 381.

²) "Market overt" or "an open public and legally constituted market" is held by charter or prescription in country towns on special days; in the City of London every day except Sunday is "market overt." Where goods are sold in market overt, according to the usage of the market, the buyer, by sec. 22 (1) of the Sale of Goods Act 1893 (56 & 57 Vict. c. 71) acquires a good title thereto, if he buys in good faith, and without notice of any defect of title.

³) Thus, share certificates of an American railway, which, when signed in blank, were proved to be transferable, by the usage of English bankers and dealers, by mere delivery, were yet held not to be negotiable instruments, since, until the blank signatures were filled in, there was no one in fact who could sue: *London and County Banking Co. v. London & River Plate Bank* (1887) 20 Q. B. D. 232.

⁴) *Conflans Quarry Co. v. Parker* (1867) L. R. 3 C. P. 1.

⁵) L. R. 8 Q. B. 374.

⁶) *Gorgier v. Mieville* (1824) 3 B. & C. 45, *Attorney-General v. Bouwens* (1838) 4 M. & W. 171.

⁷) Palmer, Company Law, 9th. ed. p. 301.

lenged, in 1875, in the case of *Goodwin v. Roberts*¹). This latter case is not absolutely identical with the earlier one, since it did not deal with an instrument issued by an English company in England, but with scrip certificates issued in England by the agent of a foreign government, which were in fact treated as foreign government bonds. The Exchequer Chamber, however, definitely declined to enter upon the question whether the contract entered into was to be regarded as a foreign or an English contract, since the negotiable character of the instrument must depend, not on the foreign law, but on how far the universal usage of the monetary world had given it that character in England²). The earlier decision was further regarded as an attempt to distinguish between usages of ancient and those of modern origin, as though the law had been finally stereotyped and settled by some positive and peremptory enactment, a view which the Court definitely declined to adopt³). The general result of this decision was to permit once more the issue of negotiable instruments by English companies in England, but even so the exact position seems for many years to have been regarded as a very doubtful one, though in one case decided shortly after the decision in *Goodwin v. Roberts*, the decision in that case was followed both as regards the question of usage, and that of estoppel⁴). The question was not finally settled till 1898, when at last a definite ruling was obtained, in the case of *Bechuanaland Exploration Co. v. London Trading Bank*⁵) on the hitherto debatable point how far it was possible to reconcile the judgment in *Crouch v. Crédit Foncier* with that in *Goodwin v. Roberts*. It was held impossible to reconcile the two decisions⁶), and the decision in *Goodwin v. Roberts* was directly followed, the defendants, who had taken, in good faith and for value, debentures payable to bearer issued by an English company in England, being held entitled to retain them on the ground that they were negotiable instruments transferable by mere delivery. Evidence was called in this case to show that debentures of this kind, that is to say payable to bearer, had been for many years past treated by the mercantile world as negotiable instruments. But it may now even be regarded as doubtful whether henceforth such evidence will be required, for, in the subsequent case of *Edelstein v. Schuler & Co.*⁷), it was held that the very expression "bearer bond" (that is to say, a bond purporting on its face to be payable to bearer) connotes the idea of negotiability, and that, under such circumstances, it is no longer necessary to tender evidence in support of its negotiability, but that the Court should take judicial notice of it. Further the view was there expressed that the time has passed when the negotiability of bearer bonds, whether Government bonds or trading bonds, foreign or English, can be called in question in English courts⁸).

Negotiable instruments at the present day. The two above cited decisions, viz that in *Bechuanaland Exploration Co. v. London Trading Bank*, and that in *Edelstein v. Schuler & Co.*, make it almost a manifest impossibility to give a list of negotiable instruments at the present time, for it would now appear to be possible for any company or person, whether English or foreign, to issue an instrument purporting on the face of it to be payable to bearer, and therefore to be treated as such. The sole checks apparently imposed are those contained in the provisions of the Bank Charter Act 1844, relating to the issue of instruments payable to bearer on demand, and in certain legislative restrictions relating to the amount for which a note payable on demand may be issued. Upwards of sixteen years have now elapsed since the decision of the case of the *Bechuanaland Exploration Co. v. London Trading Bank*, and, though the case was at the time the subject of considerable criticism, favourable and otherwise⁹), it never appears subsequently to have been

¹) L. R. 10 Ex. 337

²) See at p. 345.

³) See at p. 352. The judgment of the Exchequer Chamber in *Goodwin v. Roberts* was upheld in the House of Lords (1876) 1 App. Cas. 476, mainly on the ground of estoppel; Lord Cairns however (at p. 490) definitely stated his agreement with the *ratio decidendi* of the Court below, though that opinion seems not to have been unanimously held by the Court (see per Lord Selborne at p. 494).

⁴) *Rumball v. Metropolitan Bank* (1877) 2 Q. B. D. 194.

⁵) [1898] 2 Q. B. 658.

⁶) at p. 675; see also at p. 678, where the decisions in *Goodwin v. Roberts* and in *Rumball v. Metropolitan Bank* were held practically to overrule *Crouch v. Crédit Foncier*.

⁷) [1902] 2 K. B. 144.

⁸) See at p. 155.

⁹) See the Law Quarterly Review, vol. 15, pp. 130 and 245.

judicially impugned, and that, having regard to the important commercial interests involved, would of itself tend to prove its correctness and affinity with modern commercial requirements. This decision has probably tended largely to the increased issue, in particular, of debentures payable to bearer. There does not appear to be any precise definition of the term "debenture", though the word is of considerable antiquity. Debentures payable to bearer, issued by English companies in England, in the vast majority of cases contain conditions which prevent them being regarded as promissory notes within the Act of 1882, and their negotiability is therefore solely dependent on mercantile usage¹). Whatever the exact designation of the instrument, whether debenture, bond, scrip certificate etc., and whether English or foreign, it must come within the definition of negotiability already set out (see *ante* p. 254). Thus, firstly, it must be transferable by the custom of trade. How far evidence to this effect will be required in the case of an instrument on its face payable to bearer is, since the decision in *Edelstein v. Schuler*, open to question. It has indeed been presumed that the High Court will now take judicial notice of the negotiability of debentures payable to bearer, and that, at any rate, a cloud of witnesses is not necessary²). The instrument must be negotiable by usage in England; evidence of negotiability in a foreign country only will not suffice³). Secondly, the instrument must be capable of being sued upon by the person holding it at the time, that is to say the bearer thereof. Thus there must be no necessity for a written transfer⁴). In some issues of debentures payable to bearer, the bearer is entitled to register himself as holder, and on such registration the instrument ceases to be negotiable⁵). The title acquired by each bona fide transferee by delivery must of course, the instrument being negotiable, be a new and independent one. Formerly it seems, in order to perfect the title of the holder, a condition was indorsed on debentures to bearer that they were to be regarded as negotiable instruments, but this condition appears to be no longer required⁶), since the instrument is negotiable on its face.

Instruments held not to be negotiable. Where a dividend warrant was drawn payable to a named payee, and not to him or his order, or to bearer, it was held, in spite of usage to the contrary, not to be negotiable⁷). The Act of 1882, by sec. 97 (3) (d) recognizes the validity of any usage relating to dividend warrants, and by sec. 95 extends to them, when crossed, the provisions relating to crossed cheques, but it does not go further and include them generally within the provisions of the Act⁸). Thus, sec. 8, which impliedly repeals the necessity for the use of the words "order" or "bearer" in order to make an instrument negotiable (see *post* p. 260) does not apply to dividend warrants, and a dividend warrant made payable to the payee simply could not even now, in spite of usage, be regarded as a negotiable instrument, for the payee would have no power to indorse, and the holder for the time being would therefore have no power to sue. Dividend warrants now, however, as a rule appear to be drawn payable to the payee or order⁹). If they come fully within the definition of a "cheque" contained in the Act of 1882, they are of course negotiable, but the common addition of a receipt form will prevent them being so regarded, the order to pay in such a case not being unconditional¹⁰). Share certificates and transfers are not negotiable instru-

¹) Cf. Palmer, Company Precedents, 11th. ed. Part. III p. 31.

²) Palmer, Company Law, 9th. ed. p. 305.

³) *Picker v. London and County Banking Co.* (1887) 18 Q.B.D. 515. The instruments in this case, Prussian Government bonds, appear to have been payable to bearer.

⁴) See *London & County Banking Co. v. London & River Plate Bank* (1887) 20 Q.B.D. 232, and see *ante* p. 254, note 3.

⁵) See form of debenture in *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q.B. at p. 659.

⁶) Palmer, Company Precedents, 11th. ed. Part III, p. 46.

⁷) *Partridge v. Bank of England* (1846) 9 Q.B. 396.

⁸) An example of dividend warrants clearly within the Act of 1882 is afforded by dividend warrants issued under the provisions of the National Debt (Conversion) Act 1888 (51 Vict. c. 2), since, by sec. 30 (5) of that Act, such warrants are to be deemed "cheques" within the meaning of the Act of 1882.

⁹) Palmer, Company Precedents, 11th. ed. Part I p. 1086. Encyclopaedia of Forms and Precedents, vol. 4 p. 617.

¹⁰) Cf. *Bavins v. London and South Western Bank* [1899] 81 L.T. 655, per Kennedy J.

ments¹). Neither Post Office money orders²) nor Postal orders are negotiable instruments; the latter bear the words "not negotiable" printed on their face. A letter of credit, viz. a request from one person to another to honour the drafts of a third party, is not a negotiable instrument. The person presenting it is not necessarily the person entitled to make the draft. The person, therefore, to whom the letter is addressed ought to see that the signature to any draft drawn thereunder is genuine; if he does not, the loss will be his³).

III. Bills of Exchange.

1. Form.

Bill of exchange, how written. A bill of exchange, as defined by sec. 3 of the Act of 1882, must be an unconditional order in *writing*. Provided there be no infringement of sec. 5 of the Coinage Act 1870 (33 Vict. c. 10), which provides that no piece of gold, silver, or any other *metal* shall be issued, except by the Mint, as a coin or token for money, there is nothing to prevent the instrument being written on any substance, beside paper, other than a metallic one, such as parchment, cloth etc. By sec. 20 of the Interpretation Act 1889 (52 & 53 Vict. c. 63) any expression referring to "writing" found in any act anterior or subsequent thereto, shall, unless the contrary intention appears, include printing, lithography etc.; the body of a bill may therefore be printed, lithographed etc. There is nothing indeed, except for the obvious danger of obliteration, to prevent it being written in pencil as well as in ink⁴). No person can be liable on a bill, by sec. 23, unless he has signed it as such; the Act does not however define what is meant by a "signature", but the objection to any "signature" on a bill appearing thereon in a form other than in "writing" according to ordinary parlance, for instance a printed or lithographed one, would appear to be the necessity for supplying additional proof of such signature. In the case of signature by mark, there must be evidence that the person marking habitually so signs⁵). A bill may be written in any language and in any form of words, provided it complies with the definition in sec. 3 of the Act.

Necessity for drawer's signature. The most essential requisite of a bill of exchange is that it be signed by the drawer as such; thus the signature of the drawer written on the back of a bill has been held not to compensate for the absence of his signature on the face of the bill⁶). The signature of the drawer is usually written in the right hand corner of the bill, but it is sufficient if it is written elsewhere, though not, it would appear from the above cited case, on the back of the bill. Sec. 3 (1) impliedly requires a drawer's name, since it defines a bill as an order in writing "addressed by one person to another". An instrument without a drawer's signature is an inchoate instrument, and cannot be sued on, even when bearing the drawee's acceptance, as either a bill or note⁷). Sec. 20 indeed allows a bill wanting in any material particular to be filled up by the person in possession thereof; the material omission of a drawer's name may therefore be in this way corrected. But the person so filling in the drawer's name must do so within a reasonable time, which is a pure question of fact, dependent upon the circumstances of each particular case. Moreover he must, in so doing, act strictly in accordance with the authority given⁸). Further there must have been due delivery of an instrument issued in an incomplete state. Thus, where a man wrote a blank acceptance on stamped paper, and it was lost or stolen from him when incomplete, it was held that the person so signing was not prevented from disputing the right of a third party to insert his

¹) *Swan v. North British Australasian Co.* (1863) 32 L. J. Ex. 273. [*Rainford v. James Keith and Blackman Co.* [1905] 1 Ch. 296.

²) *Fine Art Society v. Union Bank* (1886) 17 Q. B. D. 705.

³) *Orr v. Union Bank of Scotland* (1854) 1 Macq. 513.

⁴) *Geary v. Physic* (1826) 5 B. & C. 234.

⁵) *George v. Surrey* (1830) M. & M. 516.

⁶) *South Wales Coal Co. v. Underwood* (1899) 15 T. L. R. 157.

⁷) *McCall v. Taylor* (1865) 34 L. J. C. P. 365.

⁸) Cf. *Hogarth v. Latham & Co.* (1878) 3 Q. B. D. 643, where the person filling in the name of his firm as drawer and indorser on a bill accepted by another firm, had, at the time of so filling in, reason to suspect that the acceptance had been given by one partner in fraud of the latter firm, and it was held he could not as indorsee recover thereon.

own name as drawer, since the signature in blank had never been completed by delivery on the signer's part¹).

A bill an unconditional order. The order to pay, addressed to the drawee, need be in no particular form, but it must import an absolute direction that the money shall be paid at all events, and not merely authorise the drawee to pay²). If terms of mere courtesy are added to the order, they must not go so far as to take from the bill its imperative character, so that it ceases to be an *order*, and partakes rather of the nature of a *request* to the drawee to pay³). The actual word "Pay" is not required; thus "Credit in cash" has been held sufficient⁴). An order to pay out of a particular fund is not, by sec. 3 (3), an unconditional order, for the fund may prove insufficient, unless the reference to such fund is merely added to an unqualified order to pay for the purpose of indicating from what source the drawee is to reimburse himself, or what account is to be debited with the bill. So too a mere statement in the bill of the transaction giving rise to such bill does not, by sec. 3 (3) b, make the order unconditional, since it may merely be equivalent to the expression "value received"⁵).

At what time payable. It is not material that the time when the event may happen on which the bill is payable is uncertain, if only it is certain to happen at some time or other, as provided for by sec. 11. Thus the instrument may be made payable on the death of a certain person⁶). The Act in no way recognises instruments made payable at a fair or market, though formerly they appear to have been in use⁷).

The sum payable. Payment must be required, by sec. 3 (1), of a "sum certain in money", that is to say of money in specie or legal currency⁸). By sec. 72 (4) where a bill drawn out of but payable in the United Kingdom, is expressed in a currency other than that of the United Kingdom, the amount thereof is, apart from special agreement, to be taken at the rate of exchange for sight drafts at the place of payment on the day of maturity⁹). Presumably the only person who can insert a special rate of exchange is the drawer (see sec. 9 (1) d), since the drawee by adding such a proviso to his acceptance would make the acceptance qualified, and by sec. 44 (1) the holder is not bound to take a qualified acceptance. Clearly a rate of exchange cannot be inserted by an indorser, because such an insertion constitutes a material alteration of the contract on the bill, which renders the instrument void, unless all parties liable consent thereto, or as against the party actually consenting¹⁰). The whole amount of the bill must be payable in money. Thus, part only of the sum in the instrument cannot be payable in money, and the rest set off against another claim¹¹). No other act can be required in addition to the payment of money¹²); if such requirement is added, the instrument is, by sec. 3 (2), void as a bill or note. The sum must be *certain*, not susceptible of contingent additions or subtractions¹³). The addition of a rate of interest, a provision for payment by instalments with a further proviso that, on default of any instalment, the whole shall become due,

¹) *Baxendale v. Bennett* (1878) 3 Q.B.D. 525.

²) Cf. per Pollock, C.B., *Hamilton v. Spottiswoode* (1849) 4 Ex. at p. 210. As noted later p. 285, a creditor has, as such, no right, in English law, to draw on his debtor. The right can only be acquired by agreement.

³) *Little v. Slackford* (1828) M. & M. 171, where the instrument was held not to amount to a demand.

⁴) *Ellison v. Collingridge* (1850) 9 C.B. 570.

⁵) Per Lush, J., *Griffin v. Weatherby* (1868) L.R. 3 Q.B. at p. 761.

⁶) *Colehan v. Cooke* (1742) Willes, 393.

⁷) *Ibid.* at p. 399. At the date of this case such instruments appear to have already become obsolete.

⁸) By the Coinage Act, 1870 (33 Vict. c. 10) gold is legal tender for any amount, silver coins to 40 shillings, bronze coins to 1 shilling. By the Bank of England Act, 1833 (3 & 4 Will. IV c. 98) Bank of England notes are legal tender for all sums above £5 in England, except at the Bank itself or its branches, but not in Scotland (8 & 9 Vict. c. 38, s. 15) nor in Ireland (8 & 9 Vict. c. 37, s. 6). Bank notes for less than £5 have been illegal in England since 1829 (see 7 Geo IV c. 6, s. 3).

⁹) The *ad valorem* stamp duty on such instruments is however to be calculated at the rate of exchange at the time of *drawing*, see sec. 6, Stamp Act, 1891.

¹⁰) See *Hirschfeld v. Smith* (1866) L.R. 1 C.P. at p. 353, and sec. 64 (1) of the Act.

¹¹) *Davies v. Wilkinson* (1839) 10 A. & E. 98.

¹²) Cf. *Follett v. Moore* (1849) 19 L.J. Ex. 6.

¹³) *Smith v. Nightingale* (1818) 2 Stark. 375; *Barlow v. Broadhurst* (1820) 4 Mop. C.P. 471.

or the addition of an indicated rate of exchange or one to be ascertained as directed by the bill, do not, however, by sec. 9 (1), make the amount uncertain. The amount of a bill is usually written twice on the bill: in *figures* in the left hand top corner, and in *letters* in the body of the bill. The amount expressed in *letters* is, in any case, by sec. 9 (2), to prevail¹).

Date of bill. By sec. 3 (4) a, a bill is not invalid by reason that it is not dated. It is obviously irregular, however, to issue an undated bill, since, in the case of a bill payable a certain time after date, it leaves the date of payment uncertain²). If such a bill be undated the presumption is that it is dated the day on which it was in fact drawn³), or rather, perhaps, that on which it was issued⁴). Sec. 12 allows the holder of a bill payable at a fixed period after date, which is issued undated, to insert the true date, and a *bona fide* mistake in so doing will not invalidate the bill in the hands of a holder in due course. This section does not provide for the insertion of the date of drawing where its absence is not of such material consequence, as in the case of a bill payable a certain time after sight⁵). Such an insertion may presumably be made by virtue of sec. 20 even though the bill may not be "wanting in any material particular" within the meaning of that section⁶). An absolutely unnecessary addition of this character to a bill is not, however, to be recommended.

Place of drawing, and of payment. The place of drawing should properly be inserted, though equally with the date of drawing it is a non-essential statement. The rule of the *distantia loci* seems never to have been acknowledged by English law. Though it is unusual and unnecessary for the drawer to insert a place of payment, he should certainly be careful to insert the full address of the drawee, since such address is, by sec. 45 (4) (b), to be regarded as the place of payment where no place of payment is specified. The drawee must, by sec. 6 (1), be named or otherwise indicated in a bill with reasonable certainty, and the mere name of the drawee, without any address, scarcely complies with this requirement. The statement of a place of payment is, however, no more than that of the drawing, by sec. 3 (4) (c), an essential part of a bill. There may be, by sec. 6 (2), several but not alternative drawees. The place of payment may, however, be in the alternative⁷).

Statement of the consideration. The words "value received" seem at one time to have been considered essential to the form of a bill⁸), but the principle contained in sec. 3 (4) (b) was long ago acknowledged⁹).

To whom a bill may be made payable. A negotiable bill¹⁰) may be made payable, by sec. 8 (2), either to order or to bearer. If the bill be not payable to bearer, the payee must, by sec. 7 (1), be named or otherwise indicated therein with reasonable certainty; thus a bill which omits the payee's name is a void instrument. If, however, it runs "pay — or bearer", it is payable to bearer, but a bill payable "to— or order" is not a valid bill for want of a payee's name¹¹). A bill may now, by sec. 7 (2), be made payable to the holder of an office for the time being¹²).

¹) In *Garrard v. Lewis* (1882) 10 Q. B. D. 30, a case arising before the Act, Bowen, L. J., held that the marginal figures were not an essential part of a bill, but *quære* if sec. 9 (2) now draws any such distinction, since it does not specify where the dominant amount, viz, that in letters, is to be placed?

²) Bankers do not in practice pay undated cheques drawn upon them.

³) *Hague v. French* (1802) 3 B. & P. 173; *Giles v. Bourne* (1817) 6 M. & S. 73.

⁴) By sec. 9 (3) where a bill, payable with interest (such interest running, unless otherwise provided, from the date of the bill) is issued undated, interest runs from the *issue*.

⁵) Sec. 12 applies to the case of an acceptance of a bill payable a certain time after sight, where the *acceptance* is undated.

⁶) The "alteration" of any existing date on a bill is, by sec. 64 (2), a material alteration, but the insertion of a date can hardly be so regarded.

⁷) *Beeching v. Gower* (1816) Holt. N. P. C. 313.

⁸) *Cramlington v. Evans* (1688) 1 Show. 5.

⁹) *Poplewell v. Wilson* (1719) 1 Stra. 264. By sec. 30 (1) every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value.

¹⁰) Every bill is *prima facie* negotiable, as implied by the provisions of sec. 8 (1), though nowhere directly stated in the Act.

¹¹) *R. v. Randall* (1811) Russ. & R. 195; *R. v. Richards* (1811) *ibid* p. 193. Where a bill payable to "— order" was indorsed by the drawer, but the blank was never filled in, it was held equivalent to a bill drawn payable to the drawer's order: *Chamberlain v. Young* [1893] 2 Q. B. 206.

¹²) In this case the Act has altered the former common law rule. As to the case of a fictitious payee, see *post* p. 265.

Order and bearer bills as defined by the Act. Sec. 8 (4) defines a bill payable to order as one expressed to be so payable, or to be payable to a particular person, and not containing words prohibiting transfer. A bill payable to bearer is defined by sec. 8 (3) as a bill expressed to be so payable, or on which the only or last indorsement is an indorsement in blank. These definitions are of importance as impliedly involving considerable change in the law. In accordance with the above definition a bill may now be regarded as payable to order though the actual word "order" is not inserted; thus a bill payable to "John Smith" is now equivalent to a bill payable to "John Smith or order", and John Smith can validly indorse. Formerly such a bill was equivalent to "pay John Smith only", and was therefore a non-negotiable bill which could not be indorsed so as to render any party thereto liable, except the party actually indorsing to his indorsee¹). In the case of a bill payable to bearer, the last indorsement is now decisive of the fact whether the bill is to be so regarded or not. Formerly, at common law, if a bill was indorsed in blank, and was subsequently specially indorsed (that is to say to a named payee) such special indorsee could yet transfer without himself indorsing²), for it was said that the negotiability of a bill indorsed in blank could not be restrained by a subsequent special indorsement³). In such a case at the present day the special indorsee cannot himself transfer without indorsing.

Bills in a set. In the case of foreign bills it is often usual, in order to obviate the danger of loss, to draw them in sets. The usual number of a set is three. Sec. 71 deals at length with the subject. Each separate part is signed by the drawer, but the indorser indorsing more than one part to different persons, and the acceptor accepting more than one part, are, by sec. 71 (2) and (4), liable on all such parts as though they were separate bills. In England the drawer is under no legal liability to give a set; it is presumably a matter of bargain⁴). Each part is subject to a stamp if issued or negotiated apart from the others⁵).

2. Presentment for acceptance.

When necessary. By sec. 39 a bill need only be presented for acceptance when it is payable after sight, when the bill expressly stipulates that it shall be so presented, or when it is drawn payable elsewhere than at the place of residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

In practice always advisable. In practice it is in all cases advisable for the holder of an unaccepted bill to present it for acceptance without delay, for in case of acceptance the holder obtains the additional security of the acceptor, and, if acceptance be refused, an immediate right of recourse, by sec. 43 (2), against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary⁶). Thus where acceptance of a bill, payable a certain time after date or sight, is refused, the full amount of the bill, without any discount for the time it has to run, may be demanded forthwith of the drawer and indorsers.

Time for presentment. Where a bill payable after sight is negotiated, the holder must, by sec. 40, either present it for acceptance or negotiate it within a "reasonable time" on pain of losing his rights against the drawer and prior indorsers. "Reasonable time" is a mixed question of law and fact⁷). Where a bill payable after sight is held back because the rate of exchange is adverse, this will not, of necessity, infringe the rule as to reasonable time⁸).

¹) *Smith v. Kendall* (1794) 6 T. R. 123; *Plimley v. Westley* (1835) 2 Bing. N. C. 249. The mercantile community, in part at least, seem as long ago as 1761 to have held the opposite view, as now adopted by the Act; cf. *Edie v. East India Co.* (1761) 2 Burr. at p. 1221.

²) Title could only, however, be made against the special indorser through his indorsee, cf. *Chitty, Bills*, 11th. ed. p. 173.

³) Cf. *Smith v. Clarke* (1794) 1 Peake, N. P. C. 295.

⁴) See *Chalmers, Bills*, 7th. ed. p. 259.

⁵) Stamp Act, 1891, s. 39.

⁶) Where a bill is dishonoured by non-acceptance, though presentment be in fact unnecessary, notice of dishonour, by sec. 48, *must*, not *may* be given, saving, however, the rights of a holder in due course subsequent to the omission, as provided for by sec. 48 (1).

⁷) See *Shute v. Robins* (1828) M. & M. 133.

⁸) *Mellish v. Rawdon* (1832) 9 Bing. 416, but see, contra, *Ramchurn Mullick v. Luchmeechund Radakissen* (1854) 9 Moo. P. C. 46, where the holder kept back the bill when there was no prospect of the rate of exchange improving.

General rules relating to presentment. The rules relating to presentment for acceptance, and the excuses for non-presentment are to be found in sec. 41 of the Act. It should be noted that, by sub. sec. 3 thereof, the fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not (in cases of course where presentment is necessary) excuse presentment. The drawee has, it would seem, twenty-four hours in which to decide whether to accept or not, such being the usage of merchants¹), and this is probably the "customary time" referred to in sec. 42, within which, if the bill be not accepted, it must be treated as dishonoured. A bill is, by sec. 43 (1), dishonoured by non-acceptance, if such an acceptance as is prescribed by the Act is refused or cannot be obtained. The Act specially provides, by sec. 44 (1), that the holder is not bound to take anything but an unqualified acceptance²).

3. Acceptance.

Who may accept. A bill can only be accepted by the person on whom it is drawn, i. e. the drawee³), and not by a stranger except for honour. The requirement of sec. 6 (1) that the drawee must be named, or otherwise indicated with reasonable certainty, may perhaps be complied with where no name of a drawee is inserted, but simply a place of payment, and a person residing at that place accepts. Such an acceptance was long before the Act held valid⁴), but there is no authority subsequent to 1882. If a bill be drawn upon several persons not in partnership, it must be accepted by all.

Form of acceptance. By sec. 17 an acceptance must be written on the bill, the mere signature of the drawee sufficing, and it must not express that the drawee will perform his promise by any other means than the payment of money. Sec. 6 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97)⁵), first put the question of the acceptance on a reasonable basis, since it required the acceptance to be *signed* by the acceptor or on his behalf. Formerly, in the case of inland bills, the mere word "accepted" appears to have been sufficient, and there was no necessity for the drawee's signature⁶). Further the common law rule that there could be a verbal acceptance of an existing foreign bill⁷), or, indeed, verbal acceptances at all, is not now maintainable. Acceptance, like any other contract on a bill, requires delivery for its completion, but, by sec. 21 (1), there may be an implied delivery where the drawee writes his acceptance on a bill, and then gives notice to the person entitled to the bill of that fact. In such case, as indeed of all acceptances completed by delivery, the acceptance becomes complete and irrevocable.

When acceptance may be written. The acceptance may, by sec. 18, be written on the instrument before it is signed by the drawer (though an instrument without a drawer's signature is no bill, see *ante* p. 257), or while otherwise incomplete, or when the bill is overdue, or after it has been dishonoured by previous non-acceptance or non-payment. A bill accepted when overdue is, by sec. 10 (2), payable on demand.

Qualified acceptances. The acceptance of a bill, unlike the drawing, may be qualified. Five kinds of qualified acceptances are set out in sec. 19 of the Act; it has, however, been suggested that the list is not exhaustive, but that there may be others⁸). Undoubtedly the most important qualified acceptance admitted by the Act is the "local" acceptance of sec. 19 (2) (c), whereby it is in effect provided that the mere fact that an acceptance is made payable at a particular place, for instance as is so frequently the case, at a bank, is not sufficient to make the acceptance qualified, unless the acceptance runs "payable at the X Bank *only*, and *not elsewhere*". The result of adding these latter words is to entitle the acceptor to presentment for payment at the place named, since only in the case of a bill accepted

¹) *Bank of Van Diemen's Land v. Bank of Victoria* (1871) L. R. 3 P. C. at p. 543.

²) See *post* "Acceptance".

³) *Polhill v. Walter* (1832) 3 B. & Ad. 114; *Eastwood v. Bain* (1858) 28 L. J. Ex. 74.

⁴) *Gray v. Milner* (1819) 8 Taunt. 739.

⁵) This section, as well as sec. 7 of the same Act, is now repealed by the Act of 1882.

⁶) In accordance with the somewhat remarkable provisions of an act of 1821 (1 & 2 Geo. IV, c. 78), now repealed by the Act of 1882. It required the acceptance to be in writing, but said nothing about the signature. The word "accepted" is generally in practice added to the signature, but without the latter it has no effect at the present day as an acceptance.

⁷) *Clarke v. Cock* (1803) 4 East, 57.

⁸) Per Esher, M. R., *Decroix v. Meyer* (1890) 25 Q. B. D. at p. 348.

generally is presentment to the acceptor, by sec. 52 (1), excused. But, if it is further required that presentment at such place shall be at maturity only, and not subsequent thereto, a special stipulation to that effect must be added¹). A qualified acceptance of this kind is not indeed included in sec. 19, but would appear to be impliedly allowed by sec. 52 (2). A qualified acceptance may not go so far as to alter the tenor of the bill as drawn²). The objection to a qualified acceptance is that the holder may always, by sec. 44 (1), refuse such acceptance and treat the bill as dishonoured. On the other hand, if he does admit such acceptance, he must, by sec. 44 (2), notify all prior parties, who have not already expressly or impliedly assented thereto, on pain of losing his rights against them.

Acceptance for honour. As already mentioned, the only person, beside the drawee, who may, accept a bill is an intervener for honour. Such intervener for honour may either, by sec. 15, be a party already named in the bill, and called the *referee in case of need*, or, by sec. 65 (1), a party coming forward after the bill has been protested for dishonour by non-acceptance, and called the *acceptor supra protest*. The drawee may himself accept for honour, though he may refuse to accept generally, but no party already liable on the bill can so accept. It is in the option of the holder, by sec. 65 (1), whether to take any acceptance for honour. Protest, or at least noting to be subsequently completed as a protest, is a necessary preliminary in either case.

4. Presentment for Payment.

Always necessary unless excused. Unlike presentment for acceptance, which is only required in certain cases³), presentment for payment, by sec. 45, is required in all cases in order to charge prior parties, unless specially excused. Though, in order to charge the acceptor, presentment for payment is only required, by the terms of sec. 52 (1), where the acceptance is qualified, yet a bill should obviously be presented for payment to the acceptor, and, if action be taken against an acceptor without a previous demand of payment, the question of costs will be taken into consideration⁴). It would seem, however, from the terms of sec. 52 (2), that, if the acceptor desires to insist on presentment for payment, he must insert a special stipulation to that effect in his acceptance, as by making the bill payable at a particular place only, and not merely qualify his acceptance in the other ways specified in sec. 19⁵).

Time for presentment. When a bill is not payable on demand it must, by sec. 45 (1), be presented on the day it falls due, and the date of maturity is to be calculated by aid of the somewhat complicated provisions of sec. 14. That section retains the principle of three days of grace, unless otherwise provided by the bill itself⁶). The party liable has the whole of the last day of grace on which to make payment; a writ therefore issued before the expiry of that day is bad, since no cause of action has then arisen⁷), even if payment has been definitely refused on that day⁸). The principle of days of grace does not apply to instruments payable on demand (not therefore to cheques), but it applies to promissory notes, and to bills drawn payable at a period not exceeding three days after date or sight, such instruments being regarded only for stamp purposes as instruments payable on demand⁹). Further a distinction is drawn, by sec. 14, between bills falling due on a common law holiday, viz Sunday, Christmas Day or Good Friday, or on a public fast or thanksgiving day¹⁰), when the bill is payable on the *preceding* business day, and

¹) In *Smith v. Vertue* (1860) 30 L. J. C. P. at p. 60, Keating, J., was clearly of opinion that a "local" acceptance by itself was not sufficient to ensure presentment on the day of maturity only.

²) See per Esher, M. R., *Decroix v. Meyer* (1890) 25 Q. B. D. at p. 347.

³) See *ante* p. 260.

⁴) Cf. *Macintosh v. Haydon* (1826) Ry. & M. 362.

⁵) See also *ante*, note 1, as to presentment at maturity only.

⁶) The customary mode of otherwise providing is by writing on the instrument the word "fixed".

⁷) *Wells v. Giles* (1836) 2 Gale, 209.

⁸) *Kennedy v. Thomas* [1894] 2 Q. B. 759, but notice of dishonour may then be given, *ibid.*

⁹) See *post* p. 288.

¹⁰) Trading on a Sunday or a Good Friday was forbidden, wholly or partially, at least as early as 1448 by 27 Henry VI. c. 5.

bills falling due on a statutory holiday, as provided for by the Bank Holidays Act 1871 (34 Vict. 17) when the bill is payable on the *succeeding* business day¹).

Further provisions fixing the date of maturity are to be found in sec. 14 (2) and (3). Where a bill is payable on demand it must, by sec. 45 (2), be presented within a "reasonable time"²).

General rules relating to presentment. The rules relating to presentment for payment are set out in sec. 45. Presentment can only be made on a "business day", that is to say, any day other than those specifically dealt with in sec. 14 already mentioned. Sec. 92 contains a practically identical definition of "non-business days". Presentment must be made at a "reasonable hour", that is to say during the usual hours of business, and, if at a bank, within banking hours. Banking hours are generally shorter than business hours proper³). As regards the "proper place" for presentment, the place of business is to be preferred to the place of residence, as implied by sec. 45 (4) (c), where no special place of payment is specified, and no address given on the bill. Where presentment is made at the place of residence it may, it should seem, be made up to the hours of rest in the evening⁴). If made at the proper time and place it is immaterial that there is no person within to return an answer⁵). In all cases where the address of the acceptor is given in the bill, but no place of payment is specified, the bill must, by sec. 45 (4) (b), be presented at such address, whether it be the place of business or not.

When presentment excused. Presentment for payment is dispensed with, or delay in effecting it excused, as provided for by sec. 46. As in the case of presentment for acceptance (in cases where such presentment is necessary), presentment for payment is not excused because the holder has reason to believe that the bill, on presentment, will be dishonoured. If the drawer or an indorser (where, in the latter case, the bill was drawn for the indorser's accommodation) has reason to believe that the bill would be paid if presented, he is entitled, by sec. 46 (2) (c) and (d), to insist on presentment for payment⁶).

Presentment for payment *suprà* protest. If a bill, already dishonoured by non-acceptance, has been accepted *suprà* protest, it must again be presented for payment to the drawee who has already declined to accept it, and must, on non-payment, by sec. 67 (1), be protested for non-payment, before it is presented to the acceptor *suprà* protest. Thus two protests are required. Equally so before there can be a presentment for payment to a referee in case of need there must have been presentment for payment to the original drawee, even though he has already dishonoured the bill by non-acceptance, and the referee in case of need has already accepted, and a second protest must be effected thereon. In other words opportunity must always be given to the drawee to pay the bill he has previously declined to accept, and no intervener for honour can be liable till maturity, though, as already stated (*ante* p. 260), the drawer and indorsers become immediately liable on dishonour by non-acceptance.

5. Payment and discharge.

To whom payment to be made. In order to constitute a valid discharge as regards the party paying, payment must, by sec. 59 (1), be "in due course", that is to say it must be made at or after maturity, in good faith and without notice that the title to the bill is defective. Care must therefore be taken that payment is made only to the true owner of the bill, otherwise the person paying may be liable to pay over again. Payment of instruments made or become payable to bearer, which have been lost or stolen, may be made to the *bonâ fide* holder, or even to the actual finder

¹) The latter part of sec. 14 (2) b seems to refer to the case of Christmas day falling on a Friday, and the Saturday being in consequence a Bank Holiday. In this case, though the Sunday is a common law holiday, a bill falling due thereon is payable on the Monday.

²) For the case of a note payable on demand, see *post* p. 274.

³) The usual banking hours in London, of which the Courts take judicial notice, are nine to four, except on Saturday, when they are nine to one: Hart, Banking, 1st. ed. p. 306.

⁴) *Barclay v. Bailey* (1810) 2 Camp. 527; *Triggs v. Newnham* (1825) 10 Moo. C.P. 249; in both these cases the presentment was about 8 p.m.

⁵) *Wilkins v. Jadis* (1831) 2 B. & Ad. 188.

⁶) The mere fact that the drawer or an indorser has reasonable expectation that the bill will be met, does not, however, entitle him to notice of dishonour, for there is no reference to the question of reasonable expectation in sec. 50 (2). Otherwise notice of dishonour is more freely excused than is presentment for payment.

or thief, provided such payment be not made with knowledge or suspicion of the infirmity of the holder's title. The fact that an instrument payable to bearer is lost or stolen does not prevent a subsequent party acquiring it under such circumstances as to constitute himself a holder in due course; in this case he is the sole person entitled to demand payment, and the original owner cannot question a payment made to him, for there cannot be two holders in due course of the same instrument at the same time but with adverse rights¹). If on the other hand the person presenting the instrument for payment of necessity makes title through a forgery, however *bonâ fide* he may himself be, payment to such person will not discharge the acceptor, unless the latter be protected by statute²), for, by sec. 24, no title whatsoever can be made through a forgery.

By whom payment must be made. *Primâ facie* payment must be made by or on behalf of the acceptor of a bill, or the maker of a note. By sec. 59 (2) payment by the drawer or an indorser is no discharge, and a bill so paid may, in some cases, as provided for by sec. 59 (2) (b), be reissued by the party paying. In the case of *accommodation* bills, that is to say not merely a bill accepted drawn or indorsed without value received by the acceptor, drawer or indorser, but one so accepted etc. in order to *accommodate* some other party, i. e. that he may raise money thereon, or otherwise make use of the bill, the bill, by sec. 59 (3), is discharged by payment in due course by the party ultimately liable, for a bill paid when due by the party ultimately liable (whatever his character on the bill may be) has done its work, and is no longer a negotiable instrument³). Further there may be implied payment, by sec. 61, where the acceptor becomes holder in his own right thereof *at or after its maturity*⁴). A bill or note once in circulation overdue, and coming out of the hands of the acceptor or maker is presumed to be paid. But the mere production of a bill from the custody of the acceptor, even though it bear a receipt in the usual form, is not *prima facie* evidence of his having paid it, without proof of its having been once in circulation after it had been accepted⁵).

Procedure on presentment for payment. The holder must, on presenting the bill for payment, by sec. 52 (4), exhibit the bill to the person from whom he demands payment, and, on the bill being paid, must deliver over the bill to the person paying. Payment otherwise than in money is of no avail, unless, if disputed, it be proved that the person to whom such payment was made, elected to treat a payment in that form as equivalent to a payment in money⁶). On the bill being paid the person to whom payment is made must give a stamped receipt, otherwise he becomes liable to a penalty of £10⁷). The receipt is generally written on the back of the bill. The stamp duty is one penny for all sums of £2 or upwards; receipts for smaller sums do not require to be stamped. Formerly a receipt written upon a bill or note, itself duly stamped, was exempt from stamp duty, but this exemption has been repealed⁸).

Payment for honour *suprà protest*. As regards payment for honour *suprà protest* it is to be noted that sec. 68 (1) contains no such proviso as that contained in sec. 65 (1), whereby it is provided that only a person, not already liable on the bill as a party thereto, can accept the bill *suprà protest*. Any person, even the acceptor who has just dishonoured the bill by non-payment, may intervene and pay the bill

¹) The conviction of the thief does not divest the title of the holder in due course: *Chichester v. Hill* (1882) 52 L. J. Q. B. 160; see also *post* "Lost Instrument", p. 293.

²) Bankers and bankers only (the definition of a "banker" in sec. 2 is remarkably wide) who pay on instruments bearing forged indorsements, are protected by sec. 19 of the Stamp Act 1853 (16 & 17 Vict. c. 59) and secs. 60 and 80 of the Act of 1882. See *post* "Cheques".

³) *Lazarus v. Cowie* (1842) 3 Q. B. at p. 465.

⁴) There cannot however be payment by anticipation; thus where a bill was handed back to the acceptor by the drawer before maturity as paid, and the bill was subsequently negotiated by the acceptor, the drawer was held liable thereon to a subsequent holder for value without notice (*Morley v. Culverwell* (1840) 7 M. & W. 174).

⁵) *Pfiel v. Vanbatenberg* (1810) 2 Camp. 439.

⁶) Cf. *Callander v. Howard* (1850) 19 L. J. C. P. 312, where the greater of the amount of three bills was held to have been paid by an agreed set-off.

⁷) Stamp Act, 1891, sec. 103 (2).

⁸) Finance Act, 1895 (58 Vict. c. 16) sec. 9 (1). A receipt, by sec. 102 of the Stamp Act 1891, can be stamped within fourteen days of being given on a penalty of £5, and within a month on a penalty of £10. Receipts executed out of the United Kingdom must, by sec. 15 (3) (a) of the Act of 1891, be stamped within thirty days of being received in the United Kingdom.

suprà protest, but in order that such payment may not be regarded as a mere voluntary payment, that is to say, that the payer for honour may not simply be in the position of an indorsee of an overdue or dishonoured bill, to which all defects of title affecting it at its maturity attach as against him¹), payment for honour suprà protest must (in addition of course to the actual protest for non-payment required by sec. 68 (1)), by sec. 68 (3), be attested by a "notarial act of honour", which may be appended to the protest. This "act of honour" consists of a declaration made before a notary by the payer for honour, or his agent, of his intention to pay the bill, and states the name of the person on whose behalf he pays²). Payment for honour suprà protest is further to be distinguished from acceptance suprà protest, since, if the holder declines to take such payment, he loses, by sec. 68 (7), his right of recourse against any party who would have been discharged by such payment, whereas, by sec. 65 (1), the holder is not bound, against his will, to take an acceptance suprà protest.

Payment where the payee is a "fictitious or non-existing person". Payment should be made to the "holder", or his agent, and the term "holder" is defined by sec. 2 as "the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof". Where the payee is a "fictitious or non-existing person", the instrument may be treated, by sec. 7 (3), as payable to bearer, and the exact circumstances under which it may be so regarded has been the subject of considerable litigation. It was formerly held that, if the drawer inserted a fictitious payee's name, the holder could not recover against the acceptor, unless his money had reached the acceptor's hands³), but that if the acceptor, at the time of acceptance, *knew* the payee to be a fictitious person, he could not take advantage of his own fraud, but that a *bonâ fide* holder might recover against him on the bill, and treat the bill as payable to bearer⁴). It is now at any rate immaterial whether the acceptor, or other party liable, knew or not of the fictitious character of the payee, or that the alleged payee was non-existent, for, as has been pointed out, to hold otherwise would be to import words into sec. 7 (3) that are not to be found there⁵), and the omission of any reference to the necessity of knowledge, as required at common law, must be regarded as deliberate and intentional⁶). The result of the cases, as regards the term "fictitious person", would seem to make the question dependent on the intention of the drawer at the time of drawing the bill. If the drawer is proved to have deliberately inserted the payee's name without any intention that the person whose name is so inserted should have any rights to the proceeds, then the name of such person may be regarded as "fictitious", even though it in fact be the name of an existing person⁷). It is the intention of the drawer when inserting the name, and not that of some third person, not a party to the instrument, which is alone material⁸). If no such intention can be shown, but, on the contrary, it be proved that it was fully the intention of the drawer that payment should be made to the payee named, then the payee cannot be regarded as "fictitious"; as where the drawers of cheques were induced by the fraudulent representations of a clerk in their employ to draw cheques in favour of existing customers of theirs, to whom as a fact at that time no sums were due, and the clerk subsequently forged the indorsements and negotiated the cheques with the defendant. Under such circumstances the payees were held not to be "fictitious" persons within sec. 7 (3), and the cheques could not therefore be regarded as payable to bearer, so that the defendant, who had obtained payment of the amount of the cheques from the bank on which they were drawn, was held liable to repay the amount thereof, since no title could be made through the forged indorsements⁹). Where, on the other hand, the instruments are made payable to an absolutely non-existing person, then the intention of the drawer is immaterial, and cannot be regarded as preventing the application of the

¹) *Ex parte Wyld* (1860) 30 L. J. Bky. at p. 13.

²) Sec. 68 (4), and form given, Brooke's Notary, 6th. ed. p. 180.

³) *Bennett v. Farnell* (1807) 1 Camp. 129.

⁴) *Gibson v. Minet* (1791) 1 H. Bl. 569.

⁵) See per Lord Herschell, *Bank of England v. Vagliano* [1891] A. C. at p. 146.

⁶) Per Lord Selborne, *ibid.*, at p. 130.

⁷) See the summing up of his observations by Lord Herschell in the *Bank of England v. Vagliano*, *supra*, at p. 153.

⁸) See per Lord Loreburn, *North and South Wales Bank v. Macbeth* [1908] A. C. at p. 139.

⁹) *Vinden v. Hughes* [1905] 1 K. B. 795, approved in *North and South Wales Bank v. Macbeth* [1908] 1 K. B. 13, upheld [1908] A. C. 137.

Act¹). In this latter case the negligence of the drawer in not verifying the identity of the payee is clearly the proximate cause of the fraud; whereas, in the former case, i. e. where the payee is an actually existing person, negligence cannot necessarily be imputed to the drawer, and the provision of sec. 7 (3) cannot be invoked to enable the fraud of a third person to give the instrument an utterly different character from that intended by the drawer, and to the latter's detriment.

When money paid may be demanded back. If the acceptor discovers after payment that the instrument is a forgery, he may, in general, by giving notice on the same day, or within a reasonable time thereafter, recover back the money so paid, provided the person to whom payment has been made has not thereby lost his right, as by giving notice of dishonour, to recover against prior parties²). It has, however, been held that if the party to whom payment is made, is allowed to retain the amount throughout the day when it is paid, a demand for repayment cannot be made on the following day, since the holder is entitled to know on the actual day when the bill is due whether it is a dishonoured bill or not³). There must be no negligence in the party paying⁴). Payment made under a mistake of *law*, as distinguished from a mistake of *fact*, cannot be recovered back⁵).

Discharge otherwise than by payment. A claim on a bill, note or cheque may, as in the case of any other simple contract, be discharged without satisfaction before maturity, but the person liable on the instrument should require it to be handed over to him, otherwise he may, by sec. 62 (2), be subsequently liable to a holder in due course. After the instrument is due the liability of a party thereto can only be discharged by formal release, that is to say by deed under seal, or by satisfaction. Satisfaction (as distinguished from actual payment in money) must be beneficial to the party receiving it. It does not mean merely getting payment from the debtor or of part of the money due to the party receiving it, but must be some independent benefit, actual or contingent, of a kind which might in law be a good and valuable consideration for any other sort of agreement not under seal⁶). Part payment is of course no discharge, as in the case of any other simple contract⁷). The taking of a co-extensive security of a higher nature, such as a deed, merges the remedy on the inferior instrument, but it must be strictly co-extensive⁸), and must not recognise the bill or note as still existing⁹). When judgment is recovered, the original

¹) *Clutton v. Attenborough* [1897] A. C. 90, where the plaintiffs were induced, by the fraudulent representations of a clerk in their employ, to draw cheques in favour of a non-existing person, the fraud being apparently rendered possible by the fact that the drawers had no personal knowledge of the persons who were employed to do such work as that in payment whereof the cheques were ostensibly drawn; see the fraudulent operations set out at length [1895] 1 Q. B. 306.

²) *Imperial Bank of Canada v. Bank of Hamilton* [1903] A. C. 49.

³) *Cocks v. Masterman* (1829) 9 B. & C. 902; *London and River Plate Bank v. Bank of Liverpool* [1896] 1 Q. B. 7. It is said that this rule is confined to instruments where there is a right over against third parties, a right which may be lost if notice of dishonour be not given in due time, cf. *Imperial Bank of Canada v. Bank of Hamilton*, *supra*, at p. 58, in which case it was held that money paid on a fraudulently altered instrument could be recovered on the day following payment, there being no remedies over against third parties. As a matter of fact a claim on the day following payment would not endanger the rights of the party paid as regards notice of dishonour, where the party to whom notice must be sent does not live in the same place as the sender; see sec. 49 (12) b.

⁴) Cf. *Imperial Bank of Canada v. Bank of Hamilton*, *supra*, where it was held not to be negligence on the part of a bank paying a cheque drawn on it, and already "marked" or "certified" by it as good for a certain sum (see *post* p. 277), the amount of such cheque having been subsequently fraudulently altered to a larger sum, to have so paid without previously taking the (so it was held in the case of a marked cheque) unusual course of examining the drawer's account, there being nothing on the face of the cheque to awaken suspicion. Means of knowledge and actual knowledge are not the same thing.

⁵) *Kitchin v. Hawkins* (1866) L. R. 2 C. P. 22.

⁶) Cf. *per* Lord Selborne (1884) 9 App. Cas. at p. 614. A formal renunciation in writing, even after maturity, does not, however, appear, by sec. 62, to require to be for a good consideration.

⁷) A negotiable instrument for a smaller sum may, however, operate, if so given and taken, as a discharge of a debt for a larger amount, for the instrument, being negotiable, may be more advantageous than the original debt, the latter not being negotiable (*Sibree v. Tripp* (1846) 15 M. & W. 23).

⁸) Thus a deed executed by one of two makers of a joint and several note will not discharge the other: *Ansell v. Baker* (1850) 15 Q. B. 20.

⁹) *Twopenny v. Young* (1824) 3 B. & C. 208.

debt is merged therein as regards the party against whom it is recovered, but it is no extinguishment as regards other parties¹).

Discharge by renunciation. The holder may, by sec. 62, before or after maturity renounce his rights on the bill against any party liable thereon, either by delivery up of the bill, or by renunciation in writing. Formerly a parol renunciation was allowed, but the Act does not now permit a renunciation in such form. Where it is desired to renounce a right on a bill before its maturity against a particular party thereto, reserving rights against other parties, the bill obviously cannot be delivered up and a written renunciation is now required. The renunciation in writing must be in itself a record of the renunciation, not merely a memorandum or note of the renunciation, or of an intention or desire to renounce²). Yet as long as the bill is not delivered up to the person whose liability is renounced, no formal written renunciation will protect him against the claim of a subsequent holder in due course, but to come within the definition of such holder, the latter party must have no notice of the renunciation, or (as in other cases) must make title through a subsequent holder in due course³).

Discharge by cancellation. An *intentional* cancellation by the holder or his agent will, by sec. 63 (1) and (2), discharge the bill, or the *intentional* cancellation on the bill of the signature of any party liable thereon, will discharge that party and his successors. The cancellation, in order to be operative, must not only be intentional but *apparent*. A cancellation made unintentionally, without authority etc. is, by sec. 63 (3), inoperative, but, where the cancellation is apparent, the burden of proof that the cancellation was unintentional etc., lies on the party who so alleges, that is to say, on the person wishing to enforce the instrument in its unaltered state. It has been held that a cancellation by the acceptor before issue of a bill by tearing it up, the pieces being picked up in his presence and subsequently joined together, is no answer to a claim by a holder in due course if the cancellation is not apparent, and, in this particular case, the cancellation was effected in such a way that the subsequent appearance of the bill was as consistent with its having been divided for the purpose of safe transmission by the post, as with its having been torn for the purpose of destroying it⁴). This decision has been subsequently described as sound in principle if wrong on the facts⁵); possibly this refers to the unusual practice there suggested, viz that of sending a bill (as distinguished from a bank-note, which is often so sent) in halves by post. The proper and safe mode of cancelling is to draw the pen through the name in such a way as yet to leave it legible⁶).

6. Protest.

What instruments must be protested. Every *foreign bill* must (unless protest be excused by sec. 51 (9)) by sec. 51 (2), be protested if it has been dishonoured by non-acceptance or non-payment, in order to maintain rights of recourse against the drawer and indorsers, but not, as provided for by sec. 52 (3), as against the acceptor. A foreign note never, on the other hand, by sec. 89 (4), requires to be protested as far as the retention of rights under English law against prior parties is concerned⁷). Cheques, which by sec. 73 are defined as bills of exchange drawn on a banker payable on demand, may, if they do not purport to be drawn within the British Islands, be regarded as foreign bills for the purposes of protest, for instance, where they state a foreign place of drawing. In practice, however, the cheque forms usually issued by English bankers have the place of drawing printed thereon, and such place is identical with that where the bank is situated, so that, if forms of this character are employed, the cheque does not purport to be drawn out of the British

¹ *Wegg-Prosser v. Evans* [1895] 1 Q. B. 108; *Drake v. Mitchell* (1803) 3 East, 251.

² *In re George* (1890) 44 Ch. D. 627. Probably the renunciation should be signed, but the Court in this case (see at p. 632) definitely declined to decide this point.

³ *Dod v. Edwards* (1827) 2 C. & P. 602.

⁴ *Ingham v. Primrose* (1859) 7 C. B. N. S. 82.

⁵ Per Collins, L. J., *Nash v. De Freville* [1900] 2 Q. B. at p. 89. Vaughan Williams, L. J., on the other hand, in *Smith v. Prosser* [1907] 2 K. B. at p. 746, considers *Ingham v. Primrose* as no longer law, but gives no reason.

⁶ This course appears to have the result of not finally extinguishing the liability of the party whose name is so cancelled, for, the name being still legible, the addition subsequently of the words "cancelled by mistake" will revive his liability; see *Wilkinson v. Johnson* (1824) 3 B. & C. at p. 438.

⁷ See *post* p. 273.

Islands, wherever it may in fact be drawn. Moreover, by sec. 4 (2) the holder has the option of treating any bill as an inland bill if it does not appear on its face to be otherwise, and, by sec. 51 (2), protest is unnecessary.

Definition of a foreign bill. Sec. 4 defines an *inland* bill, and leaves the definition of a *foreign* bill to be deduced from that definition. Thus a *foreign* bill may be defined as:

1. A bill drawn and payable out of the British Islands.
2. A bill drawn out of the British Islands upon some person resident therein.
3. A bill drawn within the British Islands upon some person resident abroad¹).

The term "British Islands" is more extensive than the term "United Kingdom" used in the Stamp Act, 1891, since it includes the Channel Islands and the Isle of Man. Hence, bills drawn in or upon the Channel Islands or the Isle of Man are inland bills, so far as the Act of 1882 is concerned, but foreign bills as regards the Stamp Act 1891²).

Protest of inland bills. Protest of inland bills is, by sec. 51 (1), optional and but rarely resorted to, but it is believed to be a common practice for London bankers to cause all *inland* bills, if dishonoured by non-payment, to be "noted" after six o'clock of the evening of the day of maturity³). Intervention for honour must, as already stated, be founded on a protest, whether for non-acceptance or for non-payment⁴), and this is so whether the bill be an inland or a foreign one. Further a third protest is required, by sec. 67 (4), if the bill is eventually dishonoured by the acceptor for honour. Protest is also necessary by Scotch law in order to retain the right of "summary diligence"⁵), and sec. 98 of the Act of 1882 specially excepts this case. Apart from these cases it is unnecessary to protest any inland bill, or one purporting to be such.

Formalities of protest. The provisions relating to protest, and the excuses therefor are set out in sec. 51. The protest in practice bears the official seal of the notary, though this is not required by the Act⁶). The protest must be stamped; where the duty on the instrument does not exceed one shilling the stamp is equivalent to that on the instrument, otherwise it is one shilling⁷). The "noting" is an incipient protest, but is unknown to the law as distinguished from the protest⁸), and cannot therefore take the place of protest. Noting is a minute made on the bill by the officer or his clerk at the time of refusal of acceptance or payment. It consists of his initials, the month, the day, the year, the noting charges, and a reference to the notary's register. A ticket or label is also attached to the bill on which is written the answer given to the notary's clerk when he made the presentment⁹). Noting must be on the day of dishonour, as provided for by sec. 51 (4). Formerly, it seems, this point was doubtful, though it was usual to note on the day of dishonour¹⁰). The noting may, by sec. 51 (4), and sec. 93, be converted at any subsequent time into a formal protest. Sec. 94 provides for the case of the services of a notary not being obtainable in the place where the instrument is dishonoured.

Protest for better security. Sec. 51 (5) entitles the holder, when the acceptor has become bankrupt or insolvent, or has suspended payment before the maturity of the bill, to have the bill protested for better security against the drawer and indorsers. This process is sharply to be distinguished from the right conferred on the holder by many continental laws under similar circumstances, viz that of demanding security from the drawer and indorsers after protest duly effected.

¹) A bill drawn in Liverpool on B, a resident in London, and accepted payable by the latter in Paris, is yet an inland bill: Chalmers, Bills, 7th. ed. p. 16.

²) See *post* "Stamp".

³) Wharton's Law Lexicon, 11th. ed. p. 600, *sub tit.* "Noting"; see also *post*, as to "noting".

⁴) See *ante* pp. 262, 263.

⁵) A summary process for the recovery of the amount of the instrument was introduced into Scotland as long ago as 1681; see Thomson, Bills, 3rd. ed. p. 400. It was first applied to *foreign* bills only, hence perhaps the origin of the necessity for protest.

⁶) See Brooke's Notary, 6th. ed. p. 83.

⁷) Sched. I, Stamp Act 1891; by sec. 90 of that Act the duty may be denoted by an adhesive stamp, which is to be cancelled by the notary.

⁸) See per Buller, J., *Lefley v. Mills* (1791) 4 T. R. at p. 175.

⁹) Brooke's Notary, 6th. ed. p. 82.

¹⁰) The party paying has the whole of the business hours, at any rate, of the day of maturity on which to pay. As already mentioned London bankers are accustomed to note bills after 6 p.m. on the day of dishonour.

English law confers no such right, and the only advantage obtained from effecting this protest is that it enables an acceptance for honour to be taken. Since, however, a protest duly effected in one country is recognised by the courts of another¹), a protest so effected in England would probably be sufficient if it be desired to obtain such security in a foreign country.

Protest no excuse for notice of dishonour. Protest is not a substitute for notice of dishonour. It has been held that, where the drawer is resident abroad, notice of dishonour need only state that the bill has been protested, and that it is unnecessary to send a copy of the protest²), but it has been more recently held that, apparently alike whether the party to whom notice is to be sent be resident in England or abroad, the notice of dishonour need contain no reference to the bill having been protested³). In any case it is advisable to include such a statement, though it may not be legally necessary.

7. Notice of Dishonour.

When required. The right of the party from whom payment is demanded, to notice within a reasonable time (as defined by law) of the dishonour of the instrument, whether by non-acceptance or non-payment, by the party primarily liable, before he can be himself called on to pay the amount, is one that is very jealously guarded by English law. Want of due notice is a complete defence (apart of course from questions of excuse or waiver), and evidence to show that the party to whom notice was not duly sent, was not in fact prejudiced thereby, cannot be admitted⁴). Moreover if a party is discharged from liability on a bill or note by want of notice, he is equally discharged from payment of the consideration which he received for the instrument⁵). The Act deals at length with the requisites of notice in sec. 49, but certain points in reference to the question require attention.

Form of notice. The actual form of notice is now of comparatively minor importance⁶); the provisions of sec. 49 (5) to (7) are in fact wide enough to include any form of notice, even a verbal one, which definitely informs the person receiving it of the dishonour of the bill. Care must indeed be taken that, as provided by sec. 49 (7), the notice so describes the bill that it cannot be confused with some other bill, but it lies on the defendant to prove that there is more than one bill to which the notice could apply⁷). There cannot, however, be anything approaching implied notification; the permission of verbal notice does not in the least imply that, for a man who can be clearly shown to have known beforehand that the bill would be dishonoured, is nevertheless entitled to notice⁸). Sec. 49 (6), which permits the return of a dishonoured bill to the drawer or indorser to be regarded as equivalent to notice, is said to approve a common practice of collecting bankers which was formerly of doubtful validity⁹). The practice of bankers would appear to be to return a dishonoured bill or cheque direct to the customer¹⁰), and, in the case

¹) See per Lord Eldon, *Hutcheon v. Mannington* (1802) 6 Ves. at p. 823.

²) *Goodman v. Harvey* (1836) 4 A. & E. 870.

³) *Ex parte Lowenthal* (1874) L. R. 9 Ch. 591; in this case the drawer to whom notice was sent was temporarily in England, though apparently resident abroad. The case does not profess to overrule *Goodman v. Harvey*, *supra*.

⁴) See per Abbott, C. J., *Hill v. Heap* (1823) D. & R. N. P. C. at p. 59. Formerly the rule seems to have been otherwise; see cases cited in argument, *Hill v. Heap*.

⁵) *Peacock v. Purcell* (1863) 32 L. J. C. P. 266; in this case the plaintiffs were creditors of the defendant for goods supplied, and they took from him by indorsement the acceptance of a third person, but gave him no notice of the dishonour, conceiving it to be unnecessary to do so, as they held the bill as a collateral security only. Held that they could recover neither the amount of the bill nor the price of the goods supplied.

⁶) No written notice has been held bad for want of form since the year 1841: Chalmers, Bills, 7th. ed. p. 713, referring to *Furze v. Sharwood* (1841) 2 Q. B. 388.

⁷) *Shelton v. Braithwaite* (1841) 7 M. & W. 436.

⁸) *Caunt v. Thompson* (1849) 7 C. B. 700; *Burgh v. Legge* (1839) 5 M. & W. 418; in the latter case the statement of the defendant, before the maturity of the bills, that he knew that they would not be met, that it was no use sending him notice, and that he would pay later on, was held not equivalent to notice, but to dispensation with notice. See also *In re Fenwick Stobart & Co.* [1902] 1 Ch. 507, to the effect that notice to a man in one official capacity, is not notice to the same person in another official capacity, for his mere knowledge is not sufficient.

⁹) Chalmers, Bills, 7th. ed. p. 174.

¹⁰) By sec. 49 (13) an agent, such as a banker, may either give notice himself, or give notice to his principal, i. e. his customer, and the latter practice appears generally to be followed.

of a cheque, made or become payable to bearer, it has been doubted whether the customer can come within this section as an "indorser", unless the customer has indorsed the cheque to the banker for collection¹).

Mode of transmitting notice. Sec. 49 (15) recognizes the post office as the proper medium for transmitting notice. Indeed if the parties live in different places it would appear to be the only authorized means, and the employment of a special messenger in such a case, if he in fact arrives later than a letter would have done, if duly posted, might be open to question. Besides posting in the ordinary letter boxes, a letter may in the *country* (within certain limitations), but not in *towns*, be handed to a postman on his rounds under the regulations of the Post Office²). The postmark is *prima facie*, but not conclusive, evidence of the time of posting³). As provided by sec. 49 (15) the sender is not liable for any miscarriage in the post, but the letter containing the notice must be properly directed, otherwise further evidence, besides the posting, is necessary to show that in fact the letter came into the hands of the person for whom it was intended⁴). But if the person to whom notice is sent, is the drawer, and he has given his address on the bill in a general way, such as "London", "Manchester" etc., without adding his full address, the notice to him may be addressed equally generally⁵). A notice can of course be sent as well by telegram as by letter⁶).

Place to which notice to be sent. Whenever the person, to whom notice is to be sent, has a place of business, notice should be sent there, rather than to his residence, and, if notice is sent to the place of business, it need not also be sent to the residence⁷). Since some person should always be in attendance at a place of business during business hours, it will be sufficient notice, where the notice is not sent by post, if the person giving notice attends at the place of business during business hours, though no one is within, and though he leaves no written notice on the premises⁸). If the address of the place of business, or of the residence, is not stated on the bill, or cannot with reasonable diligence be found, notice is, by sec. 50 (2) (a), dispensed with.

At what time notice must be given. The provisions of sec. 49 (12) are especially noteworthy, since they contain the only definition of the term "reasonable time" to be found in the Act. Notice must, as provided by this subsection, be given within "reasonable time", and, in the absence of special circumstances, it is not to be deemed to be so given, unless, where the parties live in the "same place", the notice is sent off in time to reach the person for whom it is intended not later than the day after dishonour, and where they live in different places, when the notice is sent off on the day following dishonour, if there be a post at a convenient hour on that day, or by the next post thereafter. Therefore in the first case the material time is that of the *receipt*, in the second that of the *despatch* of the notice. The rules thus laid

¹) Paget, Banking, 2nd. ed. p. 295.

²) The practice of posting in a specially provided private posting box was long ago admitted (*Skilbeck v. Garbett* (1845) 14 L. J. Q. B. 338), but posting in such boxes does not now seem conclusive, since, in accordance with the provisions of sec. 19 (2) of the Post Office (Protection) Act, 1884 (47 & 48 Vict. c. 76), such boxes now bear an inscription to the effect that posting therein will not be accepted in legal proceedings as evidence of receipt by the addressee.

³) *Fletcher v. Braddyll* (1821) 3 Stark. 64; *Stocken v. Collin* (1841) 7 M. & W. 515; in the latter case the date of the post mark was not accepted.

⁴) *Walter v. Haynes* (1824) Ry. & M. 149, where the letter containing the notice was addressed "Mr. Haynes Bristol", and such address was held to be too vague.

⁵) *Mann v. Moors* (1825) Ry. & M. 249; *Clarke v. Sharpe* (1838) 3 M. & W. 166; *Burmester v. Barron* (1852) 17 Q. B. 828.

⁶) *Fielding v. Corry* [1898] 1 Q. B. 268. This decision implies that the telegraphic notice may be sent off later than a notice by post, provided it reaches the addressee as soon as due notice by letter would have done; a view, however, which is difficult to reconcile with the provisions of sec. 49 (12) (b), whereby the material time is that of the despatch, not of the receipt, of the notice.

⁷) *Berridge v. Fitzgerald* (1869) L. R. 4 Q. B. 639, where the defendant was considered to have held out the place of business of a company, of which he was a director, as equally his own place of business.

⁸) *Crosse v. Smith* (1813) 1 M. & S. 545. On the other hand it has been considered that the mere going to the house and knocking at the door, without leaving a written notice behind, cannot be considered as evidence of notice, but as dispensation with notice: *Allen v. Edmundson* (1848) 2 Ex. 719.

down are a legislative enactment of former common law rulings¹), and have always been strictly enforced. The expression "same place", though a very pertinent one in this connection, never seems to have been judicially commented on as regards this question of notice of dishonour. Probably all places, in the case of London, which are within the London postal district, and, in other cases, which are within the postal district of any other city, are within the "same place" for the purposes of this provision²). A post at "a convenient hour", referred to in sec. 49 (12)(b), probably means a post going out during business hours, but there is no modern authority. It was long ago held that, where a bill was dishonoured on a Saturday, and (the Sunday being of course a non-business day), the only post on the Monday went out at 9.30 in the morning, it was not obligatory to send notice by such post, but that the 9.30 post on the Tuesday morning would suffice³). Non-business days may always in this connection be ignored, since the case of notice of dishonour is covered by sec. 92, the time limit being less than three days, but there is nothing in the Act to invalidate a notice sent or received on a non-business day; it is simply within the option of the person bound to give notice whether he ignores such day or not. The "special circumstances" of sub-sec. 12 apply, e. g. to cases of religious festivals of various religions, for the law merchant respects the religions of different persons, whereby they are absolutely forbidden to attend to secular affairs on certain days⁴). The party liable has the whole of the day of maturity whereon to pay, but notice is valid if given at any time on that day after a definite refusal to pay⁵), though no right of action accrues to the holder till the following day, and no writ can therefore be issued on the actual day of dishonour⁶).

By whom notice should be given. Sec. 49 (1) provides that notice must be given by, or on behalf of, the holder, or of an indorser who is at the time himself liable on the bill. Thus an indorser, who has not himself received due notice of dishonour, or who could not in any event sue, is incompetent to give notice. A notice by a stranger will only be effective if he can be shown to be the agent of the person on whose behalf it is given⁷). Notice by an agent is provided for by sec. 49 (2). If the agent by mistake inserts in the notice the name of the wrong principal, that will not invalidate the notice, but only entitle the party liable to raise such defences against the real principal as he would have been entitled to raise against the ostensible principal⁸). Notice is not invalid because the party giving it had no certain knowledge of the dishonour, provided that the notice definitely states that the bill has been dishonoured, for there can be no inquiry into the state of mind, or means of knowledge, of the party giving notice⁹). Notice once given by the proper person, or on his behalf, enures, by sec. 49 (3) and (4), for the benefit of subsequent parties, as there provided.

To whom notice should be given. English law, unlike many continental laws, does not tie the holder down to give notice to his immediate predecessor only. Clearly therefore the party entitled to give notice is well advised to himself give notice to all parties liable to him on the bill, as he thereby avoids the danger of the notice not being transmitted within the proper time (as ought to be done in accordance

¹) See *Smith v. Mullett* (1809) 2 Camp. 208; *Geill v. Jeremy* (1827) M. & M. 61.

²) The phrase "same town or place", in reference to an excise question, has indeed been construed as not necessarily including two places joined together by a continuous line of houses, for instance, as in the case in question, the City of London and Sydenham: *Casey v. Rose* (1900) 82 L. T. 616, but, in the case of notice of dishonour, it would appear to be simply a question of the postal arrangements.

³) *Hawkes v. Salter* (1828) 4 Bing. 715; the parties in this case appear to have been living in different places though not so stated.

⁴) *Lindo v. Unsworth* (1811) 2 Camp. 602. For a recent example of "special circumstances", other than of a religious character, see *The "Elmville"* [1904] P. 319.

⁵) *Burbridge v. Manners* (1812) 3 Camp. 193. It has been held that a premature notice of dishonour is invalid, as where the party liable said he might be able to pay later on, on the day of maturity, but notice was thereupon given: *Hartley v. Case* (1825) 1 C. & P. 555. The Court would probably be loth now to question a notice on this very technical ground.

⁶) *Kennedy v. Thomas* [1894] 2 Q. B. 759.

⁷) *Stewart v. Kennett* (1809) 2 Camp. 177. A tradesman's servant or foreman has no implied authority to give notice: *East v. Smith* (1847) 16 L. J. Q. B. 292.

⁸) *Harrison v. Ruscoe* (1846) 15 L. J. Ex. 110. The alleged principal must of course be a party entitled to give notice; in this case it was a prior indorser.

⁹) *Jennings v. Roberts* (1855) 24 L. J. Q. B. 102.

with sec. 49 (14)), or not at all, from one party to another; but, if he follows this course, he must give notice to all parties at the same time, and cannot claim an extra day for each party¹). The stringent character of the law relating to notice of dishonour is very conspicuous in this regard, for if there be any delay in the circulation of the notice back through the several parties, even though the neglect of one is compensated for by the extraordinary diligence of another party, such delay will discharge all the antecedent parties, and subsequent notices are invalid, for they are given by parties who are no longer liable on the bill²), and that too, though in fact the person sued has received notice in a shorter time from the dishonour than he would have done had each party through whose hands the bill was returned, forwarded the notice within the proper time³). Notice must, as provided for by sec. 48, be given to the drawer, and in the case of bills, notes and cheques alike, to each indorser⁴). The acceptor of a bill, by sec. 52 (3) (which also applies, by sec. 89 (2), to the maker of a note) is not entitled to notice, even though the acceptance be qualified by being made payable at a particular place, as at a bank. A transferor by mere delivery (who is not, by sec. 58 (2), liable on the instrument) of an instrument made or become payable to bearer, is not, as a rule, entitled to notice, but where a remedy arises on the consideration, notice may be necessary to render such a party liable⁵). Sec. 49 (9) to (11) deal with the question to whom notice is to be sent in special cases. As regards the case of partners, notice to a partner who habitually acts in the partnership business, of a matter relating to the partnership affairs, is, by sec. 16 of the Partnership Act 1890 (53 & 54 Vict. c. 39), notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Excuses for want of notice. Delay in giving notice is excused, or notice is altogether excused or waived, in accordance with the provisions of sec. 50. Ignorance of the party's address will only be an excuse if it be shown that due diligence has been employed, but in vain, to discover it. The holder must not allow himself to remain in a state of passive and contented ignorance. The question is one of fact for a jury⁶). As regards dispensation with notice, a promise to pay is a dispensation with notice, if made within the time for giving notice, and, if made after that time, acts as a waiver of notice. It is always evidence from which a jury may infer due notice⁷). If the promise to pay is made under a misapprehension of the law it will still be good, for everybody must be taken to know the law⁸), but it will be otherwise if the misapprehension is one of fact, as where a bill was, before maturity, presented by the indorsee for acceptance and dishonoured, but no notice of dishonour was given by the indorsee to the indorser, and a subsequent proposal by the indorser, after the maturity of the bill, to pay it by instalments, made without knowledge of the facts, was held not to amount to waiver of notice⁹). Notice is dispensed with, as regards the drawer and indorsers, in the cases detailed in sec. 50 (2) (c) (d), but the case provided for by sec. 50 (2) (c), viz that notice is excused, as regards the drawer, "where the drawee or acceptor is, as between himself and the drawer, *under no obligation to accept or pay the bill*" requires some further notice. The drawee or acceptor will be under no obligation to accept or pay if the drawer had no effects at any time during the currency of the bill in the hands of the drawee or acceptor, and the drawer will have no remedy against the drawee, acceptor, or any other person if he is obliged to pay the bill; not being therefore prejudiced by want of notice, the drawer

¹) *Rowe v. Tipper* (1853) 13 C. B. 249.

²) Cf. *Harrison v. Ruscoe* (1846) 15 L. J. Ex. at p. 111.

³) See *Turner v. Leech* (1821) 4 B. & Ald. 451.

⁴) Notice of dishonour to the drawer of a cheque is rarely necessary, as absence of effects in the drawee's hands (see *post* p. 275), the almost universal cause of dishonour, or countermand of payment, excuses it.

⁵) Cf. *Smith v. Mercer* (1867) L.R. 3 Ex. 51. A mere guarantor, who is not a party to the bill, is not entitled to notice: *Van Wart v. Woolley* (1824) 3 B. & C. 439; *Swinyard v. Bowes* (1816) 5 M. & S. 62.

⁶) *Bateman v. Joseph* (1810) 2 Camp. 461.

⁷) *Cordery v. Colville* (1863) 32 L. J. C. P. at p. 211 per Byles, J. A part payment may also be evidence of notice having been duly given, where no objection is made at the time to the want of notice: *Horford v. Wilson* (1807) 1 Taunt. 12.

⁸) *Stevens v. Lynch* (1810) 12 East, 38.

⁹) *Goodall v. Dolley* (1787) 1 T.R. 712. The bill in this case, being payable a certain time after date, did not in fact require to be presented for acceptance.

cannot set that up as a defence¹). But it seems to have been further held, at common law, that, though the drawer had no effects in the hands of the drawee, yet, if he had any *reasonable expectation* that the bill would be honoured, he was entitled to notice of dishonour, as if he had consigned goods to the drawee though in fact they never came to hand²). The Act clearly now, however, substitutes a direct *obligation* on the part of the acceptor to pay, in place of a *reasonable expectation* that he will pay, in order to excuse notice. An acceptor might in fact be under an obligation to pay though he might not have sufficient funds of the drawer's in hand to meet the bill. A course of dealing may prevail which will justify a drawer in drawing, although he may not have value in the hands of the acceptor to the amount of the bill³). In the case of a fluctuating balance in the acceptor's hands, there may possibly be an obligation on the acceptor's part to pay, and therefore notice would be required⁴).

IV. Promissory Notes.

Form. A promissory note is defined by sec. 83 (1). The maker of a note is, by sec. 89 (2), to be deemed to correspond with the acceptor of a bill, and the first indorser is to be deemed to correspond with the drawer of an accepted bill payable to the drawer's order. There is nothing to prevent the maker of a note making it payable to his own order, but such an instrument is not, by sec. 83 (2), a note, in the legal sense, till it is indorsed by the maker. No precise words of contract are essential in a promissory note⁵), provided they amount in legal effect to an unconditional promise to pay, and provided also that there is evidence of the intention of the parties to make such an instrument⁶). If there be no words amounting to a promise, the instrument is merely evidence of a debt, and may be received as such between the original parties. Such is the common memorandum I. O. U.⁷).

Differences between a bill and a note. Except for the special provisions contained in Part IV of the Act, the provisions of the Act relating to bills apply, save where specially excepted, equally to notes. The exceptions contained in sec. 89 (3) are, as far as they relate to the question of acceptance, of a somewhat obvious character. The reason for it being, as provided by sec. 89 (4), unnecessary to protest a foreign note on dishonour, has been stated to be that no action formerly lay upon a foreign promissory note except by virtue of the statute of Anne, and that that statute said nothing about protesting a note⁸). Since no protest is required in the case of a note, there is in general no payment *suprà* protest of notes, whether inland or foreign, for it has been stated that the law merchant as to payment *suprà* protest does not apply to promissory notes⁹). Yet the point may be doubtful, for it is to be observed that sec. 89 of the Act does not exclude the application of sec. 68 to this class of instrument. Where there are several makers of a note, they may, by sec. 85 (1), be liable jointly, or jointly and severally, whereas, where there are several acceptors of a bill, they can be liable jointly only. A note, moreover, always requires an *ad valorem* stamp, whether payable on demand or at not more than three days' sight, or not¹⁰).

Note containing pledge of collateral security. Sec. 83 (3) permits a note to contain a pledge of collateral security¹¹). The pledge must not of course go so far as to make the promise to pay conditional¹²), but promissory notes often accompany other securities, such as mortgages, bills of sale etc., as affording a more speedy remedy

¹) *Bickerdike v. Bollman* (1786) 1 T. R. 405; see also Smith's Leading Cases 11th. ed. vol. 2 p. 102.

²) *Robins v. Gibson* (1813) 3 Camp. 333; *Rucker v. Hiller* (1812) 16 East, 43.

³) Per Pollock, C. B., *Cumming v. Shand* (1860) 29 L. J. Ex. at p. 132.

⁴) *Blackhan v. Doren* (1810) 2 Camp. 503.

⁵) *Brooks v. Elkins* (1836) 2 M. & W. 74.

⁶) It cannot be supposed that the Legislature intended to prevent parties from making written contracts relating to the payment of money, other than bills and notes. *Sibree v. Tripp* (1846) 15 M. & W. at p. 29.

⁷) *Fisher v. Leslie* (1795) 1 Esp. 426; *Israel v. Israel* (1808) 1 Camp. 499. An I. O. U. requires no stamp.

⁸) *Bonar v. Mitchell* (1850) 19 L. J. Ex. at p. 303.

⁹) Story, Promissory Notes, 7th. ed. para. 453.

¹⁰) See *post* "Stamp".

¹¹) For forms of such instruments held to be valid promissory notes, see *Wise v. Charlton* (1836) 4 A. & E. 786; *Fancourt v. Thorne* (1846) 9 Q. B. 312.

¹²) Cf. *Jury v. Barker* (1858) 27 L. J. Q. B. 255.

in cases of default, and they may be valid and binding though the instruments which they accompany are not so¹⁾, and, though indorsed away in breach of faith, may be recovered on by a person proved to be, or making title through, a holder in due course²⁾.

When a note is regarded as overdue. Sec. 86 (3) clearly implies that the rule as to overdue instruments is not to be construed so strictly in regard to promissory notes payable on demand as in the case of bills on demand or cheques. Thus, compared with a cheque, a note on demand is intended to be a continuing security, while a cheque is intended to be presented speedily³⁾. The distinction arises from the admittedly different objects for which notes, and bank notes in particular, on the one hand, and bills and cheques on the other, are employed.

Note payable in a particular place. By sec. 87 (1), where a note is "in the body of it" made payable at a particular place, it must be presented there in order to render the maker liable, but, by sec. 87 (3), if the place of payment is indicated "by way of memorandum only" presentment at the place named is only necessary to charge the indorser, and presentment elsewhere will be sufficient to charge the maker⁴⁾. A place of payment written in the margin, or at the foot of a note, as distinguished from the body thereof, is to be treated as a memorandum only, and not as part of the contract⁵⁾. Thus, too, the insertion of a place of making, which is usually to be found at the head of a note (though, like the place of drawing of a bill, it is not a necessary requisite) will be regarded as written by way of memorandum only. A place of payment written by the maker across the face of the note has been held not to be written in the body of the note⁶⁾. As in the case of a bill (see *ante* p. 262), though presentment at the place named in the body of the note is necessary to charge the maker, yet such presentment need not be at maturity only, unless the maker has further, by sec. 52 (2), expressly so stipulated⁷⁾.

Where an instrument may be treated as either a bill or note. Sec. 5 (2) allows, in the cases there mentioned, the holder to treat the instrument as either a bill or note at his option, and in general, it would seem that, where an instrument is made in terms so ambiguous that it is doubtful whether it is a bill or note, the holder may treat it as either at his option⁸⁾. Where an instrument, in the form of a bill, is not addressed to any drawee, a written acceptance by any one may be construed as a promise to pay, and the instrument may be valid as a promissory note⁹⁾.

Statutory limitations on amount of note payable on demand. Certain statutory limitations are still in force as regards the amount for which a note, payable on demand, may be made. Thus sec. 3 of the act 7 Geo IV, c. 6 prohibits, under a penalty of £20, the issue by any person, *in England*, of any note payable to bearer on demand for less than £5, and sec. 10 requires every note payable to bearer on demand for less than £20, to be made payable at the place of issue. Sec. 1 of the act 9 Geo IV, c. 65 prohibits under a penalty the negotiation etc. in *England* of any note payable to bearer on demand for a less sum than £5, which has been made or issued in Scotland or Ireland, or elsewhere out of England. These provisions are of course primarily aimed at the issue of bank notes, but are in terms wide enough to apply to instruments issued by persons other than bankers.

V. Cheques.

Form. Sec. 73 defines a cheque as a bill of exchange drawn on a banker payable on demand. This definition is noteworthy since it does not, like some foreign laws¹⁰⁾,

¹⁾ *Monetary Advance Co. v. Cater* (1888) 20 Q. B. D. 785.

²⁾ *Glasscock v. Balls* (1889) 24 Q. B. D. 13.

³⁾ *Brooks v. Mitchell* (1841) 9 M. & W. 15.

⁴⁾ In the case of a bill, by sec. 19 (2) c, the acceptance must state that the bill is to be paid at the particular place "only and not elsewhere", in order to render presentment at such place necessary to charge the acceptor; see *ante* p. 261.

⁵⁾ *Williams v. Waring* (1829) 10 B. & C. 2; *Exon v. Russell* (1816) 4 M. & S. 505. In these cases the place of payment was written at the foot of the note. Cf. *Trecothick v. Edwin* (1816) 1 Stark. 468.

⁶⁾ *Stevenson v. Brown* (1902) 18 T. L. R. 268.

⁷⁾ *Gordon v. Kerrs* (1898) 35 Scottish L. R. 469.

⁸⁾ *Edis v. Bury* (1827) 6 B. & C. 433.

⁹⁾ *Peto v. Reynolds* (1854) 9 Ex. 410.

¹⁰⁾ Cf. Art. 1, French Cheque Law of June 14th. 1865, where a cheque is defined as a "mandat de paiement", Art. 339, Italian Commercial Code of 1882 where it is defined as "l'assegno bancario" Art. 1, German Cheque Law of March 11th. 1908.

draw an arbitrary distinction between a bill and a cheque, but applies to cheques as a matter of course, the rules relating to bills, save where special provisions have been enacted relating to cheques only. Thus, like a bill, a cheque must be drawn unconditionally for a sum certain in money, to, or to the order of, a specified person, or to bearer, though, as in the case of a bill (*ante* p. 260), the addition of the words "order" or "bearer" are not now necessary to make the instrument negotiable. The actual words "on demand" moreover need not appear, for sec. 10 renders them unnecessary. The drawer of a cheque should not deviate from the ordinary form in drawing it, for a banker is entitled to refuse payment of a cheque in a form the legality of which may be doubtful¹). If any form, other than the ordinary form, is employed, the liability of the banker to pay can only, it would seem, be the result of special agreement. The definition, in sec. 2, of a "banker", on whom alone a cheque can be drawn, is certainly somewhat nebulous, since it defines a "banker" as a person carrying on "the business of banking"²).

Relation between banker and customer. The ordinary relation of banker and customer is that of debtor and creditor, and a banker, having in his hands effects of his customer, is bound, within a reasonable time after he has received such effects, to pay cheques drawn by his customer upon him to the amount of the effects deposited, or up to the limit of any agreed overdraft. The Courts have always taken a serious view of any dishonour by a banker of his customer's cheques, if such dishonour cannot be fully justified, for the customer's credit may be gravely impaired by a refusal to honour his cheques³), even though no actual damage be proved⁴). Damages may be given even though the cheque, on a second presentment on the day after the original dishonour, has been duly paid⁵). The banker's liability to pay a cheque is, by sec. 75, determined by countermand of payment by the customer himself, or by notice of the customer's death. The drawer of a cheque may countermand, or, as it is more shortly termed, "stop" payment of a cheque at any time, though he naturally thereby exposes himself to an action at the suit of the holder, but the banker, a cheque like a bill, by sec. 53, not operating as an assignment of funds, incurs no liability to the holder on such countermand of payment⁶).

Time within which a cheque must be presented for payment. By sec. 74 (1), where a cheque is not presented for payment "within a reasonable time" of its issue, and the drawer, the state of whose account with the banker at the time entitled him to have it paid, is thereby prejudiced (as if the banker fails in the meantime), the drawer is discharged to the extent of the damage he has thereby suffered, that is to say, to the extent to which he is a creditor of the banker to a larger amount than he would have been had such cheque been paid⁷). It is obvious therefore that in this connection the question of the exact meaning of the term "reasonable time" is a very important one. Sec. 45 (2) supplies one definition, if it may be so called, since it provides that, to determine the question, regard must be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case; this definition applies to bills and cheques alike. A further definition

¹) *Emanuel v. Roberts* (1868) 9 B. & S. 121.

²) Perhaps the definition may be confined to persons having to make annual returns to the Commissioners of Inland Revenue under sec. 21 of the Bank Charter Act 1844 (7 & 8 Vict. c. 32), a provision which now applies to private bankers only (see Grant, *Banking*, 6th. ed. p. 561), and to banking companies governed by the Companies (Consolidation) Act 1908 (8 Edw. VII. c. 69), who, by sec. 108 of that Act, have to publish annually a special statement; also to savings banks certified under the Acts relating thereto, and to post office savings banks. A definition to practically the same effect is contained in sec. 9 of the Bankers Books Evidence Act, 1879 (42 Vict. c. 11).

³) Cf. *Marzetti v. Williams* (1830) 1 B. & Ad. 415.

⁴) *Rolin v. Steward* (1854) 14 C. B. 595; in this case the jury gave £500 damages, which were subsequently reduced, at the recommendation of the Court, to £200. Special damage must be alleged, if it is to be recoverable. *Fleming v. Bank of New Zealand* [1900] A. C. 577.

⁵) *Fleming v. Bank of New Zealand*, *supra*.

⁶) The practice of bankers does not permit countermand of payment of a "marked" cheque, a possible liability being incurred in such case by the banker. See *post* p. 277.

⁷) This section does not include the case of an indorser, who, like the indorser of a bill payable on demand, is by sec. 45 (2), discharged altogether (whatever the position of the bank) if the cheque be not presented within a reasonable time. Unless actual damage is caused by the delay in presentment within the meaning of sec. 74 (1), the drawer of a cheque remains liable thereon for the ordinary period of prescription, namely, six years.

is contained in sec. 74 (2), whereby it is provided that regard shall be had to the nature of the instrument, the usage of trade and of bankers, and of the facts of the particular case; this definition, unlike the former, applies to the case of a cheque only, and as far only as concerns the liability of the drawer, or the person on whose account the cheque is drawn, but the two definitions are practically identical. A more definite explanation of the exact meaning of the term is indeed to be abstracted from judicial decisions. Thus the question has been held to depend on whether or not the person who receives the cheque, lives in the same place as that in which the bank on which the cheque is drawn is situated. If he does, then he must present it for payment not later than the day following receipt, whether he presents it himself, or through his bankers, unless it is already crossed when received by him¹). If the holder resides elsewhere, then he must forward the cheque by the next day's post at the latest either direct to the drawee bank²), or to his banker or other agent for collection, who must, in his turn, forward or present it on the day after such receipt³). These definite rulings must now, however, be considered subject to "the usage of bankers", as now expressly recognised by sec. 74 (2), and to the statutory recognition, by secs. 76—82, of the principle of crossing cheques. Thus a person receiving a cheque uncrossed may now, always, by sec. 77 (2), cross it, and thereby make it payable only through a banker. The effect naturally is to extend the time for collection, and the above cited rule, that the extra time allowed for collection through a banker is only allowed when the cheque is already crossed when received by the holder⁴), seems impliedly repealed, for the Legislature appears to have admitted the right of the holder to avail himself in all cases of the services of a banker for the collection of cheques. Any other practice would in fact be manifestly impossible in many cases. There is no modern authority on the subject, except one case where the question whether or not a cheque had been presented within the proper time was left as a question of fact for the jury⁵), but the whole question must now be considered mainly to depend on the reasonable character of the banking practice adopted in any case where the holder does not collect his own cheques.

Overdue cheque. An overdue cheque is, by sec. 36 (3), like an overdue bill⁶), one that appears "to have been in circulation for an unreasonable length of time". The meaning of this term in this connection is purely a question of fact, and it is therefore impossible to lay down any exact rule, but, in one case, a cheque eight days old seems not to have been regarded as overdue⁷). The question is entirely one for the jury to decide. By sec. 36 (2), where an overdue bill is negotiated, it can only be negotiated subject to defects of title affecting it at its maturity, and no person thenceforward can acquire or give a better title than the person from whom he took it had. In other words it has ceased to be a negotiable instrument. Since the Act of 1882 it seems clear that when a jury has found that the cheque was taken when overdue, it follows as a matter of course that the holder can have no better title than his transferor. Thus the question of the lapse of time is now conclusive of the matter. Formerly the rule seems to have been that the lapse of time was merely

¹) *Alexander v. Burchfield* (1842) 3 Scott, N. R. 555. In this case the holder in London paid the cheque into his bank for collection the day after receipt. The London bankers, on whom it was drawn, were not members of the Clearing House, and, when the cheque was presented to them on the next following day, they had already stopped payment; such presentment was held to be too late.

²) This course is no longer available, since the usage of bankers does not authorize a presentment by post by the holder, unless the latter be himself a banker; see Paget, *Banking*, 2nd. ed. p. 292.

³) *Rickford v. Ridge* (1810) 2 Camp. 537; *Hare v. Henty* (1861) 30 L. J. C. P. 302.

⁴) See *Alexander v. Burchfield*, *supra*.

⁵) *Wheeler v. Young* (1897) 13 T. L. R. 468. In this case a country cheque, uncrossed, was received in London on a Friday; the holder crossed it and forwarded it to his own bankers on Saturday, it was not received by the bank till Monday, was posted thence to the head office on Tuesday, and was not presented to the bank on which it was drawn till Wednesday, on which day the latter bank stopped payment. The jury found there had been unreasonable delay in presentment.

⁶) Bills on demand, other than cheques, are but rarely used in England, so that, in practice, this subsection applies to cheques only.

⁷) *London & County Bank v. Groome* (1881) 8 Q. B. D. 288. In *Down v. Halling* (1825) 4 B. & C. 330, on the other hand, the Court inclined to the view that a cheque five days old was overdue, but declined to lay down any definite rule.

a circumstance to be taken into consideration in coming to a conclusion, and that the real question was whether the cheque, though overdue, was taken under such circumstances as ought to have excited suspicion¹). The latter point would now appear to be immaterial, the sole question being whether the instrument was taken when overdue or not, however bona fide the person taking it may have been.

Marking cheques. Cheques being intended for immediate payment on being presented are not usually accepted. The so-called practice of "marking" cheques for the purposes of settlement at the Clearing House, by the bank on whom the cheque is drawn, has been considered to amount to an acceptance by that bank in favour of the collecting bank²). Except as regards this somewhat exceptional case, there appears to be no reported instance in England of the recovery by action by the holder of a marked cheque of the amount thereof from the bank so marking the cheque. It is not in fact customary in England for bankers to mark cheques at the instance of the payee or holder, as appears to be frequently done in America³), but only at the instance of the drawer. English law has in nowise adopted the American system of "certifying" cheques as recognised by the Negotiable Instruments Law, and the only effect under English law of marking a cheque, or at any rate initialling it with the name of the banker on whom it is drawn, is, it has been stated, to give additional currency to the cheque by showing on the face of it that it is drawn in good faith on funds sufficient to meet its payment, and by adding to the credit of the drawer that of the bank on which it is drawn⁴). The marking, to be regarded as an acceptance, must now satisfy sec. 17 of the Act of 1882, that is to say must consist of the "signature" of the drawee bank⁵). The practice of bankers in England does not allow a customer, at whose instance a cheque has been marked, to subsequently countermand its payment. Since the banker, by so marking the cheque, renders himself liable to the holder, at any rate if the latter be a banker⁶), the practice appears to be a justifiable one, for the liability is incurred at the customer's own request⁷).

Drawer's negligence in filling up cheque. It was long ago held in the well known case of *Young v. Grote*⁸) that there is a duty on the part of the customer of a banker to draw cheques with reasonable care and precaution against unauthorized alterations. It therefore follows that, if the customer is negligent in this respect and draws a cheque in such a way that the amount for which he drew the cheque can be subsequently altered by a fraudulent person to a larger amount without the alteration being apparent, then the loss falls on the negligent party, the customer, and the banker is entitled to debit his customer's account with the amount of the cheque as fraudulently altered⁹). Other grounds have indeed been suggested as the *ratio decidendi* of the decision in *Young v. Grote*, but it would be impossible to analyse with any brevity the various opinions expressed in reference to this much debated case, though the view above expressed would seem to be the more generally adopted, namely, that of the duty owed by a customer to his banker. The case has at any rate never been definitely overruled. The only case in which the facts are practically identical, that of the *Colonial Bank of Australasia v.*

¹) *London & County Bank v. Groome*, *supra*.

²) *Robson v. Bennett* (1810) 2 Taunt. 388. The practice was subsequently noticed in *Goodwin v. Roberts* (1875) L. R. 10 Ex. at p. 351.

³) See Paget, *Banking*, 2nd. ed. p. 93.

⁴) *Gaden v. Newfoundland Savings Bank* [1899] A. C. at p. 285. These remarks do not appear to intimate that there is any *liability* on the part of the drawee bank to the holder.

⁵) The Act does not define the meaning of the term "signature". There is no authority for saying that mere initials will suffice.

⁶) See *Robson v. Bennett*, *supra*.

⁷) See Paget, *Banking*, 2nd. ed. p. 91 to the effect that the practice is probably correct.

⁸) (1827) 4 Bing. 253; see also report in 12 Moo. C. P. 484.

⁹) The negligence of the customer seems essential. Unless negligence is shown, the mere fact that the amount of a cheque has been fraudulently altered after issue, does not entitle the banker to charge the customer with payment of the larger amount; see *Hall v. Fuller* (1826) 5 B. & C. 750, where there seems to have been nothing unusual in the mode of drawing the cheque, but the original amount was subsequently expunged (the manner in which this was effected is not stated) in such a way that detection was impossible, a larger amount being inserted in its place and the loss was held to fall upon the banker paying. Of course, if the banker pays upon an obviously altered cheque, he is clearly liable for such negligence.

*Marshall*¹⁾, where the case of *Young v. Grote* was not followed, is a decision of the Privy Council, and cannot therefore be regarded as overruling an English decision²⁾. There does not seem to be any real analogy between a bill and a cheque in this connection. In the case of *Scholfield v. Londesborough*³⁾, a bill of exchange was drawn by the drawer in such a way that, after the drawee had accepted it, the drawer was enabled to alter the sum for which the bill was accepted to one of much larger amount without the alteration being apparent, and it was held that, under such circumstances, the acceptor was liable to a holder in due course for the lesser sum only. The distinction between the two cases would seem to be that, in the case of a cheque, the duty of the customer arises directly out of the contractual relation existing at the time between him and his banker, who is his mandatory, whereas, in the case of a bill of exchange, there is no such connection between the drawer or acceptor and possible future indorsees of the bill⁴⁾. It is unfortunate that no definite statement of the law on this important matter is possible, mainly by reason of the above cited decision of the Privy Council. Indeed until a case identical with that in *Young v. Grote* reaches the House of Lords (the Supreme Court of Appeal for the United Kingdom), as distinguished from the Privy Council, or the Legislature itself intervenes, the position must remain a doubtful one. The better opinion would seem, however, to be that *Young v. Grote* is still a binding authority⁵⁾, and a customer of a bank in drawing a cheque on his account should therefore be careful so to draw it as to render any alteration of the amount, which would not be apparent, a practical impossibility, otherwise the banker may be entitled to debit the customer's account with the payment of the larger amount. The amount, both in words and figures, should be written well up at the beginning of the line, not in the middle, as was done in *Young v. Grote*, thereby leaving a blank space in which it was quite a simple matter to insert, in one case the words "Three hundred and" before the original word "fifty"⁶⁾, and, in the other case, the figure "3" before the original figures "50", which were written some way from the symbol "£".

Protection to bankers paying cheques drawn to order. In 1853 bankers paying cheques drawn to order were granted protection in cases where the cheques bore forged or unauthorized indorsements. The Stamp Act 1853 (16 & 17 Vict. c. 59) first authorized drafts so drawn to bear a penny stamp only, whereas up to that time they had borne an *ad valorem* stamp. The consequent inevitable increase of these instruments necessitated special protection for the banker, since it would be manifestly impossible for him to verify the genuineness of indorsements, and he would be, without such protection, liable to pay twice over, for no title can be made through a forgery, and payment to a person holding under a forged indorsement is no discharge as against the true owner⁷⁾. Sec. 19 of the Stamp Act 1853, which first granted this protection, is substantially reproduced by sec. 60 of the Act of 1882. The earlier provision (though the rest of the Act of 1853 has long been repealed) is still, however, in force. It appears to have been purposely left unrepealed in order

¹⁾ [1906] A. C. 559. It was there held that the mere fact that a cheque is drawn with spaces which can be utilised for the purpose of fraudulent alteration, is not, by itself, any violation of the duty owed by a customer to his banker.

²⁾ A judgment of the Privy Council is entitled to be treated as of great weight, but is not actually binding on an English Court; see *Dulieu v. White & Sons* [1901] 2 K. B. at p. 677. The Judicial Committee of the Privy Council is the final Court of Appeal for all the courts of the British Empire, other than those of the United Kingdom.

³⁾ [1896] A. C. 514.

⁴⁾ See per Lord Watson, *Scholfield v. Londesborough*, *supra*, at p. 537, who further points out that, if there is any duty at all in the case of the acceptor of a bill, it must be towards the public at large, and that (see at p. 542) such a rule never seems to have been enforced in an English court, or affirmed by an English judge.

⁵⁾ Cf. Paget, *Banking*, 2nd. ed. p. 191; Grant, *Banking*, 6th. ed. p. 16; *Law Quarterly Review*, vol. 23, p. 390.

⁶⁾ The word "fifty" began with a small, not a capital letter, thus further facilitating the insertion of the other words before it. Obviously the word should not have been so written.

⁷⁾ A banker who pays a cheque whereon the drawer's, i. e. his customer's, signature is forged, cannot debit his customer with the amount, but the liability would seem not to depend so much on the duty of a banker to know his customer's handwriting, as on the fact that the banker can only discharge himself by paying on the genuine order of his customer; cf. Grant, *Banking*, 6th. ed. p. 23, and to same effect, Paget, *Banking*, 2nd. ed. p. 127. Where the customer's signature as indorser, not as drawer, is forged, the case would seem to be within sec. 60 of the Act of 1882; cf. Paget, p. 128.

that it might apply to drafts or orders which do not fall within the definitions of bills of exchange or cheques as defined by the Act of 1882, and in regard to which instruments the Act is silent¹). It is to be noted that, unlike the earlier provision, sec. 60 lays stress on the fact that the banker, in order to be able to claim this protection, must have acted both in good faith and in the ordinary course of business. Though negligence is, by sec. 90, not incompatible with good faith, still the negligent act might well be considered as outside the ordinary course of business. This section, as well as the earlier provision, only protects the banker on whom the cheque is drawn, and not third parties²).

Crossed cheques. The custom of crossing cheques seems to have originated in the practice of the Clearing House, where the clerks of the different bankers, who did business there, were accustomed to write across the cheques the names of their employers, so as to enable the Clearing House clerks to make up the accounts³). The practice first received legislative sanction in 1856⁴). All previous legislation is now repealed by the Act of 1882. A crossed cheque is defined by sec. 76 (1). Cheques payable either to order or to bearer may be crossed. Other instruments than cheques within the meaning of the Act of 1882, and therefore not necessarily negotiable instruments, may also be crossed, thereby obtaining for the persons drawing them, or (since any holder, by sec. 77 (2), may now cross the instrument) for any subsequent holders, the protection thereby afforded. This protection, entailing as it does, if not the actual possession of a banking account, at least access to one by leave of a third person, in practice requires a person dealing with instruments crossed, either generally or specially, to be a person at any rate of credit, if not of actual substance. Dividend warrants may, by sec. 95, be so crossed, as already noted⁵), and, by sec. 17 of the Revenue Act 1883 (46 & 47 Vict. c. 55), so may any document drawn by a customer of a banker for the purpose of obtaining payment of the sum mentioned therein from such banker⁶). Postal and Post Office orders may be crossed under the postal regulations.

Form of crossing. The words "and company", or more briefly "and Co.", are in accordance with the terms of sec. 76 not an essential part of a general crossing; the two transverse lines drawn across the face of a cheque are by themselves sufficient to constitute such a crossing. Where, however, the crossing is a special one, the two transverse lines do not appear, in accordance with the provisions of this section, to be absolutely essential, the name of the banker written across the cheque being of itself sufficient to constitute such a crossing. It is, however, always usual to add these lines in the case of a special crossing.

By whom a cheque may be crossed. A cheque may be crossed by the parties mentioned in sec. 77. The most important provision in this section is that contained in sub-sec. 2, whereby any holder is permitted to cross any cheque received by him uncrossed, and thereby avail himself of the services of a banker for collection⁷). The term "holder" does not necessarily mean, it has been held, a holder for value. The expression includes every person who is in lawful possession of the instrument, such as an agent for collection⁸).

¹) See the judgment of Lord Lindley in *Capital and Counties Bank v. Gordon* [1903] A.C. at p. 251, and the instruments numbered class 3 in that case, drafts of one branch of a bank upon another branch.

²) *Ogden v. Benas* (1874) L.R. 9 C.P. 513. In this case a banker collecting a cheque on his own behalf, and not on behalf of a customer, was held not to be protected. Otherwise he would now be protected, in the case of a cheque crossed before receipt, by sec. 82; see p. 280, *post*.

³) *Bellamy v. Marjoribanks* (1852) 7 Ex. at p. 402.

⁴) By 19 & 20 Vict. c. 25. Later Acts were an Act of 1858 (21 & 22 Vict. c. 79), which made the fraudulent alteration of a crossing a felony, and discriminated between a general and special crossing, and the Crossed Cheques Act, 1876 (39 & 40 Vict. c. 81), which introduced the "not negotiable" crossing.

⁵) See *ante* p. 256 as to how far dividend warrants may be negotiable instruments.

⁶) See the instrument in *Bavins v. London and South Western Bank* (1899) 81 L.T. 655. Sec. 17 of the Act of 1882 specially provides that the mere fact that the instrument is covered by its provisions, does not make the instrument negotiable.

⁷) There is of course nothing to prevent a banker collecting uncrossed cheques for a customer, but a banker collecting an "open" or uncrossed cheque is absolutely unprotected by statute; cf. *Paget, Banking*, 2nd. ed. p. 252; sec. 82 not covering the case, and a crossing by the banker himself not sufficing; see p. 280, *post*.

⁸) *Akrokerri Mines Ltd. v. Economic Bank* [1904] 2 K.B. at p. 472.

Duties of banker paying crossed cheque. Sec. 79 requires a banker on whom a crossed cheque is drawn, to pay due regard to the crossing in making the payment, otherwise he renders himself liable to the "true owner". The original "true owner" of a cheque may cease to be such, for instance if the cheque, when indorsed in blank or payable to bearer, is stolen or obtained by fraud, and gets into the hands of a holder in due course, who then becomes the "true owner" with a title superior to the original "true owner"¹). The only way in which this danger can be avoided is by marking the cheque "not negotiable" (see *post*). No such risk is incurred when a cheque payable to order is stolen when unindorsed, since no title can be made through a forgery, for though the paying banker, if he makes payment strictly in accordance with the crossing, by sec. 80, incurs no liability, and is further protected (whether the cheque is crossed or not) by sec. 60 (see *ante* p. 278), yet the "true owner" would have a remedy against the person receiving payment under the forged indorsement, unless such person is a banker collecting a crossed cheque for a customer, and is therefore protected by sec. 82 (see *post*). Further, by sec. 80 payment must be made by the banker in good faith and without negligence, in addition to the attention to be paid to the crossing. Under this section the banker must not be negligent, unlike sec. 60, which however requires him to act in the ordinary course of business, but perhaps, as already suggested, the two terms may be convertible.

"Not negotiable" cheques. The principle of the "not negotiable" cheque was introduced by sec. 12 of the Crossed Cheques Act 1876 (39 & 40 Vict. c. 81). The common idea that the term "not negotiable" is equivalent to "not transferable" is of course erroneous. The effect of so marking a cheque is set out in sec. 81 of the Act of 1882, and the result is that a cheque so marked is freely transferable, but the holder of such an instrument is in an exceptional position since, though he may be otherwise a holder in due course, he gets no new and independent title. He gets the title of his predecessor only, whatever that may be worth. Anybody, in fact, who takes a cheque so marked, must take the risk of the person from whom he acquires it having no title thereto²). It is perhaps not too much to say that every cheque sent by post should be so marked, since, if stolen in transit, it will be impossible for the cheque to get into the hands of a person capable of suing thereon, for, however bona fide such person may be, his title will be no better than that of the original thief³). It is therefore somewhat unfortunate that, as appears from the terms of sec. 76 and sec. 77 (4), only a crossed cheque may be so marked. Possibly this somewhat arbitrary regulation owes its origin to the fact, above mentioned, that the principle was first introduced by the Crossed Cheques Act, 1876, which otherwise dealt only with the question of crossing. Any holder, and not merely the original drawer, may indeed, by sec. 77 (2, 3 and 4), cross a cheque received by him, and mark it "not negotiable" but it should be borne in mind that the crossing is essential for the "not negotiable" marking to have any effect.

Protection to collecting banker of crossed cheque. The provisions of sec. 82 are of considerable importance, since it is the only section of the Act of 1882 that as yet has required amendment, as noticed later, at the hands of the Legislature. Moreover the section has been the subject of judicial notice in other respects, perhaps more frequently than any other section of the Act. Thus it has been held that the protection the section confers on bankers, is strictly confined to the case of a banker acting as collecting agent of a cheque already crossed when received by him. He cannot, by crossing the cheque, on receipt, to himself (which sec. 77 (6) in other respects entitles him to do) obtain the protection of the section, since otherwise, so it has been stated, the section would be deprived of all meaning⁴).

¹) Cf. *Smith v. Union Bank of London* (1875) 1 Q.B.D. 31. In this case, it is true, the paying banker paid in disregard of the special crossing, and he was held entitled to do so under the law as it then was. The Crossed Cheques Act 1876, containing a proviso similar to that in sec. 79 (2), was in consequence passed. Otherwise the decision in this case as to the identity of the "true owner" is unaffected.

²) See per Lord Halsbury, *Great Western Railway Co. v. London & County Banking Co.* [1901] A.C. at p. 418.

³) The posting, by a debtor to a creditor, of a cheque is not equivalent to payment, unless there be a special request to send the cheque by post: *Pennington v. Crossley & Son* [1897] 77 L.T. 43.

⁴) See per Lord Lindley, *London City and Midland Bank v. Gordon* [1903] A.C. at p. 249.

Collection must be made on behalf of a "customer". The term is not defined by the Act, and it has been somewhat vaguely defined as one involving something of use and habit¹). But it would now appear to be clearly settled that, in order to constitute a person a "customer", he must be shown to be possessed of some sort of account, either a deposit or a current account, or some similar relation, with the banker²). Thus a man, who never at any time had an account with the banker, but had been accustomed for many years to cash cheques with the banker as a matter of convenience, was held not to be a "customer" within sec. 82³). Like the paying banker of a crossed cheque by sec. 80, the collecting banker, by sec. 82, must act in good faith and without negligence. Thus it is negligence on the part of the banker not to notice that the indorsement is not in order, as where the indorsement of the payee was not in the same name as that given in the body of the instrument⁴). So where bankers collected for a customer, who was to their knowledge agent of a company, cheques made payable to the company, and indorsed by the customer *per pro*, they were held negligent in failing to make inquiries as to the customer's right to so deal with the cheques⁵).

The Bills of Exchange (Crossed Cheques) Act 1906. The passing of the Act of 1906, the only legislative amendment as yet of the Act of 1882, was the result of the decision in 1903 of the joint cases of the *Capital and Counties Bank v. Gordon*, and the *London City and Midland Bank v. Gordon*⁶). The cases arose out of the frauds of Jones, the clerk of the plaintiff (Gordon). Jones stole a large number of cheques made payable to his employer, forging the necessary indorsement when the instrument was payable to order, as was generally the case, and paid the cheques into accounts he kept at both the defendant banks. The findings of the jury negatived any suggestion of negligence on the part of the banks, and Jones was undoubtedly their "customer" within the meaning of sec. 82. In both cases each cheque as received was credited by the banker to Jones' account before payment was obtained of the bank on which the cheque was drawn, and Jones was allowed to draw forthwith on his account increased thereby. In the case of the London City and Midland Bank his account would in fact have been frequently overdrawn but for the amounts so placed to his credit. The House of Lords⁷) held that the banks, when sued by Gordon for damages for the wrongful conversion of the cheques, or, in the alternative, for the proceeds of the cheques as money had and received to his use, were not protected by sec. 82, inasmuch as they did not receive payment of the cheques on behalf of their customer Jones, but as holders for value on their own account. This decision deprived bankers who credited a customer forthwith, before its collection, with the amount of a crossed cheque paid in by him, of all protection under sec. 82, where an indorsement on the cheque was forged or the cheque was marked "not negotiable"⁸). The alternative, namely, that of not crediting as cash till after payment of the cheque has been obtained, and in consequence not allowing the customer to draw on the amount till after such time, does not appear to have been entirely practicable from the banking point of view. In consequence the Act of 1906 (6 Edw. VII c. 17) was passed, several previous Bills to the same effect having failed to become law. How far this Act applies to other instruments than "cheques" within the meaning of the Act of 1882, such as dividend warrants, and instruments coming within sec. 17 of the Revenue Act 1883, which are only to be regarded as cheques for the purposes of crossing (see *ante* p. 256) may be doubtful⁹).

as to cheques in class 1; see also in the Court below [1902] 1 K.B. at p. 272; *Bissell v. Fox* (1884) 51 L. T. 663.

¹) *Matthews v. Brown* (1894) 63 L. J. Q. B. at p. 495.

²) *Great Western Railway v. London and Country Banking Co.* [1901] A. C. at p. 420; *Lacave v. Crédit Lyonnais* [1897] 1 Q. B. at p. 154.

³) *Great Western Railway v. London & County Banking Co.* [1901] A. C. 414.

⁴) *Bavins v. London and South Western Bank* (1899) 81 L. T. 655.

⁵) *Bissell v. Fox* (1884) 51 L. T. 663; *Hannan's Lake View Central v. Armstrong* [1900] 5 Com. Cas. 188.

⁶) [1903] A. C. 240.

⁷) Upholding the Court of Appeal except as to one point, viz the instruments in class 3 of the case of the *London City and Midland Bank*, drafts of one branch of a bank upon another branch.

⁸) Of course where the instrument is payable to bearer, and is not marked "not negotiable", the banker gets a new and independent title. In the Gordon case it was admitted that, in the case of bearer cheques, classes 2 and 7, the banks were entitled to succeed.

⁹) See Paget, *Banking*, 2nd. ed. p. 279; *contra* Grant, *Banking*, 6th. ed. p. 51.

VI. General Provisions.

1. Negotiation and Transfer.

All bills, notes and cheques prima facie negotiable. All bills, notes and cheques are *prima facie* negotiable. This is nowhere directly stated in the Act of 1882, since it was unnecessary to do so, but it is implied from the terms of sec. 8. A cheque marked "not negotiable" is in an exceptional position, since, as already noted (*ante* p. 280), it is yet fully transferable. It is conceived that a bill (other than a cheque) or a note cannot be so marked, but there is nothing to prevent bills, notes and cheques alike being made absolutely not transferable at the time of issue, as where they are drawn or made payable to a named payee *only*¹⁾.

Transfer by indorsement and delivery. An instrument payable to order, as defined by sec. 8 (4), is negotiated, as provided by sec. 31 (3), by the indorsement of the holder completed by delivery. The requisites of a valid indorsement are set out in sec. 32. It is to be noted that, by sec. 32 (2), there cannot be a partial indorsement, sec. 33, however, impliedly allows the indorsement to be conditional, though the condition may be disregarded by the payer. No particular form of words is essential to an indorsement, but the distinction between an indorsement in blank and a special indorsement is clearly specified in sec. 34 (1) and (2), and by sec. 34 (4) an indorsement in blank may always be converted into a special indorsement. An indorsement, whether in blank or special, is usually written on the back of the instrument²⁾; if there is no room on the instrument it may be written on an "allonge", that is a piece of paper annexed to the instrument. If an instrument payable to order, one therefore requiring to be indorsed, is transferred for value without indorsement, the transferee is, by sec. 31 (4), entitled to demand the indorsement of his transferor, but if the latter declines to indorse, or is not available, and no application is made to the Court for relief, the transferee is not entitled to indorse his transferor's name³⁾.

Transfer by delivery only. An instrument payable to bearer, as defined by sec. 8 (3), is negotiated, as provided by sec. 31 (2), by delivery only. A person so negotiating the instrument is styled, by sec. 58 (1), a "transferor by delivery", and is not, except for the warranties contained in sec. 58 (3), liable, by sec. 58 (2), on the instrument, nor, it would seem, is he liable to refund the consideration which he received for it. The warranties contained in sec. 58 (3) do not impliedly involve a warranty of the solvency of the parties to the instrument⁴⁾, but a warranty of genuineness has always been implied on the part of the transferor⁵⁾. The person who takes by delivery an instrument made or become payable to bearer, bona fide and for value, acquires a good title against all the world. Gross negligence on the part of a holder for value in acquiring the instrument is not equivalent to actual bad faith; it can, at the most, be evidence tending to show bad faith⁶⁾.

Importance of delivery. By sec. 21 (1) delivery is always necessary to complete any contract on a bill, note, or cheque. Thus an indorsement does not consist of the mere writing of the indorser's name, but also of the delivery necessary to complete the legal effect of such writing and of the intention with which such delivery was made⁷⁾. There may be constructive delivery⁸⁾ to an agent or servant, or, where delivery is authorized by post, to the post office⁹⁾. Delivery must be made by or under the authority of the indorser, and may, by sec. 21 (2) (b), be shown to have been conditional, and not for the purpose of transferring the property in the instrument, except as against a holder in due course, in whose favour a valid delivery is presumed. Delivery will, by sec. 21 (3), be presumed where the instrument is no longer in the hands of an indorser, until the contrary is proved.

¹⁾ See *post*, *sub tit.* "Restrictive indorsements".

²⁾ It is not essential to the validity of an indorsement that it should be written on the back: *Ex parte Yates* (1857) 27 L. J. Bky. 9, but it is obvious that, to prevent confusion, it should be so written.

³⁾ Cf. *Harrop v. Fisher* (1861) 30 L. J. C. P. 283.

⁴⁾ Cf. per Campbell, C. J., *Gurney v. Womersley* (1854) 4 E. & B. at p. 143.

⁵⁾ *Jones v. Ryde* (1814) 5 Taunt. 488.

⁶⁾ See per Lord Denman, *Goodman v. Harvey* (1836) 4 A. & E. at p. 876.

⁷⁾ Cf. *Castrique v. Buttigieg* (1855) 10 Moo. P. C. 94.

⁸⁾ Cf. *Lysaght v. Bryant* (1850) 9 C. B. 46.

⁹⁾ *In re Deveze* (1873) L. R. 9 Ch. at p. 32.

Restrictive indorsements. Sec. 35 (1) allows the instrument to be restrictively indorsed, and gives examples of such restrictive indorsements, though the list does not pretend to be exhaustive¹). The Act supplies no similar form of words for the restrictive drawing of a bill or cheque, or the making of a note, though sec. 8 (1) obviously admits the use of instruments so drawn or made, provided at least that the restriction does not go so far as to make the drawing or making conditional. It would at any rate appear clear that, where, for instance, it is desired to make the instrument payable to a named payee only, the instrument must not contain the words "order" or "bearer," even though these words are no longer necessary to create negotiability²).

Indorsement by a stranger. The nearest approach to the continental system of the *aval* to be found in the English Act is that contained in sec. 56, whereby it is provided that a person signing a bill otherwise than as drawer or acceptor, thereby incurs the liability of an indorser. This somewhat vague provision is, however, obviously in no wise the full equivalent of the *aval*. It has indeed been definitely stated that an *aval* for the honour of the acceptor is unknown to English law³). The drawer manifestly cannot sue the indorser on his indorsement, for that would be inverting the order of parties; the only liability incurred therefore by a stranger indorsing is to a subsequent party. The existence of a prior agreement may, however, in some cases prevent the stranger indorsing from denying his liability to the drawer⁴).

The holder in due course. Every person to whom an instrument is negotiated within the meaning of sec. 31 (1), is, by sec. 30 (2), *prima facie* to be deemed a holder in due course. Such a holder is defined by sec. 29. The only way in which this presumption in favour of the holder can be upset, is, as provided by sec. 30 (2), for the person sued to prove, if not actually admitted by the holder, that the acceptance, issue or subsequent negotiation of the instrument was affected with fraud, duress, force and fear, or illegality⁵). Mere failure or absence of consideration will not be an available defence except as between immediate parties (see *post* p. 284). On proof or admission of any of the above cited facts, it is then incumbent on the holder, by sec. 30 (2), to himself prove that, subsequent to the alleged fraud or illegality, value has in good faith been given for the instrument. Such value need not have been given by the holder himself, nor need he himself have been unaware of any fraud or illegality, provided, as required by sec. 29 (3), he has not actually been a party to such fraud or illegality. In other words the actual holder need not necessarily himself be in the position of a holder in due course, provided he can make title through a prior party who became such a holder subsequent to the alleged fraud etc.

2. Consideration.

Always presumed. In the case of simple contracts generally (that is to say contracts not under seal) the consideration therefor will not be presumed; it must always be alleged and proved. To this rule bills, notes and cheques are an exception; the consideration will always be presumed, since by sec. 30 (1), every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value. If the person liable on a bill, note or cheque denies the consideration, the proof of want or failure of consideration lies entirely on him.

When want of, or failure of, consideration a defence. Want of consideration, or its subsequent failure, is only a defence as between immediate parties, for example

¹) Thus the following indorsements have also been held to be restrictive: "The within must be credited to D, value in account": *Archer v. Bank of England* (1781) 2 Doug. 637. "Pray pay the money to my servant for my use": *Edie v. East India Co* (1761) 2 Burr at p. 1227.

²) Cf. *National Bank v. Silke* [1891] 1 Q.B. 435, practically the only authority on the subject. It was there held that, where a cheque was drawn payable to M *or order*, and was crossed "Account of M, National Bank" it did not contain words prohibiting transfer within the meaning of sec. 8 (1).

³) Per Lord Blackburn, *Steele v. M'Kinlay* (1880) 5 App. Cas. at p. 772.

⁴) Cf. *Glenie v. Bruce Smith* [1908] 1 K.B. 263, where the indorser indorsed blank stamped bill forms in accordance with a prior agreement, the drawer adding his name as drawer subsequently, and the indorser was held liable on his indorsement to the drawer.

⁵) The provision of sec. 30 (2) does not apply, it has been held, to the case where the holder seeking to enforce the instrument, is the person to whom it was originally delivered and in whose possession it remains: *Talbot v. Von Boris* [1911] 1 K.B. 854. "Illegality" does not include actual forgery, which, by sec. 24, is an absolute bar to any action, however *bona fide* the holder.

as between the drawer and the acceptor, between the payee and the drawer, between the indorsee and the indorser, between the payee and the maker of a note. As regards remote parties, for example as between the payee and the acceptor, the indorsee and the acceptor, the indorsee and a remote indorser, two considerations come into question, viz. that which the defendant received for his liability, and that which the plaintiff gave for his title, and absence or failure of both these considerations will alone be a defence. If moreover any intermediate holder between the plaintiff and the defendant has at any time given value, the plaintiff will, by sec. 27 (2) (though he himself has given no value) be considered a holder for value as against the defendant, provided the latter became a party to the bill previous to the giving of such value.

Illegal consideration when a defence. The consideration for a bill, note, or cheque, may, by sec. 27 (1), (a), be constituted by, firstly, any consideration sufficient to support a simple contract; thus bills, notes and cheques *prima facie* present no exceptional features in this regard. Considerations are illegal either at common law or by statute, but only in the case of immediate parties, or as against a person himself a party to the illegality, is such illegality a defence. Mere notice of the illegality will not suffice if the person having notice can prove title, by sec. 29 (3), through a prior holder in due course¹). The only example at the present day of an instrument void in the hands of all parties, however innocent of the defect they may be, would seem to be an instrument coming within the purview of sec. 5 of the Betting and Loans (Infants) Act, 1892 (55 Vict. c. 4)²). Proof of the illegality of the consideration will, unlike its mere absence or failure, shift the onus of proof under sec. 30 (2) (see *ante*).

Antecedent debt a consideration. Secondly, by sec. 27 (1) (b), an antecedent debt or liability may be a good consideration for a bill, note or cheque, whether payable on demand or not. As regards an instrument payable on demand this seems at one time to have been doubted, for the alleged true consideration, viz. the suspension of remedies during the currency of the instrument, was said to be absent in such a case³), but the Act now definitely settles the doubt, though the result seems to be to constitute an exception to the general law of contracts⁴).

Accommodation bill. A signature placed on a bill without any consideration having been received for the liability incurred thereby, as, for example, where a drawee writes his acceptance on a bill under the idea that he is at the time indebted to the drawer, while in fact there is no such indebtedness, is to be distinguished from a signature so written for a definite purpose, viz. to "accommodate" a third person, whether the latter is himself a party to the bill or not, so that the accommodated person may raise money on the bill, or otherwise make use of it. An "accommodation" bill is definitely recognised by sec. 28. The distinction between the two cases is of importance, since a person signing a bill merely without consideration, if subsequently sued thereon, cannot claim repayment of the costs of defending the action; for instance, an acceptor who has accepted a bill by oversight, cannot recover such costs from the drawer⁵); whereas, in the case of an "accommodation" bill properly so-called, such costs may be recovered from the party accommodated, since he is (whether or not actually a party to the bill) the person bound to provide for payment of the amount of the bill⁶), provided that there was a good *prima facie* ground of defence⁷). The accommodated party, being the party bound to provide for payment of the bill at maturity, is not, as a general rule, entitled

¹) Cf. *May v. Chapman* (1847) 16 M. & W. 355.

²) This section renders void absolutely against all parties whatsoever any instrument negotiable or other, given by a person after attaining his majority in repayment partially or wholly, of a loan, void in law, incurred by him while an infant.

³) See *Currie v. Misa* (1875) L. R. 10 Ex. at p. 162.

⁴) Bygone acts or services cannot, unless coupled with a previous request, be made a good consideration for a promise: Addison, *Contracts*, 11th. ed. p. 7.

⁵) See *Bagnall v. Andrews* (1830) 7 Bing. at p. 522.

⁶) *Jones v. Brooke* (1812) 4 Taunt. at p. 468; *Stratton v. Mathews* (1840) 18 L. J. Ex. 5. See also sec. 59 (3).

⁷) Cf. *Beech v. Jones* (1848) 5 C. B. 696, where the action was held to have been improperly defended. There must, it seems, be at least an implied request, if not an express one, on the part of the accommodated party to the party sued, to defend; see *Garrard v. Cottrell* (1847) 10 Q. B. 679.

to insist on due presentment for payment, notice of dishonour, or protest¹). It is immaterial, by sec. 28 (2), that a party taking a bill for value knows at the time that any party thereto was an accommodation party, even though, it would seem, he takes it when overdue, for the original absence of consideration does not appear to be a "defect of title" which attaches to an overdue bill within the meaning of sec. 36 (2)²).

3. Capacity and authority of parties.

Right to draw bills. By sec. 53 (1) a bill does not in England or Ireland, though it is otherwise in Scotland, operate as an assignment of funds in the hands of the drawee, and a drawee of a bill who does not accept, is not liable on the instrument. The mere fact therefore that two persons are in the position of creditor and debtor, as regards each other, does not entitle the creditor to draw a bill on the debtor; such right can only be acquired by agreement. Where the seller of goods draws on the buyer for the price, and transmits a bill of exchange and a bill of lading to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and, if he wrongfully retains the bill of lading, the property in the goods does not pass to him³). If, upon the sale of goods, there is an agreement that the seller shall give credit, and also an agreement by the buyer to give an acceptance for the price, then, even if there is a refusal to accept, the period of credit still stands; there may, however, be an action for damages, if damages can be proved⁴). If, however, the agreed terms be cash on delivery with buyer's option of a bill, and not, conversely, a bill with the option to pay cash, the seller can sue immediately upon the refusal to accept⁵).

Infants. Married Women. Partners. By sec. 22 (1) capacity to incur liability as a party to a bill is co-extensive with capacity to contract. Thus the law relating to negotiable instruments presents no exceptional features, but certain cases relating thereto require attention. A minor or infant in the legal sense, that is to say a person under the age of 21, can never be liable on a bill, note or cheque⁶), even though the consideration for which the instrument is given be "necessaries"⁷). There is now no limitation on the capacity of a married woman to contract by bill, note or cheque, but the married woman must be possessed of separate property, otherwise any judgment obtained against her will prove ineffective⁸). No agency of the wife to bind the husband by a negotiable instrument can be implied from the married state; it must be strictly proved⁹). Partners not in *trade*¹⁰) cannot bind

¹) As regards presentment for payment, see sec. 46 (2) (c) and (d); the accommodated party has clearly no reason for expecting or believing (within the meaning of this subsection) that anybody but himself, and not the accommodation acceptor, will pay the bill at maturity. As regards notice of dishonour, see sec. 50 (2) (c) and (d), and protest, sec. 51 (9). The holder of course cannot sue the party accommodated, unless the latter is actually a party to the bill.

²) *Charles v. Marsden* (1808) 1 Taunt. 224. If there is an agreement not to negotiate the bill after maturity it will be otherwise, but such an agreement cannot be inferred from the mere fact of its being an accommodation bill; *ibid*.

³) Sale of Goods Act 1893 (56 & 57 Vict. c. 71) sec. 19 (3); *Shepherd v. Harrison* (1871) L. R. 5 H. L. 116. But the buyer, having thus obtained possession of the bill of lading, or his agent, may, even though he does not accept the bill of exchange, so transfer the bill of lading to a person receiving the same in good faith and without notice of other rights, as to transfer the property in the goods to such person under sec. 25. (2) of the Act of 1893. *Cahn v. Pocketts' Bristol Channel Co.* [1899] 1 Q. B. 643.

⁴) *Rabe v. Otto* (1903) 89 L. T. 562; *Mussen v. Price* (1803) 4 East, 147.

⁵) *Rugg v. Weir* (1864) 16 C. B. N. S. 471. *Anderson v. Carlisle Horse Clothing Co.* (1870) 21 L. T. 760.

⁶) *In re Soltykoff* [1891] 1 Q. B. 413. This of course does not prevent an infant opening a banking account and drawing cheques thereon, though he would not be personally liable on cheques so drawn, nor could he be sued by the banker for money lent were there an overdraft. Cf. Hart, Banking, 1st. ed. p. 604.

⁷) "Necessaries", by sec. 2 of the Sale of Goods Act 1893 (56 & 57 Vict. c. 71), mean goods suitable to the condition in life of the infant, and to his actual requirements at the time of sale. For the supply of such "necessaries" he is bound to pay a reasonable price, but action must be taken for goods supplied, and not on a negotiable instrument given in consideration therefor.

⁸) Cf. Married Women's Property Act 1893 (56 & 57 Vict. c. 63).

⁹) *Prestwick v. Marshall* (1831) 7 Bing. 565; *Cotes v. Davis* (1807) 1 Camp. at p. 485.

¹⁰) Non-trading partnerships include those of solicitors, quarry workers, farmers. There cannot, however, be said to be any authoritative list of what are "trades" in this sense; see Pollock, Partnership, 8th. ed. p. 31.

the other members of the partnership by the issue of negotiable instruments in the name of the partnership, unless it is shown that the drawing etc. of bills etc. is necessary or usual in the business¹).

Agents. Though by sec. 23 no person can be liable on a bill, note or cheque as drawer, indorser or acceptor, who has not signed it as such, yet, by sec. 91 (1), it is not necessary that he should sign it with his own hand, but it is sufficient if the signature is written by some person by or under his authority. Any persons (other than those mentally or physically disqualified) may be agents, such as an infant or a corporation, though they themselves may be legally incapable of incurring personal liability on a negotiable instrument. No particular form of appointment is necessary to enable an agent to draw, indorse, accept or make negotiable instruments so as to charge his principal, but general authorities to transact business are not sufficient for the purpose²). Since by sec. 25 a signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent has in fact authority, any person taking a bill purporting to be signed by procuration should act with caution and insist on the production of the authority. The acceptance of a bill drawn by procuration to the drawer's order, involves, by sec. 54 (2), an admission by the acceptor of the drawer's right to draw, but it does not equally involve an admission of the drawer's right to indorse, unless, possibly, it be shown that the indorsement was already on the bill at the time of the acceptance³), for *prima facie* the acceptor at the time of the acceptance is only bound to look at the face of the instrument⁴). The apparent authority is, however, the real authority, therefore, if the agent has in fact authority, his abuse of it will not affect the rights of a holder in due course⁵). But, even though the holder is aware of the agent's want of authority and cannot therefore recover on the instrument itself as against the principal, yet if the money obtained on the instrument has in fact been employed for the principal's benefit, though without the latter's knowledge, the amount so employed may be recoverable⁶).

Personal liability of agent. Where the agent signs his own name, and not that of his principal, on the instrument, he is *prima facie* liable thereon unless he complies with the provisions of sec. 26, which provide that an agent may escape personal liability on the instrument if he adds words to his signature indicating that he signs on behalf of a principal, or in a representative capacity, but that the mere addition to his signature of words describing him as agent etc. will not be sufficient. These perhaps *prima facie* somewhat contradictory provisions would appear to mean that mere descriptive additions to the signature, as for instance such expressions as "agent for A B" or "manager of the X Co", will not be sufficient to oust personal liability⁷). The addition must go further and make it obvious, not only that he is an agent etc., but that he is in fact signing in that capacity only in the particular instance. It has been held that, where two directors of a limited company drew a cheque on behalf of the company, adding to their respective signatures the word "director", they were yet personally liable, the fact that the cheque was stamped near the top with the name of the company not being sufficient to show that the defendants in fact signed in a representative character within the meaning of sec. 26⁸). A safe and proper mode in which an agent may indorse, so as to avoid personal liability, is by adding the words "sans recours" or "without recourse to me". A person who writes the name of another person on a negotiable instrument, impliedly undertakes that he has authority to do so, and, if he has not, however *bona fide* he may be, he is liable as for breach of warranty⁹), though he cannot be liable on the instrument itself, his own name not being signed thereon¹⁰), unless indeed the name written is a trade or assumed name, in which case he may be liable by sec. 23 (1).

¹) Cf. *Dickinson v. Valpy* (1829) 10 B. & C. 128.

²) *Hogg v. Snaitth* (1808) 1 Taunt. 347.

³) Cf. *Robinson v. Yarrow* (1817) 7 Taunt. 455.

⁴) Cf. *Smith v. Chester* (1787) 1 T. R. 654.

⁵) *Bryant Powis & Co. v. Banque du Peuple* [1893] A. C. 170.

⁶) *Reid v. Rigby & Co.* [1894] 2 Q. B. 40.

⁷) The Act has in no way, it seems, altered the former law in this respect; cf. *Bottomley v. Fisher* (1862) 1 H. & C. 211.

⁸) *Landes v. Marcus* (1909) 25 T. L. R. 478.

⁹) Cf. *Starkey v. Bank of England* [1903] A. C. 114.

¹⁰) *Polhill v. Walter* (1832) 3 B. & Ad. 114.

Corporations and companies. Without a special authority, express or implied, a corporation or company has no power to draw, make, accept etc. bills and notes. Such an authority will however be implied in the case of a company incorporated for the purposes of trade, the very object of whose institution requires that it should exercise the privilege. On the other hand, a company incorporated for carrying on public works, such as a railway company, though otherwise a trading company, cannot bind itself by bill or note¹). Companies formed under the provisions of the Companies (Consolidation) Act 1908 (8 Edw. VII. c. 69), have power to do whatever they are authorized to do by their memorandum of association, and, in order to obviate the danger of relying on an implied power, a clause authorizing the drawing, making etc. of negotiable instruments is usually inserted therein. In general a corporation can only contract by writing under its common seal, but companies registered under the Act of 1908, by sec. 76 of that Act, need only contract under seal where a private person would have to do so. In all cases where the matter is of a trivial nature, or one directly connected with the ordinary business of the corporation or company, a seal does not now seem to be required²). The employment of a seal does not make the instrument not negotiable, though formerly it was otherwise³), for sec. 91 (2) of the Act of 1882 impliedly allows the bill or note of a corporation to be issued under seal. Companies and corporations issuing negotiable instruments may not issue them in such a form, viz. payable to bearer, as to infringe the privileges of the Bank of England in accordance with the provisions of the Bank Charter Act 1844 (7 & 8 Vict. c. 32). The provisions of that Act are directed against the issue of bank notes other than by the Bank of England, and also by certain other banks who were, on May 6th 1844, issuing their own notes outside a radius of three miles from the City of London (for within that radius the Bank of England has an absolute monopoly), but the terms of the Act are wide enough to prevent an indirect infringement by a company other than a banking company, or indeed by a private person⁴).

Liability of companies on instruments issued in their name. By sec. 77 of the Companies (Consolidation) Act 1908 it is provided that a bill or note shall be deemed to have been made, accepted or indorsed on behalf of a company, if made, accepted or indorsed in the name of, or by, or on behalf of, or on account of the company by any person acting under its authority, and it has been stated that the decisions are bound to run rather near each other when the Court has to determine whether the company, or the directors who sign the instrument, are liable upon it, but that, when the authority of the managing director to make such an instrument on behalf of the company is once admitted, there is very little more required in order to establish the company's liability⁵). By sec. 63 of the Act of 1908 the name of the company must appear on all instruments purporting to be signed on its behalf, and any person signing on behalf of a company an instrument on which its name is not mentioned, is liable to a fine of £50, and is moreover personally liable on the instrument. The registered name of the company, and no other, must be used; should there be the slightest variation, the person signing will be personally liable⁶).

4. Stamps.

Stamp laws relating to bills, notes and cheques. The present Stamp Act is the Stamp Act, 1891 (54 & 55 Vict. c. 39). The only subsequent enactments of import-

¹) *Bateman v. Mid Wales Rail Co.* (1866) L. R. 1 C. P. 499.

²) Cf. Lindley, Company Law, 6th. ed. vol. I, p. 271.

³) It was held that an instrument under seal was *prima facie* a covenant, and not a promise, and that a covenant to pay money was not negotiable by the custom of merchants. *Crouch v. Crédit Foncier* (1873) L. R. 8 Q. B. at p. 382.

⁴) See *Wigan v. Fowler* (1816) 1 Stark. 459. See also *ante* p. 274, as to statutory limitations on the amount for which a note payable on demand may be issued.

⁵) Per Vaughan Williams, L. J., *Chapman v. Smethurst* [1909] 1 K. B. at p. 929. In this case the note ran "I promise" and was signed by the managing director of a company having power to contract by bill or note. The company's name was stamped with a rubber stamp over the signature, and the words "managing director" were stamped after the signature. It was held to be the note of the company, and that the managing director was not liable thereon. See also Lindley, Company Law, 6th. ed. vol. I, p. 279 *et seq.*

⁶) *Atkins v. Wardle* (1889) 58 L. J. Q. B. 377; *Nassau Steam Press v. Tyler* (1894) 70 L. T. 376, distinguished in *Dermatine Co. Ltd. v. Ashworth* (1905) 21 T. L. R. 510, where the word "limited" was accidentally omitted. See also *Stacey v. Wallis* (1912) 106 L. T. 544.

ance relating to negotiable instruments are those contained in sec. 10 of the Finance Act, 1899 and in sec. 10 of the Revenue Act 1909, referred to later. By sec. 97 (3) of the Act of 1882 the provisions of any existing Stamp Act are unaffected by that Act.

The rates of stamp duty are set out in Schedule I of the Stamp Act, 1891.

A cheque only requires a penny stamp, even if post-dated¹). Bills payable at a period not exceeding three days after date or sight were, as regards stamp duty, made equivalent in 1899 to bills payable actually on demand²), yet it was not till 1909, by sec. 10 of the Revenue Act 1909 (9 Edw. 7, c. 43), that the doubt was cleared up whether or not they could be stamped, like other bills on demand, with an adhesive stamp. The latter Act in effect now allows this to be done. Bank notes are promissory notes made by a banker payable to bearer on demand. They can now only be issued by such banks as have the right to issue them under the provisions of the Bank Charter Act 1844 (see *ante* p. 287). They may, by sec. 30 of the Act of 1891, be issued unstamped, if the banker is duly licensed to issue unstamped notes. The rates of duty on bank notes, set out in Schedule I of the Act of 1891 are considerably higher than the *ad valorem* duty on promissory notes³). An ordinary promissory note in all cases, whether payable on demand or not, as provided by this Schedule, bears an *ad valorem* stamp⁴). The stamp duty is charged on all instruments, whether inland or foreign, if in any manner negotiated in the United Kingdom, except that, by sec. 10 of the Finance Act 1899 (62 & 63 Vict. c. 9), in the case of bills, exceeding £50 in amount, drawn and expressed to be payable out of the United Kingdom, when actually paid, indorsed etc. within the United Kingdom, such bills shall bear the following reduced stamps: (A) Where the amount exceeds £50, and does not exceed £100 6d; (B) Where the amount is over £100, 6d for every £100, and for every fractional part of £100. The reservation of interest on the instrument does not, in any case, render a larger stamp necessary⁵).

Exemptions from stamp duty. *Prima facie* every bill, note, or cheque must be duly stamped on execution, or, if made out of the United Kingdom, as soon as received for the purposes of negotiation within the United Kingdom, and, if not so stamped, cannot, by sec. 14 (4) of the Act of 1891, be given in evidence in any matter, except in criminal proceedings, or be available for any purpose whatever. The exceptions to this strict rule, as set out in Schedule I of the Act of 1891, are mainly of an official character, or relate to the business of bankers. Further, by other statutes, notes of Loan, Friendly, and Building Societies are exempt.

Definitions of bills and notes for the purposes of Stamp duty. Sec. 32 of the Act of 1891 defines a bill, and sec. 33 a note, in such a way as to include many instruments as such for the purposes of the stamp duty, which would not be so regarded for the purposes of the Act of 1882. Thus the instrument may be made payable only out of a particular fund, which may or may not be available, or be payable on a contingency which may never happen, and so require stamping as a bill or note, though clearly not such for the purposes of the Act of 1882. The instrument must, however, be a definite order for the payment of a sum of money, not a mere assignment of a debt⁶). The amount too must be certain; thus an order to pay "value about £2000" is not sufficient⁷).

¹) If action be brought on a post-dated cheque after the date thereof, no question can be raised as to the stamp, since the instrument is sufficiently stamped on its face: *Gatty v. Fry* (1877) 2 Ex. D. 265.

²) They are not otherwise the equivalent of bills payable on demand. Thus they are entitled to days of grace, unless "otherwise provided" within the meaning of sec. 14 (1) of the Act of 1882.

³) The Schedule allows for a bank note of less than £5, but bank notes for less than £5 have been illegal in England, as distinguished from Scotland and Ireland, since 1829.

⁴) The definitions of bills and notes in the Stamp Act in fact overlap. Where an instrument came within both definitions, it was held liable, though payable at sight, to *ad valorem* duty as a promissory note: *Oettinger v. Cohn* [1908] 1 K. B. 582.

⁵) *Pruessing v. Ing* (1821) 4 B. & Ald. 204.

⁶) *Buck v. Robson* (1878) 3 Q. B. D. 686. This distinction is of importance since, if the instrument is held to be a bill, it cannot be stamped with the proper impressed stamp after execution (unless indeed it be already stamped with a sufficient impressed stamp, though of wrong denomination, as provided by sec. 37 (1), see *post*), whereas, if it is an assignment, it may yet be stamped, on payment of the penalty, and therefore become capable of being sued on.

⁷) *Jones v. Simpson* (1823) 2 B. & C. 318.

Impressed stamps. Except where express provision is made to the contrary (as in the case of foreign instruments) stamp duties are, by sec. 2 of the Act of 1891, to be denoted by impressed stamps only. This in effect requires the instrument to be written on paper already stamped, since, at least in the case of inland bills, which require to be stamped with an *ad valorem* stamp (that is, payable otherwise than on demand, or at not more than three days sight) and inland promissory notes, an impressed stamp cannot, by sec. 37 (2), be placed thereon after execution.

Adhesive stamps and foreign instruments. The use of adhesive stamps is as a rule not obligatory; thus a cheque on a banker may be stamped either with an adhesive or an impressed stamp¹). In the case, however, of bills or notes drawn or made out of the United Kingdom, the duty *must*, as provided by sec. 34 (2), be denoted by adhesive stamps only²). Further by sec. 36 an instrument, which purports to be so drawn or made, is to be deemed to be a foreign instrument, though in fact drawn within the United Kingdom. The Act of 1882, by sec. 4, defines an inland bill as one drawn and payable within the "British Islands", which include the Channel Islands and the Isle of Man, but the term "United Kingdom" does not include them³). Thus a bill drawn in the Channel Islands requires stamping with an adhesive stamp as a *foreign* bill under the Stamp Act as soon as transmitted to the United Kingdom for negotiation⁴), but it is an *inland* bill for the purposes of the Act of 1882, and does not therefore require to be protested on dishonour (see *ante* p. 268). A foreign bill or note must be stamped with the proper adhesive stamp, viz. the "Foreign Bill or Note" stamp, by sec. 35 (1) of the Act of 1891, by the person into whose hands the instrument comes in the United Kingdom, before (*inter alia*) he "in any manner negotiates" the instrument. Negotiation in this sense does not, however, include mere presentment for acceptance, thus the fact that a bill, drawn out of the United Kingdom, is presented for acceptance within the United Kingdom, does not compel the person so presenting it, previously to stamp it⁵), but it would be otherwise on presentment for payment. A foreign bill or note is not properly stamped with an adhesive stamp till the stamp has been cancelled by the person designated by sec. 35 (1) above referred to. The cancellation of an adhesive stamp being required in order to prevent the stamp being used over again for another instrument, it seems somewhat immaterial at what time the cancellation, as distinguished from the actual stamping⁶), is effected; it has been suggested that it may even take place in open Court before verdict⁷). Further, by sec. 35 (2) (b), any *bona fide* holder may cancel the stamp, but this does not absolve the negligent party from any liability he may have incurred for omitting to so cancel it⁸).

Appropriated stamps. Inasmuch as a bill or note bearing an *impressed* stamp of sufficient amount, but of improper denomination, can only be sued on, by sec. 37 (1) of the Act of 1891, if it is again stamped with the proper stamp on payment of a penalty of 40s. if the instrument is not then due, or of £10 if otherwise, it is of consequence to distinguish between the various appropriated stamps. There are appropriated *impressed* stamps for all bills of exchange, payable otherwise than on demand, at sight, on presentation, or within three days after date or sight, and purporting to be drawn within the United Kingdom. In the case of a bill of exchange payable on demand, which in practice almost invariably means a cheque, it may be stamped with an impressed stamp (though not with the penny "Bill or Note"

¹) By sec. 90 of the Act of 1891 the stamp duty on a protest may also be denoted by an adhesive stamp.

²) This only applies however to *ad valorem* duties; sec. 34 (1) impliedly allows foreign bills on demand, or foreign bills payable at not more than three days sight (as provided for by sec. 10 of the Revenue Act 1909) to be stamped with an impressed stamp, should it be possible to do so.

³) English Acts of Parliament do not apply either to the Channel Islands or the Isle of Man unless they are expressly named therein (as in the case of sec. 4 of the Act of 1882); see Comyn's Digest, 5th. ed. vol. 5 pp. 154 and 157.

⁴) Cf. *Griffin v. Weatherby* (1868) L. R. 3 Q. B. 753 as to the analogous case of the Isle of Man.

⁵) *Sharples v. Rickard* (1857) 2 H. & N. 57.

⁶) Even in this case, where action is taken on a foreign bill, which at the time of trial is duly stamped, it lies on the defendant to show that the adhesive stamp was not affixed at the proper time: *Bradlaugh v. De Rin* (1868) L. R. 3 C. P. 286.

⁷) Per Blackburn, J., *Viale v. Michael* (1874) 30 L. T. at p. 464.

⁸) That is to say, a fine of £10, as provided by sec. 8 (3).

appropriated stamp) or with an ordinary penny postage adhesive stamp; in the latter case, if drawn in the United Kingdom, the stamp must, by sec. 34 (1), be cancelled by the person by whom the bill is signed. Similar stamps may be used in the case of three day bills, since these latter instruments are now entirely assimilated, by sec. 10 of the Revenue Act 1909, as regards stamp purposes, to bills absolutely on demand (see *ante* p. 288). Promissory notes always, as already mentioned, whether payable on demand or not, require an *ad valorem* stamp, and, if made within the United Kingdom, can only be stamped with the appropriated impressed stamp required for inland bills above referred to. There are appropriated *adhesive* stamps for all bills payable otherwise than on demand, or within three days after date or sight, and purporting to be drawn out of the United Kingdom. In the case of foreign bills on demand, or foreign three day bills, the stamp used must be the ordinary 1d postage stamp, not the penny "Foreign Bill or Note" adhesive stamp, since the latter is appropriated to *ad valorem* duty only¹⁾ and these instruments are not liable to *ad valorem* duty. In such cases there is nothing indeed to prevent, as already noted, these instruments being stamped with an impressed stamp other than an *ad valorem* one. Promissory notes made out of the United Kingdom, require to be stamped with the same appropriated *ad valorem* adhesive stamp as foreign bills which are liable to *ad valorem* duty.

Stamping after execution. The only case in which the Act of 1891 allows an instrument to be stamped with an *impressed* stamp after execution, is where, as provided for by sec. 37 (1), it already bears an *impressed* stamp of sufficient amount but of improper denomination. Manifestly foreign bills and notes cannot be stamped as a general rule on execution, but they must be stamped in accordance with the provisions of sec. 35 (1) already set out. The stringency of the Act as to stamping after execution is, however, considerably relaxed as regards bills payable on demand, otherwise cheques, which are presented for payment unstamped. Sec. 38 (2) allows the person to whom the cheque is presented for payment, that is to say, the banker on whom it is drawn, to affix thereto and duly cancel the necessary penny stamp as if he were the drawer. It is to be noted that it is only the banker, and not an intermediate party, who can remedy the drawer's omission. Thus an intermediate party, who stamps the cheque, acquires no right to recover thereon²⁾. In any case the drawer, who issues the cheque unstamped, is, by sec. 38 (3), liable to a penalty, viz. by sec. 38 (1), a fine of £10.

Effect of want of a stamp. The Court has no discretionary power in dealing with an unstamped instrument, and an unstamped or insufficiently stamped³⁾ instrument is of no practical value to the holder since he is unable to recover thereon, though it may sometimes be looked at for a purely collateral purpose⁴⁾. There is no appeal from the judge's ruling that the stamp is sufficient, or that one is not required⁵⁾.

5. Alteration or Forgery of a Bill or Note.

The alteration must be "apparent". Sec. 64 (1) of the Act of 1882 modifies the common law rule that a material alteration in a bill or note entirely avoids the instrument except as against a party making or assenting to the alteration. The above section now provides that the alteration must be "apparent" in order to defeat the claim of a holder in due course, who is otherwise entitled to avail himself of the instrument as unaltered⁶⁾. If in fact the alteration is "apparent", the holder cannot be a holder in due course, for he manifestly has not taken an instrument "complete and regular on the face of it" within the meaning of sec. 29 (1). Whether the alteration be "apparent" or not, within the meaning of the section, cannot, it has been stated, be considered to be confined to the case where the holder only has not the means of detecting the alteration. If the party sought to be bound can at once discern some incongruity on the face of the instrument and point out to the holder

¹⁾ See Alpe, Stamp Law, 12th. ed. p. 80.

²⁾ *Hobbs v. Cathie* (1890) 6 T. L. R. 292. See also sec. 38 (1).

³⁾ An insufficiently stamped instrument is not duly stamped: *Jardine v. Payne* (1831) 1 B. & Ad. 663.

⁴⁾ See *Gregory v. Fraser* (1813) 3 Camp. 454.

⁵⁾ *Blewitt v. Tritton* [1892] 2 Q. B. 327.

⁶⁾ Per Lopes, L. J., *Scholfield v. Londesborough* [1895] 1 Q. B. at p. 552.

that it has been materially and fraudulently altered, the alteration is to be regarded as an "apparent" one, even if the alteration is not obvious to all mankind¹).

The alteration must also be "material". Sec. 64 (2) specifies the alterations that are to be considered "material". These provisions do not, however, on their face pretend to be conclusive of the matter. There may be "material" alterations other than those there set out. Thus the addition of the name of a new maker to a joint and several note, without the consent of an original maker, will discharge the note as regards the latter²). So an alteration of a foreign bill, by adding, either on the face of the bill, or to the indorsements, the rate of exchange according to which the bill is to be paid, is fatal³).

Alteration avoiding the instrument under the stamp laws. Even if the assent of all parties has been obtained for a material alteration, to that extent therefore legalising it under sec. 64 (1), the instrument may yet be avoided under the stamp laws, for it has become a new and different instrument, and, as such, requires a new stamp. But, save in the case provided for by sec. 37 (1) of the Stamp Act 1891 (see *ante* p. 290), no bill or note can be stamped with an *impressed* stamp after execution. If therefore the alteration is made after "issue", that is to say, as defined by sec. 2, after the first delivery of the instrument complete in form to a person who takes it as holder, there is no power to restamp it with an *impressed* stamp. The same difficulty does not arise in connection with instruments which may be stamped with *adhesive* stamps, such as bills or notes drawn abroad. If such instruments are altered subsequent to issue, so as to render them liable to a new stamp, such a stamp, if an adhesive one, may, it seems, be affixed. An alteration after issue of the sum⁴), of the date⁵), or the alteration (without any intention of correcting an omission) of the words "value received" into a more explicit statement of the consideration which passed⁶), are respectively material alterations which require the instrument to be restamped, and, if that cannot be done, the instrument is void, though the proviso to sec. 64 (1) might enable a holder in due course to recover on it in its unaltered state⁷).

Alteration to correct mistake. An alteration merely to correct a mistake, or to make the instrument what it was originally intended to be, will not avoid it under the Stamp Act. Thus where a bill had been dated by mistake 1822, instead of 1823, and the mutual agent of both the drawer and of the acceptor, to whom the bill had been given to deliver to the indorsee, corrected the mistake, but without consulting either of his principals, it was held that such alteration did not render the bill void⁸). So where a man, who had agreed to sign a note as co-maker, did so sign, but only after payment to one of the other co-makers of the consideration for which the note was given, that is to say, after the issue of the note, he was held liable on his signature as a co-maker⁹).

Forgery. Forgery is the fraudulent making or alteration of a writing to the prejudice of another man's right¹⁰). Forgery of a bill or note, or the indorsement thereon, is, by sec. 22 of the Forgery Act 1861 (24 & 25 Vict. c. 98), a felony.

Civil consequences of forgery. Sec. 24 of the Act of 1882 provides that a forged or unauthorized signature is wholly inoperative, and that no right can be acquired through or under such signature, except as against a party precluded from setting up the forgery or want of authority. Thus, where the title to a bill or note is necessarily made through a forgery, even a *bona fide* holder for value has in general no

¹) *Leeds Bank v. Walker* (1883) 11 Q. B.D. at p. 90.

²) *Gardner v. Walsh* (1855) 5 E. & B. 83.

³) *Hirschfeld v. Smith* (1866) L. R. 1 C. P. 340. By sec. 9 (1) {d} a bill may be drawn payable according to an indicated rate of exchange.

⁴) Cf. *Hamelin v. Bruck* (1846) 15 L. J. Q. B. 343.

⁵) *Bathe v. Taylor* (1812) 15 East, 412.

⁶) *Knill v. Williams* (1809) 10 East, 431.

⁷) How far the Courts would now permit stamp objections of this kind to prevail is uncertain, at any rate as regards the holder in due course: cf. Chalmers, Bills, 7th. ed. p. 238. The exact effect of the proviso to sec. 64 (1) in regard to the question of the stamp is not covered by authority.

⁸) *Brutt v. Picard* (1824) Ry. & M. 37.

⁹) *Dodge v. Pringle* (1860) 29 L. J. Ex. 115, but if the addition be made without a previous agreement, it will be a material alteration avoiding the note against the co-maker; see *Gardner v. Walsh* (1855) 5 E. & B. 83, and *ante*, note 2.

¹⁰) Blackstone, Commentaries, vol. 4, p. 248.

right to sue upon it¹), or ever retain it²), and if the acceptor or maker pays one who derives his title through a forgery, that will not, as a general rule, discharge the person so paying.

Special protection in certain cases. Sec. 24, though stringent in its application generally, is specially stated to be subject to other provisions of the Act. Thus it is subject to sec. 60, which protects the paying banker of a bill payable to order on demand, which bears forged or unauthorized indorsements³), and to secs. 80 and 82, which protect the banker paying, and the banker receiving payment, respectively, of a crossed cheque⁴). So too sec. 24 is subject to the provisions of sec. 54 (2) (a), whereby an acceptor cannot dispute, as against a holder in due course, the genuineness of the drawer's signature *as drawer*⁵), and to the provisions of sec. 55 (2) (b), whereby an indorser equally cannot dispute the genuineness of the drawer's signature, and that of all previous indorsements. Further sec. 24 is subject to sec. 7 (3). To sign the name of a fictitious or non-existing person may be forgery⁶), and therefore *prima facie* no person can make title through such a signature, but the Act allows an instrument bearing the name of a fictitious or non-existing payee to be treated as payable to bearer⁷), moreover, by sec. 55 (1) (b), the drawer is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse⁸).

6. Conflict of Laws.

General provisions. The subject is dealt with in sec. 72 of the Act of 1882. The section deals at considerable length with the question of *form*. Questions relating to contractual capacity, lawful consideration etc., are not dealt with by the Act. The question of the personal competency of the individual appears to be still unsettled, though the preponderance of opinion would seem to be in favour of the law of the place of domicile applying⁹). Generally, as regards the question of the conflict of laws, bills, notes and cheques present no exceptional features.

The *lex loci contractus* governs the question of form. The law of the place of issue, or that of the place where the contract is entered into, is, in accordance with sec. 72 (1), the predominant law to be applied in all questions relating to the form of the instrument, though the proviso contained in sec. 72 (1) (b) prevents the principle being enforced to the detriment of persons who take a foreign instrument within the United Kingdom, which conforms, as regards its form, with the English law. Otherwise the negotiation of bills drawn abroad would be a practical impossibility in England, for it would involve, on the part of the holder, a knowledge of the law of the country of origin, and indeed of any country where the bill might have been previously negotiated. Since delivery is always necessary to complete any contract on a bill or note, the place of issue, or place of making the contract, is where the delivery took place, which is not necessarily identical with the place where the signature was actually written¹⁰).

Law governing legal effect of drawing, acceptance etc. The "interpretation" of the drawing, acceptance, indorsing etc. is also, by sec. 72 (2), determined by the law of the place where such contract was made. The term "interpretation" is clearly more extensive than that of the "form" dealt with by sec. 72 (1). It has been considered to mean the legal effect of the contract¹¹). The subsection protects the person

¹) *Mead v. Young* (1790) 4 T.R. 28.

²) *Esdaile v. La Nauze* (1835) 1 Y. & C. 394; *Johnson v. Windle* (1836) 3 Bing. N.C. 225.

³) See *ante* p. 278.

⁴) See *ante* p. 280.

⁵) Sec. 54 (2) (b) allows the acceptor to dispute the genuineness of the drawer's signature where the signature is an indorsement by the drawer of a bill drawn to his own order. But query where such signature is already on the bill at the time of the acceptance? see *ante* p. 286.

⁶) *R. v. Francis* (1811) R. & R. 209.

⁷) See *ante* p. 265.

⁸) As already pointed out the provisions of sec. 7 (3) cannot be invoked to enable the fraud of a third person to make an instrument originally drawn payable to an existing payee, payable to bearer.

⁹) Per Lord Macnaghten, *Cooper v. Cooper* (1888) 13 App. Cas. p. 108.

¹⁰) *Chapman v. Cottrell* (1865) 34 L. J. Ex. 186, where the promissory notes were signed in Florence, but delivery to the payees took place subsequently in London, and the contract was held to be made in London.

¹¹) Per Romer, J., *Alcock v. Smith* [1892] 1 Ch. at p. 256.

paying an *inland* bill (see *ante* p. 268), which has been indorsed in a foreign country, since the payer is only bound to see that the English law, in respect to the indorsement, has been complied with; he may ignore the foreign law. As regards a foreign instrument, there is no such protection¹), and payment will only be a valid discharge if the person paid is shown to be the lawful holder in accordance with the foreign law. An inland bill, if indorsed abroad when overdue, may give (if the foreign law allows it), the indorsee the right to possession of the bill, though by English law the indorsee of an overdue bill is, by sec. 36 (2), subject to every flaw in his indorser's title, for the "interpretation" of the indorsement is to be determined by the law of the place where the indorsement took place²). So too the transfer of a cheque in a foreign country is to be governed (like the transfer of movable chattels) by the law of that country, and, if the law of such country allows title to be made through a forged indorsement, the holders under that title will not be liable for conversion of the amount of the cheque by obtaining payment thereof³). An acceptance void or voidable by the law of the country where it is given, is not binding by English law⁴).

Law governing presentment for acceptance or payment, notice of dishonour, etc. Sec. 72 (3) allows the question of presentment, notice of dishonour etc., to be governed either by the law of the place where the act is done, or of the place where the bill is dishonoured. Thus, where a bill was payable in a foreign country, notice of dishonour by an English indorsee to an English indorser was held to be good if it complied with the foreign law, that is to say, of the place of dishonour, though too late according to English law⁵). Clearly, in such cases, notice according to English law, being the law of the place where the act is done, would also be valid.

Foreign stamp laws and foreign laws of limitation of actions. Bills, notes and cheques made abroad do not require, in order to be valid in England, to be stamped in accordance with the law of the country where they were drawn or made. But it was at one time considered, if the instrument was rendered by the foreign law, owing to the want of a stamp, not merely inadmissible in evidence but absolutely void, with the result that there was no binding contract at all in the country in which the transaction took place, that, in such case, the instrument could not be enforced in England⁶). Now, however, at any rate in the case of instruments "issued" out of the United Kingdom, no such distinction can, owing to the explicit terms of sec. 72 (1) (a), be drawn. Equally so a foreign law of limitation of actions may either merely bar the remedy after the lapse of the prescribed time, or absolutely extinguish the debt. In the latter case only, it has been held, will an English court regard the debt as extinguished, provided that both the parties to the action have resided in the foreign country during the whole of the prescribed period⁷). But the necessity for such continuous residence has not been generally admitted⁸).

7. Lost Instruments.

Title of the finder. The finder of a lost instrument acquires no title thereto, since the case of a bill, note or cheque is in nowise distinguishable from that of other

¹) Cf. *Lebel v. Tucker* (1867) L. R. 3 Q. B. at p. 84; *Trimbey v. Vignier* (1834) 1 Bing. N. C. 151.

²) *Alcock v. Smith* [1892] 1 Ch. 238. The action was not against the party liable to pay the bill, so that the proviso to sec. 72 (2) could not apply. The bill was transferred under a judicial sale in the foreign country (Norway), the transaction being legal in that country. There was therefore no "unlawful means" of negotiation within the meaning of sec. 29 (2), so that it was in fact considered that the indorsement was good alike by the English and the foreign law; see per Lindley, L. J. at p. 263.

³) *Embiricos v. Anglo-Austrian Bank* [1905] 1 K. B. 677. This case expressly does not decide that the English acceptor of a bill or drawer of a cheque is therefore bound to pay on a forged indorsement effected abroad, since in this case payment had already been obtained. Vaughan Williams, L. J. was however, disposed to think that the contract of the payer is to pay on an indorsement recognised by English law, though invalid according to what he calls the "local law" of England; see at p. 684.

⁴) *Burrows v. Jemimo* (1726) 2 Stra. 733.

⁵) *Rothschild v. Currie* (1841) 1 Q. B. 43; *Hirschfeld v. Smith* (1866) L. R. 1 C. P. 340.

⁶) *Bristow v. Secqueville* (1850) 19 L. J. Ex. 289.

⁷) Per Tindal, C. J., *Huber v. Steiner* (1835) 2 Bing. N. C. at p. 211; *Harris v. Quine* (1869) L. R. 4 Q. B. 653.

⁸) See Smith's *Leading Cases*, 11th. ed. vol. I, p. 635.

movable property, the finder whereof acquires no title unless he can show an express intention to abandon it on the part of the former owner¹). Yet, though the finder acquire no title, he may, under certain circumstances, be able to transfer so as to confer a good title on a third party. Since no title whatever can be made through a forgery (*ante* p. 291), if the instrument is lost when in a condition requiring indorsement, for instance a bill drawn to the drawer's order but undorsed by him, the finder is powerless to transfer the instrument so as to confer title, for the drawer's necessary indorsement must under the circumstances be a forgery, if an attempt is made to transfer. If, on the other hand, the instrument when lost is payable to bearer, either originally made so, or become so by indorsement in blank, though the actual finder acquires no title thereto, yet he may transfer it by mere delivery so as to confer a good title on a third party. A person acquiring a lost instrument payable to bearer, not being himself the actual finder, would probably, on the loss being proved, have to show, within the meaning of sec. 30 (2), that value has in good faith been given for the instrument, for it would seem (though there is no reported authority to that effect) that the word "illegality" in sec. 30 (2) would cover the case of the loss of an instrument, and its subsequent negotiation by the finder. Clearly the word must cover the case of a *stolen* instrument, and the above observations apply equally to the case of the theft of an instrument payable to bearer. The fact that the thief or finder acquires no title does not affect the right of a holder in due course, who must, in order to come within such definition, be himself ignorant of the theft or loss, as the case may be, and the title thereby acquired may be transferred to a subsequent party, though the latter gave no value and was aware of the facts, provided that he was not actually a party to the theft or finding. Where a crossed cheque is marked "not negotiable", in accordance with sec. 81, the transferee only gets his transferor's title (see *ante* p. 280), that is to say, if the instrument is lost or stolen, he only gets the worthless title of the thief or finder. Hence, in this case, the danger of loss is avoided.

Notice should be given of loss. It is clearly advisable that notice of the loss should be given at once by the loser to the parties liable on the instrument, for they will thereby be prevented from paying the instrument without due inquiry. Further it is advisable that the loss should be publicly advertised. Still neither notice nor advertisement of the loss will be sufficient to impugn a payment made in despite thereof, even though the party dealing with the instrument be proved to have received the notice, if in fact he has made the payment in honest forgetfulness of the notice²). Moreover, by sec. 90, a thing is to be deemed to be done in good faith where it is in fact done honestly, whether negligently or not.

Loser's right to demand duplicate. If the instrument is lost when not overdue, sec. 69 entitles the holder to demand of the drawer another bill of the same tenor on his giving security, if required, against possible claims on the instrument alleged to be lost. This section only deals with the case of an instrument lost before its maturity, since a bill lost when overdue would be, by sec. 36 (2), subject to any defects of title affecting it at its maturity, and a person taking it after it is overdue, would have no better title than the original finder. The only signature obtainable in these circumstances is that of the drawer. The Act affords no means of obtaining a duplicate bearing the signatures of the acceptor, or of prior indorsers.

Action on lost instrument. Sec. 70 in effect allows action to be taken upon a lost instrument provided an indemnity is given, to the satisfaction of the Court, against any possible claims. For the provisions of this section to apply the instrument must comply strictly with the definition of a bill, note or cheque in the Act. In the case of other instruments, as for instance bills of exchange which are only such for stamp purposes, the practically identical provisions of sec. 87 of the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125) must be invoked.

Destroyed instruments. Secs. 69 and 70 make no mention of destroyed instruments. There is no reason, however, for supposing any difference to exist between destroyed and lost instruments³). The destruction must of course be accidental,

¹) Cf. Blackstone's Commentaries, vol. 2, p. 9.

²) See *Raphael v. Bank of England* (1855) 17 C. B. 161.

³) In *Thackray v. Blackett* (1811) 3 Camp. 164, the provisions of 9 & 10 Will III. sec. 3 (of which sec. 69 of the Act of 1882 is practically a re-enactment) were invoked in order to obtain from the drawer duplicates of accidentally destroyed bills.

otherwise it will amount to cancellation by sec. 63 (1). Notice of dishonour must be given on a lost or destroyed instrument¹).

8. Limitation of Actions.

General provisions. Actions on bills, notes and cheques are in no way distinguishable from actions on other simple contracts, and the Act of 1882 accordingly contains no reference to the question of the limitation of actions. Such actions therefore fall within the general provisions of sec. 3 of the Statute of Limitations of 1623 (21 Jac. I. c. 16), and must be brought within *six years* of the first accruing of the right of action. Actions on promissory notes were not indeed brought within the general Statute of Limitations till 1704, by sec. 2 of the Statute of Anne (3 & 4 Anne, c. 9)²). This statute has now been repealed by the Act of 1882, but there can be no doubt that there is no distinction between bills and notes in this respect, there being no reference to any such distinction in sec. 89 of the Act of 1882. The same period of prescription applies to all parties to the instrument, whether acceptor, maker, drawer, or indorser.

From what time limitation runs as regards parties primarily liable. The time from which the period of limitation runs, as provided by sec. 3 of the Statute of 1623, is to be determined by the time when a right of action first accrued, that is to say when some person, not necessarily the person seeking to enforce the right of action, acquired such a right against the party sued. On a bill or note payable a certain time *after date*, the time runs, in favour of the acceptor or maker, not from the time the bill or note was drawn or made, but from the time it falls due³). On a bill or note payable a certain time *after sight*, since there is no right of action till presentment and the lapse of time specified, the time does not begin to run, in favour of the acceptor or maker, till after presentment and the expiration of the time specified⁴). On a bill or note payable *on demand*, or *at sight*, or *on presentation*, or in which no time for payment is expressed⁵), unless the instrument is accompanied by some writing restraining or postponing the right of action, the time runs, in favour of the acceptor or maker, from the date of the instrument, or date of delivery, if delivery be delayed, and not from the time of demand⁶). The drawer of a cheque being the party primarily liable, there is an immediate right of action against him, and time would run from the date of the cheque, or of its first issue, and not of its presentment⁷). In the case of an accommodation bill (see *ante* p. 284.), where action is brought by the party granting the accommodation against the party accommodated to enforce the contract of indemnity involved in such a transaction, the time runs, in favour of the party accommodated, from the time when payment was made on his behalf by the plaintiff, and not from the maturity of the bill⁸).

As against parties secondarily liable. In order to enforce the right of recourse against the drawer of a bill, or the indorsers of a bill, note, or cheque, the instrument must always, unless presentment is excused, be presented for payment⁹), and notice of dishonour, unless excused, be given¹⁰); also, if the instrument is a foreign one, it must be protested¹¹). Generally, therefore, the time will run, in favour of the drawer and indorsers, from the time when notice of dishonour is duly given and received¹²). Since there is an immediate right of action against the drawer and indorsers on non-acceptance of a bill, the time will run in their favour from notice of such

¹) *Thackray v. Blackett*, *supra*.

²) See *ante* p. 282.

³) *Wittersheim v. Carlisle* (1791) 1 H. Bl. 631.

⁴) Cf. *Holmes v. Kerrison* (1810) 2 Taunt. 323.

⁵) Sec. 10 (1) of the Act of 1882 includes all these cases in the general definition of a bill payable on demand.

⁶) *Norton v. Ellam* (1837) 2 M. & W. 461; *Francis v. Bruce* (1890) 44 Ch. D. 627.

⁷) *In re Bethell* (1887) 34 Ch. D. at pp. 556, 557.

⁸) *Reynolds v. Doyle* (1840) 1 M. & G. 753; *Webster v. Kirk* (1852) 17 Q. B. 944.

⁹) See *ante* p. 262.

¹⁰) See *ante* p. 269.

¹¹) See *ante* p. 267; but not a foreign note.

¹²) Cf. *In re Boyse* (1886) 33 Ch. D. at p. 623; in this passage the necessity for notice of dishonour, in addition to presentment, is apparently overlooked. Protest, as already noticed (*ante* p. 269) does not excuse want of notice of dishonour, so that the time cannot run from the date of protest.

non-acceptance; no fresh right of action is acquired by subsequent non-payment, and the time will not be considered as running from that date¹).

Acknowledgments preventing period of limitation running out. In this regard the case of bills, notes or cheques presents *prima facie* no exceptional features. As in other cases of simple contracts, any acknowledgment admitting liability must be in writing, signed by the party chargeable, or his duly authorized agent²). Payment of interest is generally a sufficient acknowledgment to prevent the time running out³). But no indorsement or memorandum of any payment, written upon a bill or note by or on behalf of the person to whom the payment is made, can be regarded as a sufficient acknowledgment to prevent the time running out⁴). All payments, therefore, indorsed on a bill or note, whether part payment of principal, or payment of interest, should be signed by both parties, the party paying as well as the party to whom payment is made. Any acknowledgment, or any part payment by one of several joint contractors, as for instance joint acceptors of a bill, does not prevent the time running out as regards the other joint contractors⁵).

¹) *Whitehead v. Walker* (1842) 9 M. & W. 506.

²) As provided by 9 Geo. IV. c. 14 (commonly known as Lord Tenterden's Act), as amended by sec. 13 of the Mercantile Law Amendment Act 1856 (19 & 20 Vict. c. 97).

³) *Bealy v. Greenslade* (1831) 2 C. & J. 61.

⁴) Sec. 3, Lord Tenterden's Act; see above.

⁵) Sec. 1, Lord Tenterden's Act; sec. 14, Mercantile Law Amendment Act, 1856.

Title VI. Banks and Banking.

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I. Introduction.

The development of banking in England began somewhat later than the similar movement in the great trading centres of the Continent, where the earliest banks seem to have been established in the fourteenth century, commencing with certain Venetian banks, which developed out of the business of money-changing. The goldsmiths of Lombardy, who gave their name to Lombard Street in the City of London, were established here at least as early as the reign of Queen Elizabeth, and by the reign of James I they had begun the business not only of lending money at interest, but, what is the natural complement thereof, of accepting the deposit of money at interest, and they also kept running or current accounts with their customers. Of these bankers some have long ceased to carry on business, others have been absorbed into or now form part of larger institutions, constituted on the joint-stock principle, and only one survives as an existing firm, namely, Messrs Child & Co. of No. 1, Fleet Street, Temple Bar.

But the history of the great Bank of England is in substance the history of banking in this country. This bank was founded by Act of Parliament in the year 1694, for the purpose of raising the sum of £1,200,000 and lending it to the Government at first at 8 per cent. per annum. It was formed on the joint-stock system and, in order to foster its success serious restrictions were imposed on the business developments of other banks, and none other was allowed to be formed on the joint-stock principle with limited liability, — a restriction which lasted until the year 1862.

Bank notes, which were originally receipts for money deposited with the goldsmiths, and subsequently issued by the true banks, passed from hand to hand and carried the title to an equivalent amount of the money on deposit; and they were in constant use until the institution of the modern cheque in 1780. From the year 1708 no banking firm of more than six partners was allowed to issue notes, and this prohibition impeded the founding of new banks until, after a modification in 1826, it was abolished in 1833. By the Bank of England Act of that year, no bank notes can be issued in London or within 65 miles thereof except by the Bank of England. By the Companies Act of 1862 private banks were allowed to have as many as ten partners. With the invention of cheques, the issue of notes became of less importance, and indeed some banks which had the power ceased to issue them, partly to avoid the liability to pay on demand large accumulations of notes in nervous or hostile hands, an Act of 1704 having declared that promissory notes were transferable by delivery, like bills of exchange to bearer.

After certain Acts dealing with the right of banks to issue notes, which need not be mentioned here, the Bank Charter Act of 1844, 7 & 8 Vict. c. 32, forbade all banks other than those lawfully issuing such instruments on 6 May, 1844, to draw, accept, make or issue any bill of exchange or promissory note payable on demand to bearer. A banker who has once ceased to issue his own notes cannot resume issuing. From the year 1828 the issue in England and Wales of notes of a less amount than £5 has been forbidden.

Under the above Act of 1844 the Bank of England may issue notes covered by public securities up to the amount of £14,000,000, and above that sum may issue to any amount to the banking department of the same bank in exchange for gold coin or gold or silver bullion. The Act also divided the bank into two departments, one to continue the ordinary banking business and the other to issue notes only.

Although it had long been thought that the Act of 1708 made large joint-stock banks illegal, in the year 1833 the law officers of the Crown gave an opinion that such banks were lawful by the Common Law, and by the Bank of England Act of that year the purport of that opinion was affirmed. From that time dates the rise of the great modern joint-stock banks, those formed before the Companies Act of 1862

being at the time of unlimited liability, though all the leading banks have since taken advantage of the powers of the Companies Act of 1879, and the liability of their shareholders is now limited to the amount unpaid on their shares.

Bankers and banks which are authorised to issue notes are bound to take out an annual revenue licence of £30, and certain stamp duties are payable on the notes issued¹⁾; but these may be compounded for²⁾.

The provincial banks which previous to the year 1844 had the power to issue notes have now to a very considerable extent become merged in, and act as branches of, some large joint-stock bank centred in London. This movement has been very rapid in late years, partly owing to the general tendency of business to accumulate in fewer but more powerful establishments — the cause for which need not here be investigated — partly through the great London banks finding it more profitable to own branches than to act as agents to country banks, and partly to avoid competition between an extending London bank and the existing local institutions. The note issue of the local banks had already been much reduced in quantity, and in some cases discontinued, but on amalgamation with the London companies the note issue automatically ceased.

Except in the case of the Bank of England no security was required to be kept in English banks to guarantee the payment of the note issue; but the Act of 1879 enacted that on an unlimited company becoming limited, its note issue should be a first charge with unlimited liability on all assets: and that the liability of the members for meeting the notes, should be unlimited³⁾.

As an inducement to other banks to discontinue their issues of bank-notes, the Bank of England has power, while such banks are continuing business, to enter into agreements of composition with them⁴⁾.

A limited banking company must put up in a conspicuous place, both in its registered office, and in each of its branches, a statement of its capital, assets and liabilities⁵⁾.

Formation of banks. It is now usual for banks to be formed under the Companies (Consolidation) Act 1908, and by s. 1 thereof, "No company, association or partnership consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament, or of letters patent." It is now unusual for banks to be formed by letters patent.

Returns. Every banker in England and Wales must on the first day of January in each year, or within fifteen days thereafter, make a return to the Commissioners of Stamps and Taxes, Inland Revenue Office, of his name, residence and occupation, or, in the case of a company or partnership, of the name, residence and occupation of every person composing or being a member of such company or partnership, and also the name of the firm under which such banker, company or partnership carries on the business of banking, and of every place where such business is carried on. The penalty for infringement is £50⁶⁾.

Every limited banking company must before it commences business, and also on the first Monday in February and the first Tuesday in August in every year during which it carries on business, make a statement in the form marked C. in the First Schedule to the Companies (Consolidation) Act, 1908, or as near thereto as circumstances will admit. A copy of the statement must be put up in a conspicuous place in the registered office of the company, and in every branch office or place

¹⁾ Stamp Act, 1891 (54 & 55 Vict. c. 39).

²⁾ 9 Geo. IV. c. 23, s. 7; 17 & 18 Vict. c. 83, s. 12.

³⁾ This section was repealed by the Companies (Consolidation) Act 1908 (7 Ed. 7, c. 69, section 251), which now governs the point as follows: 1. A bank of issue registered under this Act as a limited company shall not be entitled to limited liability in respect of its notes; and the members thereof shall be liable in respect of its notes in the same manner as if it had been registered as unlimited; but if in the event of the company being wound up the general assets are insufficient to satisfy the claims of both the note-holders and the general creditors, then the members after satisfying the remaining demands of the note-holders, shall be liable to contribute towards payment of the debts of the general creditors a sum equal to the amount received by the note-holders out of the general assets.

⁴⁾ 7 & 8 Vict. c. 32, s. 25; 19 & 20 Vict. c. 20.

⁵⁾ Companies Consolidation Act, 1908 (8 Ed. 7, c. 69) s. 102 (2).

⁶⁾ 7 & 8 Vict. 32, s. 21.

where the business of the company is carried on; and every member and every creditor of the company is entitled to a copy of the statement, on payment of a sum not exceeding sixpence. If default is made in compliance with these provisions, the company is liable to a fine not exceeding five pounds for every day during which the default continues; and every director and manager of the company who knowingly and wilfully authorises or permits the default is liable to the like penalty¹).

Audit. In the case of a banking company registered after the 15th of August 1879, if the company has branch banks beyond the limits of Europe, it is sufficient if the auditor is allowed access to such copies of and extracts from the books and accounts of any such branch as have been transmitted to the head office of the company in the United Kingdom; and the balance sheet must be signed by the secretary or manager (if any), and where there are more than three directors of the company by at least three of those directors, and where there are not more than three directors, by all the directors²).

Unclaimed dividends. Provision is made by the National Debt Act, 1870, for the transfer to the National Debt Commissioners of dividends unclaimed for ten years on the several capital or joint stocks of perpetual annuities described in the first schedule to the Act, and for re-transfer to the account of any person showing a title thereto³).

The Bankers' Clearing House. This institution, which appears to have existed in a rudimentary form as early as the year 1773, was designed and is used to avoid the necessity of presenting each individual cheque at the bank on which it is drawn, by setting off the claims by a bank against the claims upon it, and settling the account by paying the difference only. Thus, to take a very simple case, Bank A presents a cheque for £100 drawn upon Bank B: but Bank B presents a cheque for £50 drawn upon Bank A, with the result that Bank B has to pay Bank A the balance of £50. Bank B pays this balance, not directly to Bank A, but by paying that sum into the Clearing House Account at the Bank of England, to the credit of Bank A. In practice the balances shown by all the Clearing House operations at the close of each day, are paid by the debtor banks.

For convenience in clearing, all printed cheques are now marked in the lower left hand corner with T for Town or City Clearing, or M for Metropolitan Clearing, or C for Country Clearing.

Cheques presented direct to a Bank after the closing of the Clearing House are marked, that is, accepted for payment on the next day in priority to other cheques.

The Bank of England is not a member of the Clearing House but it utilises that institution for the presentment and payment of cheques due. In the year 1858 the Country Clearing Department was added, in which the practice is for cheques on country bankers to be presented through a London bank to the London agent of the country banker. The latter transmits them by the next post to the country banker, who advises his agent by return of post whether to pay or not; and in the first case the agent pays the amount to the Clearing House account.

There are printed Rules and Regulations to be observed by the members of the Clearing House, and a few cases have been decided as to their due observance, but they do not seem material to this work.

Savings Banks. In 1863 an Act⁴) was passed repealing all previous Acts on the subject, and defining a Savings Bank as "any institution in the nature of a bank to receive deposits of money for the benefit of the persons depositing the same, to accumulate the produce of so much thereof as shall not be required by the depositors, their executors or administrators, at compound interest, and to return the whole or any part of such deposit and the produce thereof to the depositors, their executors or administrators" (after deducting management expenses) "but deriving no benefit whatsoever from any such deposit or the produce thereof."

No future savings bank was to be formed without the previous sanction and approval of the Commissioners for the Reduction of the National Debt⁵) and their Rules and Regulations must be certified by the Registrar appointed under the

¹) Companies (Consolidation) Act, 1908, s. 108.

²) Companies (Consolidation) Act, 1908, s. 113.

³) 33 & 34 Vict. c. 71, Part 7.

⁴) 26 & 27 Vict. c. 87.

⁵) 26 & 27 Vict. c. 87, s. 2.

Friendly Societies Acts under the Title "Savings Bank certified under the Act of 1863¹⁾. No designation or description of a Savings Bank may import the suggestion that the Government is responsible to the depositors²⁾).

Any dispute between persons claiming a deposit or between them and the officials of the bank must be referred to the final award of the Registrar under the Friendly Societies Act, 1896³⁾.

All sums for investment by the Trustees must be paid into the Bank of England and invested in the names of the Commissioners for the Reduction of the National Debt or the trustees may (since 1904) make special investments if authorised as required by the Act of that year⁴⁾.

If any officer has in his hands or possession by virtue of his office or appointment, any money or effects belonging to the bank, or any deeds or securities relating to the same, such money is repayable in priority to any of his other debts and all his assets are charged with the payment and discharge thereof⁵⁾.

A certified bank may be wound up under the Companies (Consolidation Act), 1908⁶⁾.

The Post Office Savings Bank is a bank with the security of the Government for the repayment of the deposits, and is subject to much the same legislation as the above trustee banks.

There are also special banks for the savings of the naval and military servants of the Crown.

Foreign and Colonial Banks. A foreign or colonial bank duly constituted as a corporation in its own country, may sue and be sued in this country as a corporation. The capacity of a corporation to enter into any legal transaction is governed both by the constitution of the corporation, as limited by the law of its country, and by the law of the country where the transaction takes place⁷⁾.

Partners must sue and be sued as individuals, but if carrying on business within the jurisdiction may sue and be sued in the firm name⁸⁾.

Bankers' correspondents. The relation of customer, banker and the correspondent of the latter is governed by the usual law of agency. "Every agent who employs a sub-agent is liable to the principal for money received by the sub-agent to the principal's use, and is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment."⁹⁾

If the customer has given orders inconsistent with this usual relation or has by conduct acquiesced in a course of disposition of the funds by the sub-agent, and the loss occurs through carrying out these orders or through this disposition being followed, the banker will be exempt from responsibility¹⁰⁾.

Collecting banks. The rights and liabilities of bankers acting as collecting agents will be found under the title "Bills of Exchange".

Branch Banks. It has been said above that a great many local banks have been absorbed by the larger London banks, and that the latter have also formed fresh branches on their own account. This gives rise to the question of the relative position of these institutions to each other.

For the purpose of ascertaining the assets and liabilities of a central bank, the total of all the assets and liabilities both at the central office and at all the branches must be added together and balanced. But for the purpose of the internal relations of the whole system, each branch is regarded as the agent of the central office and of each of the other branches¹¹⁾.

However, as between the customer and the branch where he keeps his account, this branch is a separate bank, so long as both he and the bank are going concerns

¹⁾ *Ibid.* s. 5.

²⁾ 54 & 55 Vict. c. 21 s. 1.

³⁾ 26 & 27 Vict. c. 87, s. 48, as subsequently amended by 59 & 60 Vict. c. 25, s. 68.

⁴⁾ 4 Ed. VII, c. 8.

⁵⁾ 26 & 27 Vict. c. 87, s. 14.

⁶⁾ 8 Ed. VII, c. 69, s. 267.

⁷⁾ Cf. Dicey's Conflict of Laws, 2nd ed. p. 469.

⁸⁾ Order XLVIIIa.

⁹⁾ Bowstead's Law of Agency, art. 61, *Mackerey v. Ramsays*, (1843), 9 Cl. & F. p. 818; *Barkworth v. Ellerman* (1861), 6. H. & N. 605.

¹⁰⁾ *Williams v. Deacon* (1849), 4 Ex. 397.

¹¹⁾ *Prince v. Oriental Bank Corporation* (1878) 3 App. Cas. 325.

and able to pay. One effect of this is that each branch which is liable on the same bill is entitled to notice of dishonour¹). Another result is that a payee who obtains payment at a branch, other than that on which a cheque is drawn, must repay the amount if the cheque is ultimately dishonoured²). Again, if the head office has stopped payment, but before notice thereof has been received, a customer pays in money, this cannot be recovered, except as a debt provable in the winding up³).

On the other hand, notice of the customer's bankruptcy received at the head central office, is only notice to each branch at a time when a reasonable interval for receiving it has transpired⁴).

Bankers' Books Evidence Act, 1879 (42 Vict., c. 11). By this Act a copy of any entry in a banker's book must be received as *prima facie* evidence in all legal proceedings on certain previous proof of regularity of the book, provided that it has been examined with the original by the witness. Unless by order of the judge, a banker cannot be compelled to produce a book the contents whereof can be proved in this way; but a Court or judge may make an order giving a party liberty to inspect and take copies of any entries for the purpose of any pending legal proceeding, the costs being in the discretion of the Court or judge.

A stockholder is entitled to inspect the particular entries which refer to the stock in which he is interested, but no other entries; and books may generally only be inspected when some particular dispute has arisen in which the applicant is personally interested in a manner which differs from the interests of other members of the company⁵).

II. Usual documents of credit.

Bank Notes. All bills, drafts or notes (other than notes of the Bank of England) which are issued by any banker or the agent of any banker for the payment of money to the bearer on demand, and all bills, drafts or notes so issued which entitle or are intended to entitle the bearer or holder thereof, without indorsement, or without any further or other indorsement than may be thereon at the time of the issuing thereof, to the payment of any sum of money on demand, whether the same is so expressed or not, in whatever form and by whomsoever such bills, drafts or notes are drawn or made, are deemed to be bank notes of the banker by whom or by whose agent the same are issued⁶).

Bank of England notes are for most purposes considered as cash and pass as such. They are legal tender for all sums above £5⁷).

Notes issued by other banks are not legal tender, and can be objected to at the time that they are tendered. A person who pays a new obligation in these notes does not guarantee the solvency of the banker who issued the notes, and if the latter fails to meet them, cannot be made to pay again⁸). But it is otherwise if the obligation was already existing⁹), unless the person receiving the notes is guilty of laches. And in any case the transferor by delivery "warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right

¹) *Fielding & Co. v. Corry* [1898] 1 Q. B. 268.

²) *Woodland v. Fear* (1857), 7 E. & B. 519.

³) *Oriental Bank Corporation* (1884), 28 Ch. D. 634.

⁴) *Willis v. Bank of England* (1835), 4 Ad. & E. 21.

⁵) *Foster v. Bank of England* (1846) 8 Q.B. 689; *Bank of Bombay v. Suliman Sonji* (1908) 99 L. T. 62.

⁶) 17 & 18 Vict. c. 83, s. 11. All such notes are liable to stamp duties or composition for stamp duties, s. 12. See the Stamp Act, 1981, ss. 29 to 31. By the Schedule to this Act the duties are as follows (excepting notes of the Bank of England):

For money not exceeding £1	0	0	5
Exceeding £ 1 and not exceeding £ 2	0	0	10
„ £ 2 „ £ 5	0	1	3
„ £ 5 „ £ 10	0	1	9
„ £ 10 „ £ 20	0	2	0
„ £ 20 „ £ 30	0	3	0
„ £ 30 „ £ 50	0	5	0
„ £ 50 „ £ 100	0	8	6

⁷) 3 & 4 Will IV, c. 98, s. 6.

⁸) *Camidge v. Allenby* (1827), 6 B. & C. 373.

⁹) *Ibid.* See generally *Timmis v. Gibbins* (1852), 18 Q. B. 722.

to transfer it, and that at the time of the transfer he is not aware of any fact which renders it valueless"¹).

The Statute of Limitations does not apply to bank notes, whether they have been presented or not²).

If the bank stops payment, interest will be due on its notes from the time when a demand is made in respect thereof³).

Bank post bills. These are now only issued by the Bank of England and are used mostly by persons who are travelling. They are practically equivalent to promissory notes to order and do not therefore require acceptance. But in some respects they pass as money, when duly indorsed, and form good tender or payment if not objected to at the time⁴).

Letters of Credit. "A *letter of credit* (sometimes called a bill of credit) is an open letter of request, whereby one person (usually a merchant or a banker) requests some other person or persons to advance money or give credit to a third person named therein, for a certain amount, and promises that he will repay the same to the person advancing the same, or accept bills drawn upon himself for the like amount. It is called a general letter of credit when it is addressed to all merchants or other persons in general, requesting such advance to a third person; and it is called a special letter of credit when it is addressed to a particular person by name, requesting him to make such advance to a third person"⁵). It is not negotiable.

Marginal letters of credit are negotiable. These are written on the same paper as a bill of exchange to the same amount, and together constitute an undertaking by the issuer to accept the bill⁶). They are limited usually in time and amount. They are called "open credits" unless there is a condition therein that they are to be accompanied by commercial documents representing goods at the time of their acceptance. They are then called "documentary credits". These letters of credit must be stamped as bills of exchange, unless they authorise drafts to be drawn out of the United Kingdom for payment in the United Kingdom⁷).

Circular notes. A circular note is a request by a bank to its foreign correspondents to pay a certain sum to a certain person. It is usually accompanied by a "letter of indication" intended to identify the person in whose favour the note is drawn and containing his signature.

Cheques. A cheque is an unconditional and imperative stamped order in writing drawn on a banker signed by the drawer or his duly authorised agent, requiring the banker to whom it is addressed to pay on demand a sum certain in money to or to the order of a specified person or to bearer⁸).

A cheque is not invalid by reason:

- a) That it is not dated;
- b) That it does not specify the value given, or that any value has been given therefor;
- c) That it does not specify the place where it is drawn or the place where it is payable⁹).

Cheques should be drawn in English and expressed in English money. If the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable¹⁰).

After a cheque has been paid by the banker and the account in which it appears has been settled, it becomes the property of the customer, who can demand it from the banker¹¹).

A cashed cheque is evidence of payment of a debt, when the latter is admitted or proved to have existed¹²).

¹) Bills of Exchange Act, 1882, 45 & 46 Vict. c. 43, s. 58 (3).

²) 55 & 56 Vict. c. 48, s. 6; 17 & 18 Vict. c. 83, s. 11.

³) *The East of England Banking Co.* (1868), L. R. 4 Ch. 14.

⁴) *Tiley v. Courtier* (1817), 2 C. & J. 16, note (c); *Caine v. Coulton* (1863), 1 H. & C. 764.

⁵) Story on Bills of Exchange, § 459.

⁶) *Maitland v. The Chartered Mercantile Bank etc.* (1869), 38 L. J. Ch. 363.

⁷) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 32, Schedule (4th exemption).

⁸) Bills of Exchange Act, 1882, (45 & 46 Vict. c. 43), ss. 3 & 73.

⁹) *Ibid.* s. 3 (4).

¹⁰) *Ibid.* s. 9 (2). For further information see title "Bills of Exchange", *ante*.

¹¹) *Charles v. Blackwell* (1877), 2 C. P. D. 151, 162.

¹²) *Mountford v. Harper* (1847), 16 M. & W. 825; *Thompson v. Pitman* (1858), 1 F. & F. 339.

III. Banker and Customer.

In so far as the banker is the agent of his customer, he is "bound to use reasonable skill, care and diligence in presenting and securing payment of the drafts entrusted to him for collection and placing the proceeds to his customer's account, or in taking such other steps as may be proper to secure the customer's interests"¹).

He is also under an obligation, the limits of which are not well defined, not unreasonably to disclose the state of his customer's account. He is justified in answering inquiries as to the general credit of the customer to a person who proposes to enter into business relations with him²); but he is not under any duty to the inquirer to do more than answer honestly according to the information in his possession at the time. He is not bound to make further inquiries³).

Current Account. Apart from special transactions, which will be noticed in due course, the relation between banker and customer is that of debtor and creditor according as the banking account of the customer is in credit or is overdrawn⁴).

But if the customer's account is in credit merely because the banker has made a specific loan to the customer, the customer is a debtor to the extent of that loan, subject to the special terms thereof. An overdraft is a loan to the extent of the money actually overdrawn.

One result of this relation is that the money paid in by the customer becomes the absolute property of the banker and he is neither strictly a trustee nor agent of the customer in respect of that money. Hence it follows that the debt is a simple contract debt, and in the absence of special circumstances is barred by the expiration of six years⁵). A cheque does not operate as an assignment of funds in the hands of the banker⁶). There is therefore no contractual relation between a payee of a cheque and the banker on whom it is drawn, and the former has no right of action against the latter for refusing to pay the cheque⁷).

On presentment of a cheque drawn upon him by a customer the banker must pay it at once according to the custom of bankers, provided that he has sufficient funds of the customer in his hands for a sufficient time before presentment to enable him to do this⁸).

As a balance in a customer's favour is a debt immediately payable, it follows that the bank has no right to retain that sum against a future debt by the customer to itself, e. g. by reason of having discounted bills which are not mature, and cheques may not be dishonoured either on that ground, or because of an error made by the banker in the accounts, or because of a disputed claim which is unsettled⁹).

But if a banker has by mistake shown a larger balance in the passbook than the true one, the customer is entitled to have his cheques, which are issued before the mistake is notified to him, honoured up to the amount of the balance shown, in the absence of fraud or negligence. But he remains a debtor to the amount of the overdraft¹⁰).

It seems that if a bank habitually credits a customer's account with the amount of cheques paid in, before they are cleared, they must honour the customer's cheques up to the balance so shown, in the absence of special circumstances¹¹).

¹) Hart's Law of Banking, part V. *Bank of Van Diemen's Land v. Bank of Victoria* (1871), L. R. 3 P. C. 526; *Prince v. Oriental Bank Corporation* (1878), 3 App. Cas. 325.

²) *Robshaw v. Smith* (1878), 38 L. T. 423.

³) *Parsons v. Barclay* (1910), 26 T. L. R. 628.

⁴) *Foley v. Hill* (1848), 2 H. L. C. 28.

⁵) *Ibid.* and *Pott v. Clegg* (1847), 16 M. & W. 321.

⁶) Bills of Exchange Act, 1882, (45 & 46 Vict. c. 61), s. 53 (1).

⁷) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 53; *Schroeder v. Central Bank* (1876), 34 L. T. 735; *Bence v. Shearman* [1898] 2 Ch. 582.

⁸) *Foley v. Hill*, u. s.; *Bank of England v. Vagliano* [1891] A. C. at p. 157.

⁹) *Jeffryes v. Agra Bank* (1866), L. R. 2 Eq. 674. This was in fact a case of dealing with marginal receipts given by Bank (C) to customer A. who pledged them with Bank (B). The marginal receipts represented moneys of A. retained by Bank (C) to meet his future liabilities; cf. *King v. British Linen Co.* (1899), 1 F. 928.

¹⁰) *Marzetti v. Williams* (1830), 1 B. & Ad. 415; *Deutsche Bank v. Beriro* (1895), 1 Com. Cas. 123, 255.

¹¹) *Armfield v. London & Westminster Bank* (1883), C. & E. 170; *Bransby v. East London Bank* (1866), 14 L. T. 403.

If a banker dishonours or refuses to pay the amount of his customer's cheque without just cause, he is liable to an action for the damage to the credit of his customer, and must pay a reasonable sum although no actual damages are proved¹). But if a bank receives cheques as an agent for collection, which is the usual case, the customer is not entitled to draw against them by the mere fact that they have been credited in the ledger²). It might be otherwise if they were credited in the pass-book.

On the other hand, if a customer has two current accounts, one at one branch and one at another, a cheque drawn on one branch may be dishonoured, although he has a sufficient credit balance at another, and payment of a cheque drawn on one branch may be refused at a different branch³). And if at the same bank a customer has both a current account and a deposit account, the bank may dishonour a cheque drawn on an insufficient current account, although there is sufficient on the deposit account. But where a customer has two accounts at the same office, a cheque drawn on a solvent account cannot be dishonoured on the ground that the other account is overdrawn⁴), provided the accounts ought to be kept separate under an agreement to keep them so.

Bankers are only entitled to charge their customers for payments made in respect of orders to pay signed by the customer or by his duly authorised agent. An unauthorised signature which is not forged may be ratified⁵).

If a banker has agreed to allow the customer to overdraw or has advanced him a loan, the cheques of the latter which are issued before the bank gives notice to the customer withdrawing the overdraft or loan, must be honoured⁶).

If the customer has given security for the overdraft, which is generally done with a margin for the safety of the bank in case of realisation becoming necessary, the bank is not bound to honour cheques which would diminish that margin of safety through the security having become depreciated, or assigned⁷).

But if a customer dies before a cheque is presented, the banker is entitled to set off against the current account any sums due on other accounts and, refuse payment if the balance shows a debt to him⁸).

Although all banks now issue counterfoiled books of cheques to their customers duly stamped, there is no law in England, as in some countries, which forbids a customer to continue the older practice of writing out the whole cheque and cancelling an adhesive stamp with his signature written over it, or otherwise.

If a customer draws a cheque in excess of his balance, the bank may honour it up to the amount of the balance and dishonour it for the excess, but in England the practice is to honour or dishonour it altogether. In Scotland the banker is bound to honour it up to the amount of the balance⁹).

Bankers when requested to do so will mark a customer's cheque as "good for £—"; the effect of which would appear to be only that the certifying bank warrants that at that time the customer had sufficient funds in their hands to meet it, and not that they would pay it in any event¹⁰). A banker is not bound, in the absence of a special contract, to meet his customer's acceptances¹¹).

Revocation of authority. A banker must not pay a customer's cheque when the authority to pay has been countermanded, or when he has received notice of

¹) *Marzetti v. Williams*, *supra*.

²) *Akrokerrri etc., Mines v. Economic Bank* [1904] 2 K.B. 465; *Boyd v. Emmerson* (1834), 2 A. & E. 184.

³) *Garnett v. McKewan* (1872), L.R. 8 Ex. 10; *Prince v. Oriental Bank Corp.* (1878), 3 App. Cas. 332.

⁴) See *In re Johnson & Co.* [1902] 1 I. R. 439; *Cumming v. Shand* (1860) 5 H. & N. 95.

⁵) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 24. As to the fraudulent alteration of a cheque, see title "Bills of Exchange".

⁶) *Rouse v. Bradford Banking Co.* [1894] A.C. p. 596; *Fleming v. Bank of New Zealand* [1900] A.C. 577, where a condition precedent was fulfilled. *Thomas v. Howell* (1874), L. R. 18. Eq. p. 202. But in the absence of an agreement the banker is not bound to allow or continue an overdraft: *Ritchie v. Clydesdale Bank* (1886), 13 S. C. 866: q. v. as to conduct not amounting to an agreement.

⁷) Cf. *Parkinson v. Wakefield & Co.* (1889), 5 T. L. R. 646. In the latter event, the bank could not safely lend money after notice of the assignment.

⁸) *Kirkwood v. Clydesdale Bank* (1897), 45 Scot. L. R. 3.

⁹) *British Linen Co. v. Carruthers* (1883), 10 R. 923.

¹⁰) *Gaden v. Newfoundland Savings Bank* [1899] A. C. 281.

¹¹) *Bank of England v. Vagliano* [1891] A. C. p. 357.

the customer's death¹⁾, or of a receiving order having been made against him²⁾, or that he has committed an act of bankruptcy available for founding bankruptcy proceedings²⁾, or that he is insane³⁾.

A telegram countermanding payment of a cheque may only be acted on by the banker to the extent of postponing the honouring of the cheque until further inquiry can be made⁴⁾.

Married women. All deposits in any post office or other savings bank, or in any other bank, standing in the sole name of a married woman, are deemed to be the separate property of such married woman, unless and until the contrary is shown⁵⁾.

Partners. In the absence of notice to the contrary, a banker is entitled to assume that each member of a partnership has authority to sign the name of the firm for all business purposes⁶⁾.

Corporations and companies. Bankers must obtain a resolution of the board of directors stating how the cheques and other negotiable instruments are to be signed, and must be careful not to act upon such instruments without such signature, which they must ascertain to be accurate. They are not concerned to ascertain whether the affairs of the company are conducted with regularity, so long as they appear to be in consonance with the articles of association⁷⁾.

Infants. It is quite usual for infants to have banking accounts; and it seems that a banker runs no risk in treating an infant as an ordinary customer, as long as he is not allowed to overdraw and is not otherwise accommodated with a loan.

Infants are only incapable of contracting to the extent that is necessary for their protection⁸⁾. An infant can therefore sue for money which he has deposited in a bank.

A loan to an infant cannot be recovered by legal proceedings, although an infant may validly repay it. A security given by an infant to guarantee a loan is void⁹⁾.

Lunatics. A lunatic may have a banking account and operate upon it, as long as his lunacy is not known to the banker.

Trustees. Trustees may not leave trust moneys in the custody of a bank except for temporary purposes, e. g. while they are obtaining an investment, or while the bank as their agents are investing the money on their behalf. If the money is left for more than a reasonable time the trustees will be personally liable for the loss of capital on failure of the bank, and to the tenant for life for loss of income for unreasonable delay in investing the capital¹⁰⁾.

As executors have a year from the death of their testator, in which to wind up his estate, they will not generally be liable for leaving moneys of the estate in a bank during that time, unless there is a direction in the will requiring speedy investment or distribution¹¹⁾.

A trustee may empower a banker to receive trust moneys payable under a policy of insurance, but not to retain the moneys longer than is reasonably necessary for paying them over to the trustee¹²⁾.

When a person in the position of a trustee is the officer of a parliamentary company or body and the account is in fact the account of his principals, he is not personally liable, as he would be if his *cestuis que trustent* were private persons¹³⁾.

Where a bank has notice that an account is a trust account, either from the title of the account or otherwise, it cannot insist upon the title of the trustee as against that of the beneficiary. And so when the bank has notice that securities lodged by a customer are trust securities, it cannot hold them as against the beneficiaries

¹⁾ Bills of Exchange Act, 1882, (45 & 46 Vict. c. 61), s. 75.

²⁾ 46 & 47 Vict. c. 52, s. 49.

³⁾ *Drew v. Nunn* (1879), 4 Q. B. D. 661.

⁴⁾ *Curtice v. London City & Midland Bank Ltd.* [1908] 1 K. B. 293.

⁵⁾ Married Women's Property Act, 1882, (45 & 46 Vict. c. 75), s. 6.

⁶⁾ See further title "Partnership", *ante*.

⁷⁾ *Mahony v. East Holford Mining Co.* (1875), L. R. 7 H. L. 869.

⁸⁾ *Burnaby v. Equitable Reversionary etc.* (1885), 28 Ch. D. 416, 424.

⁹⁾ *Nottingham Permanent etc. v. Thurstan* [1903] A. C. 6.

¹⁰⁾ *Cann v. Cann* (1884), 51 L. T. 770.

¹¹⁾ *Johnson v. Newton* (1853), 11 Hare, 160.

¹²⁾ Trustee Act, 1893, (56 & 57 Vict. c. 53), s. 17.

¹³⁾ Cf. *Higgins v. Livingstone* (1816), 4 Dow. 341; 10 & 11 Vict. c. 16 s. 60.

even if they are unknown, to secure its customer's adverse account¹). If, however, the securities are bearer securities, or are negotiable after the custom of merchants, the bank which lends upon them without notice is secure as against the true owner or beneficiary. A mere suspicion is not enough. The notice must be distinct²).

The fact that securities lodged by a customer are being transferred to the bank by a third person is enough to put the bank on inquiry as to the right of the customer as against the transferor: especially when the latter has signed the transfer without the transferee's name being filled in³).

There are very numerous cases which show the liability of the banker where he has notice of the existence of a trust and pays himself or honours cheques in breach of his duty to protect the beneficiaries⁴).

The fact that a bank is aware that a trustee has committed a breach of trust in respect of an account, would justify the bank in closing the account, but would not justify the dishonour of any cheque as to which the bank did not know that it was a misappropriation. A consequential benefit to the bank would be strong evidence of knowledge⁵).

Similarly it has been held that when money, known to be trust money, is innocently paid by a bank into the customer's account, he having no separate trust account, and the account is thereby put into credit, the bank is not liable for allowing him to draw on this money, which for all it knew might have been done for trust purposes⁶).

Bank's Charges. In addition to the interest charged by a bank on a loan or an overdraft, it is the custom of some banks to make a charge for commission on making an advance at the rate of about one quarter per cent. Commission is only properly payable when the bank acts as agent to obtain a loan from a third person, and if it charges on its own advance, custom alone will not justify it, unless brought to the knowledge of the customer, as by a separate entry in his account, and assented to by the latter. Each such charge requires a separate entry⁷).

It is said that there is a custom in the North of England for this 'commission' to be charged at the end of each six months, as if on a fresh loan, but this would not apply to a specific advance on a specific security⁸).

There is no right to charge compound interest except in mercantile transactions, and by virtue of a contract, express or implied, or by custom⁹).

Where there is a specific advance on a specific security, the bank cannot charge compound interest in the absence of agreement¹⁰). The right of a bank to charge compound interest ceases on the death of the customer, after which only simple interest at 5 p. c. can be charged, in the absence of special agreement¹¹).

The rule by which payments into a customer's account are presumed to be applied in payment of interest in preference to capital, does not apply to interest on an overdrawn account which has been capitalised¹²).

Closing the Account. The customer may close his account at any time and draw out the balance due to him; but the banker, if the account is in credit, or there is an agreement for an overdraft, cannot close the account without giving the customer reasonable notice so that he may make arrangements with another bank, and in any case outstanding bills and cheques must be honoured by the bank to the amount of the balance in the customer's favour¹³).

¹) *Rearden v. Provincial Bank* [1896] 1 I. R. 532; *Bank of Montreal v. Sweeney* (1887), 2 App. Cas. 617.

²) *Humberstone v. Chase* (1836), 2 Y. & C. Ex. 209; *Simpson v. Molson's Bank* [1895] A. C. 270. These were cases of transfers of securities being registered by the company itself.

³) *France v. Clark* (1884), 26 Ch. D. 257; *Magnus v. Queensland Bank* (1888), 37 Ch. D. 466.

⁴) See Hart's Law of Banking, 2nd ed. 152 etc; Grant's Law of Banking, 6th ed. p. 200, 690.

⁵) *Gray v. Johnston* (1868), L. R. 3 H. L. 1.

⁶) *Coleman v. Bucks etc. Bank* [1897] 2 Ch. 243; *Shields v. Bank of Ireland* [1901] 1 Ir. R. 222.

⁷) *Williamson v. Williamson* (1869), L. R. 7 Eq. 542; cf. *Baring v. Stanton* (1876), 3 Ch. D. 502.

⁸) *Spencer v. Wakefield* (1887), 4 T. L. R. 194; *Mosse v. Salt* (1863), 32 Beav. 269; *Stewart v. Stewart* (1891), 27 L. R. Ir. 351.

⁹) *Ferguson v. Fyffe* (1841), 8 Cl. & F. 121.

¹⁰) *Mosse v. Salt*. u. s.

¹¹) *Williamson v. W.* u. s.; *Stewart v. S.* u. s.

¹²) *Parr's Banking Co. v. Yates* [1898] 2 Q. B. 460.

¹³) *Buckingham & Co. v. London & Midland Bank* (1895), 12 T. L. R. 70.

But if the customer has done anything equivalent to closing the account, e. g. by giving notice of suspension of payments, the bank is justified in treating the account as closed¹). And on the customer's death, the relation ceases and the bank may close the account at once, without regard to outstanding bills and cheques²).

Title to the balance. The question to whom the balance of an account belongs, when it is claimed by more than one person, generally arises on the closing of an account, though, of course, it may arise at any time. In this there is no matter which distinctively belongs to the law of banking, and the solution must be found in other sections, such as that of agency. It need here only be said that money paid into his own account by an agent, but not known by the bank to be trust money, is not money for which the bank is accountable to the principal, except on proper legal proceedings taken by him, and subject to the right of the bank to set off in the account any sums properly paid to the agent or appropriated by his order³).

IV. Special Operations.

Specific appropriation. Although money paid in by a customer to his current account is lent by him to the banker, whose property it becomes, this is not the case with money paid in by him with directions, accepted by the banker, to apply it to some specific purpose, e. g. for payment of a bill about to become due⁴). On the other hand, money paid into a bank by a customer specifically to meet bills drawn by the customer and discounted by the bank, or for an appropriation which has been carried out, cannot be drawn out, but may be retained by the bank to meet the bills at maturity, or the new liability arising from the appropriation⁵). But where there is no specific appropriation, but only a general practice to remit against bills, the money becomes the money of the banker: it may be otherwise if the remittance consists of a bill not yet paid or negotiated⁶).

Transfer from one account to another. It occasionally happens that both a creditor and his debtor keep accounts at the same bank. The debtor can then pay by an order to the bank, assented to by the creditor, to transfer the whole or part of his account to that of his creditor. When this has in fact taken place in the books of the bank, the debt is paid to the extent of the credit acknowledged by the bank in favour of the creditor. But a future or conditional order has not this effect until it has been acted on⁷).

Rights of third persons. A direction by a customer to his bank to make a payment to a third person does not give that third person any right against the bank, even when the bank has appropriated that sum in its own books for the purpose of making that payment: for such a process does not create any legal relationship between the bank and the third person, or in more technical words, there is no privity of contract between them. In order to give a right to a third person the bank must not only agree to hold the money, as ordered by its customer, for the use of the third person, but must give notice of that fact to the third person so that a contractual relationship arises between them⁸). And a mere notice which does not amount to an undertaking to pay is not such a contract⁹). This promise to pay is not required to be in writing, as it is not an undertaking to pay another person's debt, but the banker's own debt¹⁰).

Revocation of Appropriation. It follows from what has been said that until the banker by some act or conduct on his part, becomes bound to the third person to pay him the appropriated money, the customer has a right to revoke the appro-

¹) *Berry v. Halifax & Co.* [1901] 1 Ch. 188.

²) *Kirkwood v. Clydesdale Bank* (1907), 45 Sc. L. R. 3.

³) See Hart's Law of Banking, 2nd ed. p. 229, and title "Agency" ante.

⁴) *Farley v. Turner* (1857), 26 L. J. Ch. 710.

⁵) *Chartered Bank etc. v. Evans* (1869), 21 L. T. 407; cf. *Kerrison v. Glyn & Co.* (1912), 17 Com. Cas. 41.

⁶) *In re Broad* (1884), 13 Q. B. D. 740.

⁷) *Eyles v. Ellis* (1827), 4 Bing. 112; *Caley v. Short* (1815), Cooper, Ch. Cas. 148; *Pedder v. Watt* (1796), 2 Chit. 619. This order must be stamped as a bill of exchange payable on demand. *Committee of London Clearing Bankers v. Commissioners of Inland Revenue* (1896), 12 T. L. R. 283.

⁸) *Noble v. National Discount Co.* (1860), 5 H. & N. 225, as to conduct evidencing an agreement. *Morrell v. Wootten* (1852), 16 Beav. 197; *Kilsby v. Williams* (1822), 5 B. & A. 815.

⁹) *Malcolm v. Scott* (1850), 5 Ex. 601.

¹⁰) *Hodgson v. Anderson* (1825), 3 B. & C. 842.

priation, unless the banker has himself such an interest in the appropriation that he can object to the revocation¹).

But after the bank has acted on the order, e. g. by crediting the account of the third person, the customer can no longer revoke, and ignorance that the third person has stopped payment is not such a mistake as to entitle the customer to revoke his order²).

Money paid by mistake may be recovered unless the payee creditor is an agent and has altered his position on the faith thereof³); but if the payee is a different person from the banker, the customer must sue the banker and not the person whom the banker has paid in error⁴).

Assignment of funds in hands of banker. While, as has been seen, an order for the payment of money, such as a cheque, does not give the payee any rights as against the banker, it is otherwise when the customer assigns to his creditor the money which the banker owes to him. In such a case the banker becomes the debtor of the assignee⁵). A future debt may be assigned, and also a part of a larger debt⁶). But a mere request to pay is not an assignment, and may be revoked before it is acted on⁷).

As between assignor and assignee a debt may be assigned verbally and by any form of words sufficient to show the intention: unless an interest in land is created or charged, in which case it must be by writing⁸). It is not necessary that the debtor should assent⁹). But in order to be good against all the world, the assignment must be for valuable consideration and in writing, and notice thereof must be given to the debtor¹⁰). Claimants will rank in order of the dates of their respective notices being received¹¹).

A fund which is assigned, or charged, or partly assigned, for payment of a debt, must be clearly specified¹²). It has been held that an agreement for valuable consideration to endorse cheques received by an intermediate buyer of goods from the ultimate buyer is a good assignment of the value thereof¹³). And that goods can be pledged by an agreement to hypothecate the bills of lading relating to them¹⁴).

Deposits. Most banks are prepared to accept loans from their customers and others which are then carried to a "deposit account", which is distinct from the current account, and is not liable to reduction by the payment of the customer's cheques. It is usual for a specific agreement to be entered into by the bank with the customer, stating the rate of interest which will be paid, and stating also the terms of notice for withdrawal. Some banks accept sums on deposit at a fixed rate for stated times, and this was, and is believed still to be, the practice of most of the Australian banks doing business in London.

It is usual to deliver a deposit receipt¹⁵) to the customer, on which the terms of the loan are set out; and from this receipt it will appear whether it is a negotiable instrument or not, and what are the requirements on the part of the customer as to signatures etc. for obtaining repayment. In England it is usually not a negotiable instrument, but if signed and delivered with the intention of passing the property therein, there may be a good equitable assignment¹⁶).

It is probable, although nothing is said upon the point, that the bank is entitled to reasonable notice for withdrawing a deposit which is not made for a definite

¹) *Hodgson v. Anderson* (1825), 3 B. & C. 842, and cases cited.

²) *Kerrison v. Glyn & Co.* (1912) 17 Com. Cas. 41.

³) *Kleinwort v. Dunlop etc. Co.* (1907), 23 T. L. R. 696.

⁴) *Rogers v. Kelly* (1809), 2 Camp. 123.

⁵) *Buck v. Robson* (1878), 3 Q. B. D. 686.

⁶) *Brice v. Bannister* (1877), 3 Q. B. D. 569; but see *Forster v. Baker* [1910] 2 K. B. 636.

⁷) *Ex p. Hall* (1879), 10 Ch. D. 615.

⁸) *Gorringe v. Irwell etc.* (1886), 34 Ch. D. 128; *Ex p. Hall* (1879), 10 Ch. D. 615.

⁹) *Morrell v. Wooten* (1852), 16 Beav. 197. *Brandts v. Dunlop Rubber Co.* [1905] A. C. 454.

¹⁰) *Judicature Act*, 1873, (36 & 37 Vict. c. 66) s. 25 (6).

¹¹) *Dearle v. Hall* (1828), 3 Russ. 1.

¹²) *Percival v. Dunn* (1885), 29 Ch. D. 128.

¹³) *West v. Newing* (1900), 82 L. T. 260; following *In re Irving* (1877) 3 Ch. D. 419.

¹⁴) *Lutscher v. Comptoir etc.* (1876), 1 Q. B. D. 709.

¹⁵) It is considered that no stamp duty is payable on this receipt: see *Grant on Banking*, 6th ed. p. 271.

¹⁶) *Judicature Act*, 1873; *In re Griffin* [1899] 1 Ch. 408.

time¹). Where the deposit of money does not amount to a loan, but is a deposit for safe custody, although it may be applied in the business, the Statute of Limitations does not begin to run until demand for repayment²).

If nothing is agreed as to interest, the usual interest as paid to other lenders in the same bank, or others of the same standing, must be paid³). This is usually one half per cent. below bank rate.

The interest ceases to run from the time fixed for repayment, if the fault is the lender's, or from the time that the sum is appropriated for some purpose, or is transferred to his current account at the request of the customer⁴).

If a bank pays an unauthorized person, who appropriates the money, it will be liable to the true owner, even although the indorsed receipt is duly signed, unless an authority to pay the holder is also signed on the document or on a separate document⁵).

Appropriation of payments. A customer who is debtor to a bank on two or more accounts is entitled on paying in money, to appropriate the payment to the account or part of the account which he pleases⁶). If he neglects to do so, the banker may make any appropriation he pleases, even up to the last moment⁷); but not after judgment in an action involving the accounts⁸).

While payments are presumed to be applied to the payment of interest in preference to principal, this does not apply to capitalized interest⁹).

A banker may appropriate towards payment of debts which are prescribed by the lapse of time; but this will not revive the remainder of a debt so as to make the debtor again liable therefor¹⁰). Nor may an executor make an appropriation so as to revive a lapsed credit of the estate¹¹). But an entry in a banker's books which has not been communicated to a customer firm, does not bind the former so as to discharge a retiring member of the customer firm¹²).

Rights of third persons. The banker's right to appropriate in his own favour money which is unappropriated by the customer may be subject to rights of third persons if the banker has contracted to appropriate in their favour¹³).

On the other hand, if payments are not specifically appropriated on either side, the payments in discharge the payments out, or the credits discharge debits, in order of date, in spite of changes taking place in the constitution of the banking firm or customer firm, so long as the same accounts are kept¹⁴). This even applies where a new company succeeds an old company and the accounts are continued¹⁵).

The debt owing by the guarantor of a principal debt is necessarily extinguished in the same way, in the absence of special contract, i. e. in the order of the payment of credits to the account¹⁶); but it is otherwise when the guaranty has expired leaving the guarantor a debtor¹⁷).

The question as to whether an appropriation has or has not been made, is one to be proved by evidence, in which the accounts which are rendered are a strong

¹) *In re Tidd*, [1893] 3 Ch. 154.

²) *Ibid*.

³) *Bank of Scotland v. Watson* (1813), 1 Dow. p. 48.

⁴) *Fruhling v. Schroeder*, (1835), 2 Bing. N. C. 77.

⁵) *Evans v. National Provincial Bank etc.* (1897), 13 T. L. R. 429; cf. *In re Dillon* (1890), 44 Ch. D. p. 81; *In re Griffin* [1899] 1 Ch. 408.

⁶) *Mills v. Fowkes*, (1839), 5 Bing. N. C. 455; *Simpson v. Ingham* (1823), 2 B. & C. 65; *Merriman v. Ward* (1860), 1 J. & H. 371.

⁷) *Ibid*; *Seymour v. Pickett*, [1905] 1 K. B. 715.

⁸) *Smith v. Betty* [1903] 2 K. B. 317.

⁹) *Parrs Banking Co. v. Yates* [1898] 2 Q. B. 460.

¹⁰) *Mills v. Fowkes*, u.s.; *In re Boswell* [1906] 2 Ch. 359, [1907] 2 Ch. 331.

¹¹) *Merriman v. Ward* (1861), 1 J. & H. 371.

¹²) *London & Westminster Bank v. Button* (1907), 51 Sol. J. 466; *Simson v. Ingham* (1823), 2 B. & C. 65.

¹³) *Kilsby v. Williams* (1822), 5 B. & A. 815.

¹⁴) *Devaynes v. Noble* (1816), 1 Mer. 572. This is known as the rule in *Clayton's case*. See *In re Sherry*, (1884), 25 Ch. D. p. 702 as to new accounts being opened.

¹⁵) *Taurine Co Ltd.* (1878), 38 L. T. 53.

¹⁶) *Kinnaird v. Webster* (1878), 10 Ch. D. 139; cf. *Bateman's Case* (1873), 42 L. J. Ch. 577, a case of a B contributor in the winding-up of a company.

¹⁷) *In re Sherry*, (1884), 25 Ch. D. 692.

element¹), although they are not conclusive, if there is other evidence to counteract their effect²).

The banker has no right to appropriate so as to pay illegal or fraudulent debts³).

Trust moneys. Where a trustee has paid trust moneys into his private account, the rule in *Clayton's* case does not apply as between himself and the beneficiary, but where he pays in trust moneys belonging to separate trusts or beneficiaries, the rule is applied as between those trusts or beneficiaries, if there is not enough money to pay them all⁴).

Loans to companies. In making advances to corporations or companies it is essential that the bank should ascertain from the constitution of the corporation or company that it has the power to borrow. It is not necessary to ascertain that the formalities and conditions under which the borrowing may take place have in fact been fulfilled⁵). A security given for a valid loan will also be good⁶). A trading company has a general implied power to borrow for the purposes of its business, and the bank is not bound to inquire as to the application of the money, nor if there is any genuine occasion for borrowing⁷). Borrowing by directors may be ratified by the company if the powers of the company are not exceeded⁸).

If the borrowing is illegal, but the loan has been applied to satisfying creditors of the company, the lender is entitled to be subrogated to the rights of these creditors, or in other words 'to stand in their shoes'; but not to the extent of having the benefit of any security held by them. But he may follow the money into any investment made therewith by the borrowing company⁹).

Banks which lend upon security given by companies must see that the requirements of the Companies (Consolidation) Act, 1908, as to registration of charges are complied with¹⁰). Income tax may not be deducted by a customer when the loan is for a period less than a year¹¹).

Bankers as bailees. It is the custom of all bankers, although this custom has never been proved in Court, to receive valuables belonging to their customers for safe custody. In the opinion of the authors of most text-books on the subject, the banker in so acting is not a gratuitous bailee, but is acting for reward. No case has yet been before the Courts which has been disputed on that ground, for in the leading case¹²) the point was not insisted on, and as the plaintiff claimed that the defendant banker was liable as gratuitous bailee, the Court held that he was not liable, as he had acted as a reasonably prudent and careful man might fairly have been expected to act in taking care of his own property of like description. In a very recent case it was said that bankers who accept the custody of their customers' deeds and securities, whether gratuitously or for reward, are not insurers, but contract to use only reasonable care and diligence¹³).

V. Banker's Lien.

Bankers have a lien or charge to the extent of the indebtedness of their customer to them, on all securities and valuables deposited with them as bankers by the customer, unless there is a contract inconsistent therewith, either express or implied from the circumstances¹⁴). All securities and valuables in which bankers are accus-

¹) *In re Hamilton* (1877), 25 W. R. 760; *Egg v. Craig* (1903), 89 L. T. 41.

²) *City Discount Co. v. McLean* (1874), L. R. 9 C. P. 692; *Brown, Janson & Co.* (1890), 6 T. L. R. 250.

³) *Brooks v. Blackburn & Co. Building Society* (1884), 9 App. Cas. 857, the case of a building society which had no power to borrow; *Lacey v. Hill* (1876) 4 Ch. D. 537.

⁴) *Hallett's Estates* (1879), 13 Ch. D. 696; *In re Stenning* [1895] 2 Ch. 433.

⁵) *Royal British Bank v. Turquand* (1856), 6 E. & B. 327. But see *Premier Industrial Bank v. Carlton* [1909] 1 K. B. 106.

⁶) *In re Patent File Co* (1870) L. R. 6 Ch. 83.

⁷) *David Payne & Co.* [1904] 2 Ch. 608.

⁸) *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366.

⁹) *Blackburn Building Society v. Cunliffe, Brooks & Co.* (1885), 29 Ch. D. 902, and cases there cited.

¹⁰) See title "Companies" *ante*.

¹¹) *Goslings v. Blake* (1889), 23 Q. B. D. 324.

¹²) *Giblin v. McMullen* (1868), L. R. 2 P. C. 317.

¹³) *Lloyd v. Grace, Smith & Co.* (1911) 27 T. L. R. 409. This was an obiter dictum as far as concerns the obligations of a banker.

¹⁴) *Brandao v. Barnett* (1846), 12 Cl. & F. 787.

tomed to deal in the course of their business may be the subject of this lien and it has been held that money is likewise so subject¹⁾, and unmatured bills²⁾, and dishonoured bills³⁾. Securities which are in the possession of a bank in any other capacity than that of banker, e. g. for safe custody, are not subject to the lien⁴⁾. This of course includes securities in boxes or bundles and plate in boxes, or in any condition which shows that the purpose of the deposit is inconsistent with a lien. Similarly, securities or money which are in the possession of a bank for a special purpose, e. g. for effecting a purchase through the bank or for collection of interest, are not subject to the lien⁵⁾.

Among circumstances which are inconsistent with the lien are the fact of the bank taking a specific charge on the same or another security⁶⁾, without reserving the right. And this may amount to abandoning a lien which has already attached⁷⁾. When the specific purpose has been satisfied and the contractual charge has thereby ceased, the general lien may attach on the remaining securities or money⁸⁾.

The lien extends to sums actually due, but not to sums which will become due in the future⁹⁾. For the purpose of this lien, bankers may, and in favour of other creditors with specific rights against or to the security, may be compelled to, combine all accounts which they have; so that on the balance of the total account the lien may operate¹⁰⁾. If the bank has no notice at the time of the deposit, even a trust account may be so treated¹¹⁾; as well as property which belongs to a third person, which has come to the hands of the depositor without the intervention of the crime of theft, and which does not require any further act to be performed by the third person to complete the transfer¹²⁾.

The banker's lien will extend to all negotiable instruments, although they in fact belong to persons who claim against their customer, in the absence of notice or sufficient circumstances to put the bank on inquiry¹³⁾. So, if the customer is authorised by the true owner of the securities to borrow on the security thereof, and the latter puts all the indicia in the control of the customer, the loan raised by him in fraud of his principal will bind the latter in favour of the lender without notice, even when the securities are not negotiable instruments¹⁴⁾.

In the case of partnerships, and in the absence of any agreement to the contrary, a bank has no lien on the separate property of a partner for a partnership debt, nor on the joint property for a separate debt¹⁵⁾. Conversely, a change in the personnel of the bank may occasion the lien to cease as regards future advances, but it is probable that both this proposition and the preceding only apply to specific liens; and very slight evidence would alter the legal relationship¹⁶⁾.

¹⁾ *Brandao v. Barnett* (1846), 12 Cl. & F. 787.

²⁾ *Roxburghe v. Cox* (1881), 17 Ch. D. 520.

³⁾ *Giles v. Perkins* (1807), 9 East, 12.

⁴⁾ *Misa v. Currie* (1876) 1 App. Cas. 554.

⁵⁾ *Leese v. Martin* (1873), L. R. 17 Eq. 224.

⁶⁾ *Bock v. Gorrissen* (1860), 2 De G. F. & J. 434; *Brandao v. Barnett*, u.s.

⁷⁾ *In re Bowes* (1886), 33 Ch. D. 586.

⁸⁾ *London & Globe Finance Corporation* [1902] 2 Ch. 416, which was a case on a stock-broker's lien.

⁹⁾ *Jeffryes v. Agra & Co. Bank* (1866), L. R. 2 Eq. 674.

¹⁰⁾ *Mutton v. Peat* [1900] 2 Ch. 79.

¹¹⁾ *Teale v. Williams & Co.* (1894) 11 T. L. R. 56.

¹²⁾ *London Joint Stock Bank v. Simmons* [1892] A. C. 201; *Goodwin v. Roberts* (1876), 1 App. Cas. 476.

¹³⁾ *Rimmer v. Webster* [1902] 2 Ch. 163; *Collis v. Hibernian Bank* (1893), 31 L. R. Ir. 261.

¹⁴⁾ *Brocklesby v. Temperance Building Society* [1895] A. C. 173; *Fry v. Smellie* [1912] 3 K. B. 282.

¹⁵⁾ *Exp. McKenna* (1861), 3 D. F. & J. 629.

¹⁶⁾ See *Lindley on Partnership*, 11th edition, p. 140.

Title VII. The Stock Exchange.

By Wyndham A Bewes, LL.B., Barrister-at-Law.

I. Introduction.

History. The business of share-broking may be considered as having begun subsequent to the incorporation of the Bank of England by Royal Charter in 1694.

The nucleus present Stock Exchange building was opened in March, 1802, with a membership of about five hundred subscribers, who paid an annual sum of £10 each. Previous to this, business had been transacted in the Rotunda of the Bank of England and in the Stock Exchange Coffee House in Threadneedle Street, and earlier still, in a coffee-house on the same site, known as Jonathan's, which was burnt down in 1748 and then rebuilt. The rules were first codified and printed in 1812. The early history of the institution and its constitution and practice will be found detailed by Mr. Levien, then Secretary to the Committee for General Purposes, in his evidence given before the Royal Commission on the Stock Exchange in 1877¹). The proprietary interest, regulated by deeds of 1802 and 1876, is represented by the managers, who control the building and its administration and fix annually the charge for members' subscription. It was partly to induce greater community of interest that, in 1904, a rule was made obliging new members to become shareholders. The proprietary company is divided into 20 000 shares unlimited in liability and with £12 per share paid. Only members of the Stock Exchange are allowed to hold these shares, except in the case of those proprietors who acquired their shares before 31 Dec. 1875, whose executors or legatees may hold shares, though not members. Otherwise, on a holder ceasing to be a member, or in case of his death, bankruptcy or lunacy, his shares must be transferred to a member within twelve months of such an event.

Committee for General Purposes. The Stock Exchange is governed by an annual Committee, elected by ballot, and very much on the lines of a well-managed club, with strict powers of discipline, including suspension and expulsion, of regulating the course of business, of settling disputed claims, etc. Disputes are, in the first place, dealt with by the Committee, but those not affecting the general interests of the Stock Exchange are referred to arbitration (r. 71); no legal proceedings are allowed without the consent of the Committee (r. 72), and in the case of a default, of the creditors of the defaulter (r. 176).

Instances of the ruling of the Committee have come before the Courts. In one case where a selling broker innocently delivered on a forged transfer, he was condemned to replace the stock, and the outside broker, who had given the instructions to sell, was held liable in an action to indemnify him²), the ruling of the Committee being reasonable and fixing the liability. Provision is made for investigating complaints by non-members, and for arbitration where such proceeding appears suitable (r. 73). No application to annul a bargain is entertained unless upon a specific allegation of fraud or misrepresentation or material mistake (r. 70). In the absence of an allegation of bad faith against a seller, the Committee does not entertain any dispute as to title arising after registration of securities "until the legal issue has been decided" (r. 112).

General Rules. It is prescribed that all bargains must be fulfilled according to the rules, regulations, and usages of the Stock Exchange (r. 69), that no member shall advertise (r. 74), that contract notes of dealings with non-members shall so state, though brokerage may not be received from both buyer and seller (r. 82), that no speculative business shall be done for an outside official or clerk without the knowledge of the employer (r. 76), and none at all for a member's clerk (r. 78), nor for an individual member of a firm if such bargain is wilfully concealed from the firm (r. 77), nor for a defaulting outside principal (r. 79), nor with a defaulting member before re-admission, nor for his benefit without certain consents (r. 177), nor in prospective dividends (r. 87).

¹) Blue Book, C. 2157.

²) *Reynolds v. Smith* (1893), 9 T. L. R. 494, H. L. *Union Corporation v. Charrington* (1902) 8 Com. Cas. 99; *Benjamin v. Barnett* (1903), *ib.* p. 244.

Membership. Members may be elected at any time. All members are re-elected by the Committee on the first Monday in March in each year, and for one year only from the 25th of that month (r. 21).

Members are either brokers or jobbers (otherwise dealers), but may not carry on business in both capacities at the same time (r. 80). When first elected, and at each re-election, they are required to state their intentions in this respect (r. 22).

II. Transactions on the Exchange.

Jobbers or Dealers. A jobber or dealer acts as a principal, and generally in special securities. Dealing with foreign countries is called "arbitrage". Dealers in American or Canadian securities calculated in dollars treat the dollar as four shillings by universal custom in the Stock Exchange internal transactions, but for "arbitrage" the exchange, insurance, interest while the securities are in transit, postage, etc., has to be calculated¹). The jobber's business consists in buying and selling at prices named by him to the broker, he being willing to do either in a reasonable amount and in a marketable security, without knowing whether the broker wishes to sell or to buy. The difference between these two prices is called the "market turn".

Runners. As a rule these intermediaries are remunerated by the broker to whom they introduce clients, by a proportion of the profits made by the broker in respect of the business of such clients. They are usually answerable for the same proportion of the losses. This relationship does not constitute a partnership and is not within the Statute of Frauds²). In the absence of a special agreement, they are not entitled to share in the profits on continuations³).

The Account. All except special bargains and those done after twelve o'clock on contango days are done for the current account (r. 91), which terminates in an Account-day, formerly known also as Pay-day or Settling-day. There is approximately one fortnight's interval between successive Account-days, making twenty-four in each year, and this period is often called an "Account". The consols account is monthly (r. 89).

Continuation. In ordinary times a large proportion of transactions are speculative in the sense that the buyers of securities (known then as "bulls") do not wish to pay for them, and the sellers (known then as "bears") do not wish to deliver them. To accommodate these respective operators and some others a day called "Contango" day, the third day before the Account-day (in the case of most mining securities, the fourth day), is devoted in its morning to arranging their interests. A bull desiring to "continue", or "give on", his speculation sells for the current account to a dealer who desires the converse and buys back from him at the same time the same stock for the ensuing account, giving him interest, called a "Rate", or "Contango", for the accommodation. The bear reverses this operation and is said to "take in" the securities, and to receive a "Rate" or "Contango". These transactions are bargains and not loans, and are effected at the making-up price, or at the then existing market price (r. 98).

The bears who are "uneven", on the other hand, must either deliver what they have sold and cannot "take in", or borrow it from a holder, undertaking to replace it on the Account-day following the current account. If bears are numerous, they may be charged what is known as a "backwardation", or "back", for the accommodation. If no rate is paid the stock is said to be carried over "even".

Differences. It is obvious that where stocks are thus continued the prices of the continuation bargains will probably differ from those at which the original bargains are done. This difference in price, if it is a depreciation and shows a loss to the "bull", must be paid by him at the first Account-day, but the rate will not be payable until the following Account-day, when, if he has not sold the stock, he pays for it or "continues" it again for another account in the same way as before. The bear who takes in the stock will himself have to pay the difference if the price has appreciated between the bargain price and the making-up price.

Make-up price. It should be mentioned that where securities are "made up", or "cleared", in the Settlement Department they are all arranged at the official

¹) Arbitrage is regulated by r. 86.

²) 29 Car. II. c. 3, *Sutton v. Grey* [1894] 1 Q.B. 285.

³) *Tayson v. Baer Ellissen* (1912) Financial News, Jan. 17th.

making-up price. When the Settlement Department undertakes the arranging of the account in any stock, as it does in all important ones, it acts as a clearing house for all members who subscribe to it, and by arranging the buyers against the sellers, determines what the seller of so much stock shall deliver to a particular buyer. The intermediaries then all settle their accounts with each other according as the price they dealt at exceeded or fell short of the making-up price, settling only in balances, while the actual stock passes at the price of the last bargain done, the ultimate buyer paying or receiving the balance to or from his immediate seller, while the making-up price is of course paid to the ultimate seller. The making-up price does not apply to Government securities nor to those deliverable by deed but which are not arranged by the Settlement Department, in which cases the bargains are arranged at the price paid by the last purchaser, and this appears by the ticket passed by him to his immediate seller and is paid by him to the ultimate seller.

Transfer¹⁾. Transfers of registered shares and stock are always by deed when bought and sold on the Stock Exchange, although most companies do not require this formality, a written transfer only being required by companies which adopt Table A of the Companies Consolidation Act and similar articles. Certain companies by their constitution require transfers to be by special form, and certain notices to be given, and otherwise restrict the free power of transfer, and where this is so the requirements must be observed²⁾ unless they are waived by the company³⁾. The buyer of Bank of England Stock may require at the seller's expense as many transfers as there are even thousand pounds stock in the sum dealt in (r. 110). The stamps and fees on all transfers are payable by the buyer (r. 120). An exception to this is in the case of small amounts of stock and cash sales when a dealer on buying stipulates for transfer into his name free of stamp duty. Bargains in Exchequer bonds and in Stock certificates are for securities not filled up to order (r. 111). The member selling securities is responsible for their genuineness, and in the case of registered securities, for dividends received within a reasonable time by the holder (rr. 112, 125, 126).

Bearer securities are dealt in at a price which includes accrued interest, except in the case of Indian Railway debentures and certain other securities (r. 129).

Bearer securities which are not carried over on Contango-day must be delivered and accepted on Account-day. The coupons must be delivered with the bearer bonds⁴⁾.

Buying-in. Securities which are not known to be out of the control of the seller for payment of calls or receipt of interest, dividends, or bonus, may be bought in against him by the officials of the Buying-in and Selling-out Department if not delivered in the time appointed by the rules (rr. 134—140). This time, in the case of securities deliverable by deed, is the eleventh day from the Ticket-day, except where companies prepare their own transfers, when the time is calculated from the earliest date on which a transfer can be procured (r. 138). If the issuer of the ticket allows thirteen clear days to pass without buying-in, the intermediaries are in general released from liability, but not the ultimate buying and selling members (r. 139). If buying-in of any security is suspended by the committee, the liability of intermediaries continues, unless otherwise determined by the committee (r. 135).

Delivery of securities. On Account-day, and the days following, the delivery of securities begins at ten o'clock (r. 93) and stops at half-past two (twelve on Saturdays) (rr. 123, 133). No buyer of securities transferable by deed need pay unless a transfer deed is either accompanied by a certificate or is a "certified transfer", i. e. bearing an official certification by the company's officer that the certificate is at the office of the company (r. 121). Another method is for the certification to be made by the Secretary of the Share and Loan Department, who forwards the certificate itself to the company (r. 121). This is very largely done, especially when companies, such as most English railways, refuse to certify.

¹⁾ The rules for the transfer of Government and Corporation inscribed or registered stocks are 107—111, of registered company securities, 102—124, of bearer securities, 125—133.

²⁾ *Bargate v. Shortridge* (1855), 5 H. L. C. p. 312.

³⁾ *Murray v. Bush* (1873), L. R. 6 H. L. 37; *Ex p. Walton* (1857), 26 L. J. Ch. 545.

⁴⁾ r. 130. Some foreign Government bonds have a "talon" attached which enables the holder to obtain a fresh series of coupons. This should be delivered with the bond.

Payment. Cheques must be crossed and drawn to bearer, except cheques for dividends, which may be to order, and they must be drawn on a clearing bank (r. 94). A member by giving proper notice may demand payment in bank-notes for securities sold, but not for differences (r. 94). Members cannot be obliged to pay or receive payment from non-members when the bargains have been done with members (r. 95), so that brokers cannot refer to their principals for the completion of bargains.

Government and Corporation stock. Government and Corporation inscribed and registered securities are transferred on the books of the banks that have the remunerated duty of keeping the registers. They are not in general transferable by deed and registration, but by executing transfers in the registers kept at the respective banks, the chief of which are the Bank of England, and the London County and Westminster.

Power of attorney. When, as often happens, the transferor is not able to attend to transfer in person, it is necessary for him to transfer by his attorney, who is usually a stockbroker or banker. A form of application for a power of attorney supplied by the bank has to be filled in with particulars and signed by the applicant, and lodged by hand, upon which the power of attorney¹⁾ is prepared by the bank and retained. The transferee of stock at the Bank of England may, if he pleases, sign his acceptance of the transfer in the books, but this is not usual, and his omission to do so will not aid the transferor in disputing his title²⁾. The transfer of stock on the books of the Bank of England is complete without attestation and without acceptance³⁾, and the transferor cannot impeach the transfer and bring an action for dividends on the ground of non-acceptance by the transferee²⁾. The title of the stockholder is the entry in the bank books. The broker is entitled to a fee on a transfer for nominal consideration, and to a brokerage where stock is sold in the market. The transfer charges, payable in the first instance by the seller in respect of Bank of England stock, are nine shillings for transferring stock not above £25, and twelve shillings if above that amount. In transfers of less than £500 these charges are paid by the purchaser when the transferor is a jobber.

Stock certificates. "Floaters". A holder of certain Government and other stocks at the Bank of England will be given a bearer stock certificate representing the amount of his stock with a blank left open for the name if he so desires; and thereupon his name is erased as stockholder. These stock certificates have coupons for the dividends payable during the succeeding five years, and while the blanks are unfilled are transferable by delivery. Stock certificates are issued to "bearer", but holders of English Government Funds, and of Metropolitan, London County, New Zealand, New South Wales, Queensland and Transvaal Stocks can insert a name, and so make the certificate "nominal", in which case it cannot be re-inscribed in any name other than that so inserted. "Nominal" stock certificates, if duly endorsed, may be exchanged for "bearer" certificates on payment of a fee of 1s. per certificate. Certificates may be exchanged for either larger, or smaller, denominations, on payment at the rate of 1s. per certificate surrendered.

Dividends and Rights. Government and Corporation inscribed or registered securities are quoted ex-dividend on the day after the books are closed for ascertaining the holders entitled to be paid the coming dividend. In most cases this happens a month before the payment. Securities transferable by deed, except mining securities and registered debentures, are quoted ex-dividend on the Account-day following the closing of the books, or following the declaration of the dividend, if it is payable to the holders then registered. Mining securities are quoted ex-dividend on the Account-day following its payment, bearer securities and registered debentures on the day of its payment, except bearer securities with coupons payable only abroad, and American shares (r. 101). Dividends are accounted for less income tax (r. 102). When they are payable on bearer securities after the Account-day, the current coupon must be delivered or the full face value accounted for, and in

¹⁾ Powers of attorney, enabling named persons to act for stockholders, may be obtained at the Power of Attorney Office, Bank of England, on the necessary instructions being lodged by hand. Applications made through the post are not attended to. Powers for sale and transfer, or for sale, transfer and dividends cost 11s. 6d. Powers for sale of English Government Stock where the nominal amount does not exceed £100 cost 4s.

²⁾ *Foster v. Bank of England* (1846), 8 Q. B. 689.

³⁾ *Gade's Case* (1796), 2 Leach, p. 747.

the case of dividends payable abroad at a price fixed by the Secretary of the Share and Loan Department (r. 130).

The seller of registered securities is responsible for dividends until a reasonable time has elapsed for registration (r. 112), and at law for an indefinite time, as the seller is trustee for the buyer of benefits received in right of the securities sold. Members are forbidden to deal in prospective dividends (r. 87), but a broker who carries out such a contract is entitled to be indemnified by his client¹). Interest is not included in the price in the case of British and Colonial Treasury and Exchequer Bonds or Bills, Rupee Paper, some Indian Railway Debentures and certain securities of a like character, the accrued interest being added to the price paid by the purchaser (r. 129). A bull of "continued" stock is entitled to the dividend²).

When shares are sold the purchaser takes them with all rights then or afterwards attaching to them, and so on a fresh issue of shares to the members of a company in right of their holding, the seller, whose name is still on the register, cannot retain the new shares for himself³). He is trustee of them for the buyer of the original shares and must transfer them on being paid his outlay. He is under no obligation to apply according to the practice of the Stock Exchange unless the purchaser provides the money necessary.

Options. There are three kinds, viz. "put", "call", "put and call", or double option. A "call" is negotiated when A contracts to pay B money for the right to buy from him a named security at a given date at a named price. A "put" is negotiated when A contracts to pay B money for the right to sell him a named security at a given date at a named price. A "put and call", or double option (called in the United States a "straddle"), gives the payer of the option money the right either to sell or buy the named security at a given date at a named price. The money is generally double that charged for a single option. The consideration money is called "option money", and is paid on the Account-day following the declaration of the option.

Declaring. The time for a giver for the "put" to declare whether he sells the security and for a giver for the "call" to declare whether he buys the security is fixed by rule 100. The giver of money for the double option must declare whether he buys or sells by the time appointed, but in single options this is not necessary unless the price of the stock happens to be the same as that fixed as the option price, *i. e.* showing neither profit nor loss. In all other cases options are said to "declare themselves" without any communications between the parties.

Rights. The person whose eventual right it is to receive the securities, *i. e.* who has given for the call, is entitled to all rights attaching to the securities during the currency of the option, unless the option was originally arranged at a price *ex-rights*. It may happen that during the currency of an option the security may be quoted "*ex-rights*", and on this happening an official price will be fixed for the rights on application to the Secretary of the Share and Loan Department, and this will settle the value of the rights as between the option dealers unless the actual rights have been applied for in specie by notice in writing on or before the day the securities are quoted "*ex-rights*" (r. 106).

Special Settlements. When no time is specified, bargains in new securities are for special settlement (r. 91). If no special settlement is granted the bargains cannot be enforced. Any interested person may apply to the Committee to grant a special settlement on complying with the rules, but it is usually done by the broker to the company or the issuing company. There is no implied condition that the special settlement should be in a reasonable time, and clients as well as brokers are bound on the special settlement taking place⁴). Bargains in *vendors' securities*, issued as fully or partly paid, will not be settled until six months after the day fixed for settling the bargains in shares issued to the public, and the quotation of these securities will be similarly deferred (r. 152).

Fraud, etc. Obtaining a special settlement by fraud does not affect the bargains of those who are not parties to this fraud, nor does the fact that the company was initiated in fraud⁵). The Committee of the Stock Exchange in considering an appli-

¹) *Marten v. Gibbon* (1876), 33 L. T. 561, C. A.

²) Cf. *Re Morgan* (1861), 2 De G. F. & J. 634.

³) *Stewart v. Lupton* (1874), 22 W. R. 855; see r. 94.

⁴) *Consolidated Goldfields &c. v. Spiegel* (1909) 25 T. L. R. 275.

⁵) *In re Ward* (1882), 20 Ch. D. 356, C. A.

cation for a settlement is not acting in a judicial capacity, and therefore the fact that one of the members is interested in obtaining the settlement does not invalidate the decision¹⁾. Persons who combine to make false statements to the Committee with a view to obtain a special settlement and thereby to defraud purchasers are criminally liable²⁾.

Official quotation. Quotation in the official list may be granted for any security of sufficient magnitude and importance. All information required by the Committee must be given by a broker authorized for this purpose (r. 139). No quotation will be granted to securities on which *when fully paid* the company may claim a lien under their articles. (Appendix, 36 B.)

Official List. An official list of securities, formerly known as Wettenhall's list, is published every evening with the closing prices, giving also the rate of the last dividend paid, and the date when a security was last ex. div. The buying and selling prices quoted by jobbers is given, within which business is generally practicable, and the prices at which business has actually been done are recorded.

Stamps. For the purpose of the Finance Acts the expression "marketable security" means a security of such a description as to be capable of being sold in any stock market in the United Kingdom³⁾, and by the Stamp Act, 1891, certain duties were imposed on the transfer, assignment, disposition, or assignation. By the Finance Act, 1899⁴⁾, all foreign marketable securities transferable by delivery are subjected to duty on being first dealt in within the United Kingdom⁵⁾. The Finance Act, 1910, s. 77, has greatly altered the scale of duties on Stock Exchange contracts. By s. 78 the obligation to issue a contract note is made more stringent and extended to brokers who act as principals, and by s. 79 the stamp duties are extended to options, one half duty being charged on the opening of the option and one half on the closing contract (if any), the broker certifying on the face of the contract note that a duly stamped contract has been rendered on the date mentioned in the certificate. Letters of allotment and renunciation for the nominal value of under £5 must bear a separate one shilling stamp, which must be impressed in the former case, but in the latter may be adhesive and must then be cancelled by the person executing it⁶⁾. Where parties contract outside the Stock Exchange as principals, and reduce the contract to writing, an agreement stamp is necessary⁷⁾.

III. Broker and Client.

Broker's duty. It must be remembered that a broker is an agent and in most respects is subject to the general law of agency, except as varied by the Rules, Regulations and Customs of the Stock Exchange. A broker must act for his client at least as carefully and efficiently as if he were conducting his own business, but he does not undertake to execute the commission absolutely and at all events⁸⁾. Moneys remitted to him or securities confided to him are held by him on an express trust, and he is therefore accountable notwithstanding the Statute of Limitations⁹⁾.

It is the duty of a broker to effect a valid bargain on the Stock Exchange¹⁰⁾, and doubtless, in the case of shares better dealt in locally, on a country Exchange. He must strictly carry out his instructions in accordance with the practice of the Stock Exchange. Thus, a broker employed to buy shares has been held justified in buying allotment letters, there being no shares at the time in existence¹¹⁾, and in another case in buying railway scrip which was dealt in on the market as genuine, though in fact it was not¹²⁾.

¹⁾ *In re Ward* (1882), 20 Ch. D. 356, C. A.

²⁾ *R. v. Aspinall* (1876), 2 Q. B. D. 48.

³⁾ Stamp Act, 1891, 54 & 55 Vict. c. 39, s. 122; Finance Act, 1899, 62 & 63 Vict. c. 9, s. 6.

⁴⁾ 62 & 63 Vict. c. 9, ss. 4—6.

⁵⁾ See *Revelstoke v. Commissioners* [1898] A. C. 565.

⁶⁾ 10 Edw. VII. c. 8.

⁷⁾ *Knight v. Barber* (1846), 16 M. & W. 66.

⁸⁾ *Fletcher v. Marshall* (1846), 15 M. & W. 755.

⁹⁾ *North American, etc. v. Watkins*, [1904] 2 Ch. 233, C. A.

¹⁰⁾ See *Neilson v. James* (1882), 9 Q. B. D. at p. 552; *Mitchell v. Glasgow Bank* (1879), 4 App. Cas. 624. The contract with the jobber is complete, and not inchoate so as to be really made on the name day.

¹¹⁾ *Mitchell v. Newhall* (1846), 15 M. & W. 308; *Tempest v. Kilner* (1846), 3 C. B. 249.

¹²⁾ *Lamert v. Heath* (1846), 15 L. J. Ex. 297.

Broker selling on credit. A broker employed to sell stock may only do so in the usual manner, and therefore he is not justified in selling on credit, *e. g.* by taking a bill in payment, when it is usual to sell for cash¹⁾.

Dealing with non-member. If he deals with a non-member, it would be wise to obtain his client's previous consent. The rules permit dealing with a non-member if he can so deal to greater advantage for his principal than with a member, the contract notes stating that the bargain has been done between non-members (r. 82). The liability of a broker who deals with non-members is governed by the general law of principal and agent, and it is doubtful whether the new rules bind the client to a bargain done with a non-member, unless he assents expressly or by conduct; and apart from the rules, where a broker deals for both parties to the contract he cannot obtain commission from either, "unless his double employment was known and assented to by both"²⁾. And he must not only return to A the commission he has received from him, but he is a debtor to A for the commission he has received from B, his other principal, and *vice versa*³⁾.

Authority. A broker on the Stock Exchange has authority, which arises from his employment, both to make and take payments on behalf of his principals, and this power arises also from rules 69 and 95, under which a broker is personally responsible to the jobber with whom he deals⁴⁾, and the right to indemnity which results. His resulting right to indemnity from his client extends not only to loss, but also to liability⁵⁾. A broker who is given possession of all the indicia of property by the owner with the intent that he should deal with it can give a good title either by mortgage or sale to an innocent purchaser⁶⁾.

Ambiguity in order. Where an ambiguous order is given, it is the wisest course to communicate with the client, so that the ambiguity may be removed; but if the order may fairly bear two interpretations, and the agent *bona fide* adopts one of them, the principal is liable on the contract so interpreted⁷⁾.

Special orders. In the absence of special instructions an order to buy or sell at a limited price ceases with the current account⁸⁾. And an order without any direction to "retain it" if impracticable, does not extend beyond the day on which it is received, unless perhaps when it is received too late to deal, through the House being closed and the jobbers having ceased business for the day.

Commission or brokerage. A broker is entitled to a reasonable commission or brokerage as remuneration for his services⁹⁾. When a broker is prevented by the winding-up of a company (his principal) from earning his agreed commission, he can prove against the assets¹⁰⁾.

Where commission is divided with an introducing firm (*e. g.* a bank or a remisier), the contract note should so state. It is not sufficient to render accounts to clients "net", meaning that a charge for commission is included, unless this is explained so to mean. But a broker who has honestly charged his client a commission by making a "net" contract, without explaining that this included his commission, is still entitled to his proper charges as a *quantum meruit*¹¹⁾.

Contract notes. The contract notes issued to clients are simple and very much matters of common form, except that the older fashioned brokers state the names of the jobbers with whom they deal. They must now contain the words, "Member(s) of the Stock Exchange, London", immediately after the signature, and where a contract is effected with a non-member the contract note must explicitly so state (rr. 82, 83). The note advising a "continuation" should, if necessary, notify the client that the firm considers itself at liberty to employ its own capital and continue the

¹⁾ *Wiltshire v. Sims* (1808), 1 Camp. 258; *Campbell v. Hassell* (1816), 1 Stark. 233.

²⁾ Story on Agency, § 334, n.

³⁾ *Andrews v. Ramsay & Co.*, [1903] 2 K. B. 635. *Mc Devitt v. Connolly* (1885) 15 L. R. Ir. 500.

⁴⁾ *Pearson v. Scott* (1878), 9 Ch. D. 198.

⁵⁾ *Lacey v. Hill* (1874), L. R. 18 Eq. 182.

⁶⁾ *Rimmer v. Webster*, [1902] 2 Ch. 163.

⁷⁾ *Ireland v. Livingstone* (1871), L. R. 5 H. L. p. 416. Cf. *Loring v. Davis* (1886), 32 Ch. D. p. 631; *Mills v. Hazlehurst & Co.* (1907), 23 T. L. R. 142. *Tallentire v. Ayre* (1884), 1 T. L. R. 143, C. A.

⁸⁾ *Lawford v. Harris* (1896), 12 T. L. R. 275.

⁹⁾ Cf. *Stubbs v. Slater*, [1910] 1 Ch. 195; *Manson v. Baillie* (1855), 2 H. L. C. 80.

¹⁰⁾ *Inchbald v. Western Neilgherry, etc.* (1864) 17 C. B. (N. S.) 733.

¹¹⁾ *Stubbs v. Slater*, [1910] 1 Ch. 195, C. A.

stock in its own name. This of course makes the brokers principals for that account. The contract notes are evidence against the parties charged therein¹⁾. Where a mistake is made in them, it can afterwards be rectified, although the mistake may have made one of the parties alter his position by accounting to his principals to his disadvantage²⁾.

Lumping. A broker is entitled to execute several orders in one bargain provided that this does not affect the price to the detriment of his clients³⁾. Where, however, a broker lumps together at an average price bargains done with different jobbers at different prices and for different clients, he does not make an enforceable contract⁴⁾.

Payment. Notice of title. When a broker has reason to know that stock sold does not belong to the person who gave the order to sell, *e.g.* by express notice, or even perhaps by the names of the transferors being different⁵⁾, he must be careful to pay the agent in such a manner as to facilitate and encourage the agent to pay it to his principal, and he is not entitled to treat the money merely as a matter of account between himself and the agent. If there is such a custom on the Stock Exchange, it is unreasonable and not binding on the principal⁶⁾. The mere fact that an order to sell has been given by one of several holders or by the solicitor to the holders does not justify payment to the person giving the order, in the absence of further authority, actual or implied from the circumstances⁷⁾. Where a London broker receiving an order to sell through a country broker has sold under a power of attorney by the (foreign) principal to himself, there is clear privity of contract under this power and payment in account with the country broker is no discharge⁸⁾. Payment by a cheque to the seller's agent is good on the cheque being honoured⁹⁾, but not otherwise¹⁰⁾.

Time, the essence of the contract. The contract for purchase or sale is for delivery on the Account-day for which the bargain is done or within a reasonable time afterwards, and if the time elapses before delivery the buyer can promptly demand back the money which he may have paid to his broker¹¹⁾. The times are now fixed by rr. 134—141. If the securities are delivered to the broker in time, this is sufficient to bind the principal, but if out of time the principal cannot be made liable in an action by his broker for indemnity, although the broker has himself been compelled to accept delivery and to pay under a resolution of the Stock Exchange Committee¹²⁾, unless the client knew of and assented to bear this additional liability. But if a buying broker accepts and pays for shares a little, say four days, after time, and his client accepts and pays him, the latter is bound to indemnify the transferor against calls¹³⁾. The rule as to unreasonable delay does not apply as between members of the Stock Exchange, unless advantage is taken of the power to sell out or buy in through the official broker, as the rule "once a bargain always a bargain" is strictly adhered to; so where a broker cannot get delivery in time he should always apprise his client promptly, acquaint him with his rights, and take his instructions, otherwise he may find himself burdened with securities which he cannot compel his client to pay for. It was held in *Scott v. Ernest*¹⁴⁾, that the rules as to buying in and selling out do not apply except as between members. By rule No. 139 intermediate buyers are released from their obligations, and the ultimate buyer who issues the ticket is alone responsible for payment of the purchase-money, if thirteen clear days have been allowed to elapse from the delivery of the ticket without attempting to buy in.

¹⁾ *Goom v. Aflalo* (1826), 6 B. & C. 117; *Parton v. Crofts* (1864), 10 C. B. N. S. 11.

²⁾ *Dails v. Lloyd* (1848), 12 Q. B. 531; cf. *Shaw v. Picton* (1825), 4 B. & C. 715.

³⁾ *Scott v. Godfrey* [1901] 2 K. B. 726; following *Levitt v. Hamblet* [1901] 2 K. B. 58. See *Consolidated Goldfields v. Spiegel* (1909) 25 T. L. R. 275.

⁴⁾ *Maffett v. Stewart* (1887) 14 R. 506.

⁵⁾ Consider *France v. Clark*, (1884) 26 Ch. D. 257, C. A.; *Anderson v. Sutherland* (1897) 2 Com. Cas. 65; *Cooke v. Eshelby* (1887) 12 App. Cas. 271.

⁶⁾ *Pearson v. Scott* (1878), 9 Ch. D. 198, per Fry, J.; dist. *Bridges v. Garrett* (1870), L. R. 5 C. P. 451.

⁷⁾ *Ibid.*

⁸⁾ *Crossley v. Magniac*, [1893] 1 Ch. 594.

⁹⁾ *Bridges v. Garrett, u.s.*, followed in *Walker v. Barker* (1900), 16 T. L. R. 393; *McC. Devitt v. Connolly* (1885), 15 L. R. Ir. 500.

¹⁰⁾ *Papè v. Westacott*, [1894] 1 Q. B. 272, C. A.

¹¹⁾ *Fletcher v. Marshall* (1846), 15 M. & W. 755.

¹²⁾ *Benjamin v. Barnett* (1903), 8 Com. Cas. 244; *Westropp v. Solomon* (1849), 8 C. B. 345.

¹³⁾ *Fenwick v. Buck* (1871), 24 L. T. 274; following *Hodgkinson v. Kelly* (1868), L. R. 6 Eq. 496.

¹⁴⁾ (1900) 16 T. L. R. 498.

Continuation¹. A broker who is not supplied with purchase-money by his client is not entitled to carry over the stock without authorisation. If he does so the original contract is as regards the client at an end, and he is under no further liability, nor may the broker pass the client's name as purchaser of the carried-over securities on a future Ticket-day. His remedy is to promptly sell. The dealer who originally bought the shares from the client, and re-sold to the client on continuation, is liable to the seller as having passed a bad name²). In the absence of agreement, actual or implied from past dealings or otherwise, a broker is under no obligation to arrange for the continuation of his client's stock, nor even to sell stock that he has bought, or buy back what he has sold³). If he does not intend to "continue" stock open for a client, according to the expectation of the latter, he should give him notice⁴).

Where a client who is running a speculative account fails to pay his differences his broker may at once close the account by selling or buying as the case may be. He may not in any case without notice sell stock that has been paid for in order to pay losses on other accounts⁵). If the broker endeavours unsuccessfully to carry over the whole of his client's securities, he is justified in carrying over such as he can, and in selling the others, if it is clear that his client cannot or will not pay for them, as this is an anticipatory breach, and there is no obligation on a broker himself to take up and pay for his client's purchases⁶).

A broker is entitled to be paid by his principal in cash, but payment by a cheque which is duly honoured is of course usual, proper, and convenient. A dishonoured cheque is no payment⁷). Cheques should be drawn on clearing banks, if possible, and those marked T will be in time if delivered on the morning of Account-day, but those on the metropolitan banks, and marked M, should arrive during banking hours the day before, and those on country banks, and marked C, three days before.

Selling on default. If, therefore, the client does not provide purchase-money in time to pay on delivery of stock, the broker is entitled to sell sufficient of it to meet that liability⁸). An attempt has been made⁹) to prove a custom that the client need not pay until the security is delivered to him personally by the broker, but this would be unreasonable, as it might mean the broker being out of pocket for some days in a large and perhaps to him an impossible sum¹⁰). The insolvency of the client which justifies the broker in closing his account is that state of insolvency which prevents or will prevent payment in full at the time¹¹). And it has often been held that mere non-payment justifies the closing, whether the client can or cannot pay. In *Scrimgeour's claim*¹²), Mellish, L.J., said the "rules are that when a broker, making a contract in his own name, has made for his principal a contract by way of speculation whether certain stocks will, during the next fortnight, rise or fall and the principal dies or becomes bankrupt, or falls into such a state of insolvency that it is manifest the brokers cannot depend on him to protect them against any loss that may occur, then the brokers may at once¹³) terminate the transaction, so as to make the profit or loss, whichever it is, depend upon the state of things on that

¹) The nature of the contract has been explained, *ante*, p. 313.

²) *Maxted v. Payne* (No. 1), (1869), L. R. 4 Ex. 81; *Maxted v. Morris* (1869), 21 L. T. 535, Ex. Ch.

³) *Thacker v. Hardy* (1878), 4 Q. B. D., at p. 691.

⁴) *In re Hewett* (1893), 9 T. L. R. 166, C. A.

⁵) *Samuel v. Rowe* (1892), 8 T. L. R. 488.

⁶) *Cullum v. Hodges* (1901), 18 T. L. R. 6, C. A. Cf. *Dorriens v. Hutchinson* (1804), 1 Smith, 420.

⁷) *Everett v. Collins* (1810), 2 Camp. 515.

⁸) In *Stubbs v. Slater*, [1910] 1 Ch. 632, C. A., the point was taken that an excessive amount of security had been sold to pay differences.

⁹) See judgment in *Mc. Devitt v. Connolly* (1885), 15 L. R. Ir. 500; *Field v. Lelean* (1861), 30 L. J. Ex. 168; *Spartali v. Benecke* (1850), 10 C. B. 212.

¹⁰) *Stock and Share, etc. v. Galmoye* (1887), 3 T. L. R. 808; *Macoun v. Erskine*, [1901] 2 K. B. at p. 501, C. A.

¹¹) *Crowley's claim* (1874), L. R. 18 Eq. 182.

¹²) (1873) L. R. 8 Ch. 921.

¹³) There is no rule of law or practice that they should wait till the carry-over day. *Morten v. Hilton* (1908), *Financial News or Times*, July 3; cf. *Fletcher v. Marshall* (1846), 15 M. & W. 755, where an immediate sale was good on repudiation; and *Anderson v. Beard* [1900] 2 Q. B. 261; *Davis v. Howard* (1890), 24 Q. B. D. 691; *Druce v. Levy* (1891), 7 T. L. R. 259.

day and not to run the risk of any further fall in the market". This applies both where the broker is "carrying" the stock himself and where it is carried in the market.

Upon the death of a client who has a speculative account open, the broker should close at once, and if he still continues the account he cannot claim any differences beyond those shown at the next Account-day¹⁾.

Brokers are entitled to charge a defaulting client or his estate not only the amount due at the time of the default, but the increased amount which may be caused by a subsequent fall in value before the client's securities can be sold²⁾. Although it would be better for the broker of a defaulting client to close his account by an out-and-out sale, it would not always be improper to sell as against the client and buy on his own account, provided it could be shown that the client got the full price and so was not damnified³⁾, but if by such an operation the broker obtained the advantage of the market turn, he must account for this to his client⁴⁾. In a case in which there was no market for shares, which the broker had already paid for, a similar operation was upheld⁵⁾. In the case of unmarketable securities no better plan can be suggested, as a forced sale would produce a very bad price for the client, and at the same time increase his debt to the broker. A broker who wrongfully closes his client's account is liable in damages⁶⁾.

Broker's lien. A broker has a general lien on securities and funds in his hands as between himself and the customer, for the balance due from the customer to the broker, and, in the case of negotiable securities, even on the property of others, if the broker had no sufficient reason to know of the ownership⁷⁾. The mere fact that a specific charge has been made on certain securities and paid off, does not prevent the operation of the general lien⁸⁾, and the proceeds of a security specifically charged may be applied to reduce the general indebtedness⁹⁾. It is, however, only a lien on the interest of the clients, so that a prior equitable interest will take precedence⁹⁾. It should be remembered, however, that the right of detention or of keeping a client's securities until he pays his debts to the broker who insists on the lien does not allow the broker to sell¹⁰⁾ and pay himself without legal proceedings, except perhaps as regards unpaid purchase-money on the specific securities retained, a point which is doubtful. As regards the general balance of indebtedness, unless he has authority to sell, or the securities are specifically charged, he must rely on his right of action against the client and the enforcement of the judgment debt. A security received for a special purpose, *e.g.* for sale, is free from the general lien¹¹⁾. A selling broker who sells stock or shares to repay himself a charge which he has upon them, is responsible for delivering valid securities¹²⁾.

Purchasing broker should pass a "good" name. It is the duty of a broker to pass a "good name" as the buyer of shares purchased by him for a client or in default to pass his own¹³⁾. He has the right in the absence of instructions to pass his client's name¹⁴⁾. But a purchasing broker is entitled to be indemnified by his client for any liabilities he incurs through acting properly as his agent¹⁵⁾, and so if the purchaser

¹⁾ *Philips v. Jones* (1888), 4 T. L. R. 401; *In re Overweg* [1900] 1 Ch. 209.

²⁾ *Lacey v. Hill, Crowley's claim* (1874), L. R. 18 Eq. 183.

³⁾ *Macoun v. Erskine*, [1901] 2 K. B. 493, C. A. There is no custom for the broker to take over the stock, and if proved as a custom it would be unreasonable as against a customer not proved to be acquainted with it. *Hamilton v. Young* (1881), 7 L. R. Ir. 289.

⁴⁾ *Erskine v. Sachs*, [1901] 2 K. B. 504, C. A.

⁵⁾ *Walter v. King* (1897), 13 T. L. R. 270.

⁶⁾ *Michael v. Hart* [1902] 1 K. B. 482, C. A.; *Ellis v. Pond* [1898] 1 Q. B. 426, C. A.

⁷⁾ *Jones v. Peppercorne* (1858), 46 L. T. 430. *Hope & Co. v. Glendinning* [1911] A. C. 419.

⁸⁾ *London and Globe Finance Corp.*, [1902] 2 Ch. 416.

⁹⁾ *Peat v. Clayton*, [1906] 1 Ch. 659.

¹⁰⁾ *Cf. Thames Ironworks, etc., Co. v. Patent Derrick Co.* (1860), 29 L. J. Ch. 714.

¹¹⁾ *Symons v. Mulken* (1882), 46 L. T. 763.

¹²⁾ *Platt v. Rowe* (1909), 26 T. L. R. 49, a case of duplicated securities.

¹³⁾ *Street v. Morgan* (1869), 21 L. T. 432. This was an action by a seller through a London broker against a country broker. Special authority was held to be given to the latter's London broker to pass the country broker's name under the words "we authorize you to do whatever you think best".

¹⁴⁾ *Pender v. Fox* (1872), 20 W. R. 966.

¹⁵⁾ *Chapman v. Shepherd*, (1867), L. R. 2 C. P. 228; *Taylor v. Stray* (1857), 2 C. B. (N. S.) 175, C. A., purchase money paid after a winding-up had occurred.

has put forward the name of an infant transferee and the broker has to indemnify the transferor, he has a right over against his client¹). The name of a foreigner domiciled abroad and with no available property in this country can reasonably be refused²). The name of a lunatic is not a good name if he was known to be such by the other contractor at the time of the contract³). The name of an infant is also bad⁴). The jobber passing such a name is liable to the vendor as much as a broker; and where a broker acts for both buyer and seller he is as much liable as if acting for the buyer only⁵). An infant's contract to take shares is voidable on his attaining majority, though he must repudiate within a reasonable time or will be bound thereby⁶).

There are special companies, such as certain banks, which by their constitution forbid certain classes of persons being shareholders. Married women, or even unmarried women, and aliens are excluded. Certain private companies have also restrictive articles of association so as to keep the capital in the company in certain families.

Intermediate brokers. Difficulties often occur where intermediate brokers are employed to carry out Stock Exchange transactions, who, if they carry out genuine buying or selling orders themselves, generally employ brokers who are members of the London Stock Exchange to make the needful bargains with the dealers. The difficulty about privity of contract is obviated in most cases by the custom of the Stock Exchange under which the ultimate buyer and the ultimate seller contract with each other, regardless of any number of intermediaries⁷). The ultimate buying broker has to provide a good name, and in default must himself take up and pay for the stock, his London broker having implied authority to pass his name⁸). An agent not on the Stock Exchange, but intended to make a bargain on it, has the right to employ a broker on the Exchange, and to be indemnified against his liability to this sub-agent⁹).

Secret profit. No agent may make and retain a secret profit. So that when an account is rendered to a client at a "net" price, the contract note should explain that the commission is included, although if the commission is reasonable, the contract will not be upset in consequence of non-disclosure, as a broker is entitled to a reasonable commission¹⁰).

A sub-agent making an undisclosed profit is as much liable to account for this to the principal as the agent himself would be¹¹), and this because of the fiduciary relationship between the parties, and even though no privity of contract exists¹²). Of course, if an agent discloses fully to his principal that he is making a profit, which without disclosure he could not retain, or that he has a specified interest in the property, and the principal acquiesces, the position of the agent will be secure, but the disclosure must be full, and notice of *an* interest but not *the* interest is not sufficient¹³).

Agent dealing with client. An alleged custom for brokers to take over the securities of their clients at the price of the day when a sale in the Exchange would unduly depress the shares is unreasonable, and cannot be supported. This is so even when the brokers have made advances to the clients on the value of the shares or hold them as cover¹⁴) or for unpaid purchase-money.

Agent contracting as principal. Where a broker is employed as an agent and acts as a principal, disclosing, therefore, no privity of contract between the client and jobber, the whole transaction can be upset at the option of the client. The broker is in fact selling his own stock to his client, and so strict is the law on this point that

¹) *Peppercorn v. Clench* (1872), 26 L. T. 656.

²) *Allen v. Graves* (1870), L. R. 5 Q. B. 478; *Goldschmidt v. Jones* (1870), 22 L. T. 220.

³) *Imperial Loan Co. v. Stone*, [1892] 1 Q. B. 599.

⁴) *Nickalls v. Merry* (1875), L. R. 7 H. L. 530.

⁵) *Queensland Invest., etc. v. O'Connell* (1896), 12 T. L. R. 502.

⁶) *Mitchell's case* (1870), L. R. 9 Eq. 363.

⁷) *Nickalls v. Merry* (1875), L. R. 7 H. L. 530.

⁸) *Street v. Morgan* (1869), 21 L. T. 432.

⁹) *Hannan v. Beeton* (1889), 5 T. L. R. 703, a bargain on the New York Corn Market.

¹⁰) *Stubbs v. Slater* [1910] 1 Ch. 632, C. A.; *Johnson v. Kearley* [1908] 2 K. B. 514.

¹¹) *De Bussche v. Alt* (1878), 8 Ch. D. 286, C. A. and cases quoted in *Slater v. Stubbs* u. s.

¹²) *Lister v. Stubbs* (1890), 45 Ch. D. 1; *Powell v. Evan Jones*, [1905] 1 K. B. 11, C. A.

¹³) *Dunne v. English* (1874), L. R. 18 Eq. 524; *Wilson v. Short* (1847), 6 Hare, 366.

¹⁴) *Hamilton v. Young* (1881), 7 L. R. Ir. 289; *Erskine v. Sachs* [1901] 2 K. B. 504, C. A.; *Morrison v. Thompson* (1874) L. R. 9 Q. B. 480, C. A.

such transactions will be set aside even after some years have elapsed, and the client has suffered no loss¹). If the client is not in a position to restore the stock to the broker principal, he is then entitled to sue for damages²) without ripping up the contract, but these will be confined to what the actual loss was at the time when the client might reasonably have sold.

Indemnity. The broker who conforms to the rules, regulations, and customs of the Stock Exchange in carrying out a contract is entitled to be indemnified by his client in respect of all resulting liabilities³). Where a purchaser on the Leeds market neglected to keep his broker in funds, and the vendor therefore sold the shares and was paid the difference in price, the broker who paid was held entitled to sue as for money paid by request⁴). Conversely, where a seller neglected to supply his broker on the Liverpool Exchange with the sold shares, in consequence of which he had to pay a difference to the buying broker. When a man deals at a market in a particular place, he deals with reference to the custom of that place⁵). Blackburn, J., said, in *Duncan v. Hill*⁶), "It must be admitted that for any loss incurred by the agent by reason of his having entered into such contracts according to such rules, unless they be wholly unreasonable, and where the loss is without any personal default of his own, he is entitled to be indemnified by his principal upon an implied contract to that effect". The making of the contract on the Stock Exchange is the time at which the liability of the client to his broker, who has to pay for securities bought, is fixed⁷).

The printed Rules and Regulations of the Stock Exchange bind the client, although unwritten customs may not, and so a client may have to pay for such portion of a purchase as is delivered in time, although he may not be liable to indemnify his broker for the portion delivered out of time⁸). A selling principal must indemnify his broker paying under a decision of the Committee that the purchaser is entitled to the dividend which the seller has received⁹). And so the purchaser's broker who repays a call to the seller¹⁰), and a broker who completes a bargain in prospective dividends, is entitled to an indemnity¹¹). As arbitration is compulsory on members of the Stock Exchange under the Rules and Regulations, the client must indemnify his broker for what he so has to pay, as the rule is neither unreasonable nor illegal¹²). A principal who has bought and paid his broker for partly paid shares, but who subsequently refuses to take delivery, is not entitled to recover this payment from the broker, where the latter's liability to the seller equals or exceeds this sum¹³).

On failure of the broker, the client who owes for "differences" remains liable to the jobber, and is only liable to the broker's estate if the insolvency has been caused by his neglect to pay the differences¹⁴).

If a broker acting for a company buys its own shares — a transaction entirely unauthorised by its constitution — he cannot recover price or commission, and, if he has received payment, he may be ordered to refund¹⁵). *Leeman's Act*¹⁶) requires contracts for Bank shares to be in writing and to specify the numbers of the shares

¹) *Rothschild v. Brookman* (1831), 5 Bligh (N. S.) 165; 2 Dow. & Cl. 188; *Gillet v. Peppercorn* (1840), 3 Beav. 78; *Hamilton v. Young* (1881), 7 L. R. Ir. 289; *Ex p. Dyster, Re Moline* (1816), 2 Rose, 349; *Johnson v. Kearley*, [1908] 2 K. B. 514, C. A.

²) *Kimber v. Barber* (1872) L. R. 8 Ch. 56; *Waddell v. Blockey* (1879) 4 Q. B. D. 678, C. A.

³) *Forget v. Baxter* [1900] A. C. 467; *Lacey v. Hill, Crowley's claim* (1874) L. R. 18 Eq. 182; *Biederman v. Stone* (1867) L. R. 2 C. P. 504, where the broker of a seller who declined to complete was held entitled to an indemnity against the expense caused by "buying in".

⁴) *Pollock v. Stables* (1848), 12 Q. B. 765.

⁵) *Bayliffe v. Butterworth* (1847), 1 Ex. 425.

⁶) (1873) L. R. 8 Ex. at p. 248; see *Sutton v. Tatham* (1839), 10 A. & E. 27, where the client had oversold by mistake.

⁷) *Chapman v. Shepherd, Whitehead v. Izod* (1867), L. R. 2 C. P. 228; *Bayley v. Wilkins* (1849), 7 C. B. 886 (payment of call by purchaser's broker).

⁸) *Benjamin v. Barnett* (1903) 8 Com. Cas. 244; 19 T. L. R. 564.

⁹) *Harker v. Edwards* (1887), 57 L. J. Q. B. 147, C. A.

¹⁰) *Bayley v. Wilkins* (1849), 7 C. B. 886.

¹¹) *Marten v. Gibbon* (1876), 33 L. T. 561, C. A.

¹²) *Smith v. Reynolds* (1892), 66 L. T. 809, C. A.

¹³) *McEwen v. Woods* (1848), 17 L. J. Q. B. 206.

¹⁴) *Crowley's Claim* (1874) L. R. 18 Eq. 182; *Hartas v. Ribbons* (1889) 22 Q. B. D. 254; *Allen v. Wingrove* (1901) 17 T. L. R. 261, C. A.

¹⁵) *London Hamburg, etc., Bank (Zulueta's claim)* (1870), L. R. 5 Ch. 444.

¹⁶) (1867) 30 Vict. c. 29.

dealt with and the name of the shareholder; but if the broker accepts the transfer where the Act has not been complied with, the client is bound to indemnify the broker¹). But where the purchaser who repudiates a contract void under *Leeman's Act* is ignorant of the Stock Exchange usage of dealing in unnumbered shares and of the liability of his broker so dealing under the rules, he cannot be made to indemnify²).

It being the duty of a selling broker to make a valid contract, when he omits to do this, e.g. through dealing in unnumbered bank shares and in not giving the name of the registered holder, he is liable to his client³). A contract made by brokers initialing each other's books, but not mentioning the name of the registered holder, is bad⁴).

IV. The Jobber's position.

The contract with the jobber is complete, and not inchoate so as to become complete on the Name-day⁵), but "in transactions between members of the Stock Exchange, there is an implied understanding that on the purchase of stock, the jobber shall be at liberty by a given day, commonly called the "Name-day"⁶), to substitute if he is able to do so, another party or parties as buyers, and so relieve himself from further liability on the contract, provided that such party or parties be persons to whom the seller cannot reasonably object, and that such party or parties accept the transfer of the shares and pay the price agreed on between the seller and the jobber. The first buying jobber is liable to the vendor for calls on shares where an infant's name has been passed, and the transfer executed, although ten days after Account-day have elapsed without any objection being taken, no usage to the contrary being proved⁷).

On the failure of the purchaser's broker and refusal of the client to complete, the client is liable to the jobber who sold to him for the full difference between the original price and the price at which the jobber closed the bargain, with the addition of the "continuation" sale, if any has been properly arranged⁸).

V. The Contract and its Breach.

A contract for sale of shares is a contract to deliver or transfer shares answering the description, and does not by itself pass the property in any specific shares⁹). A vendor has no right to bring an action for the price of the shares, as if they were so many chattels. His remedy is to claim specific performance or damages with an indemnity¹⁰).

Specific performance. Specific performance is never granted where damages are an adequate remedy, and therefore a transfer of stock in the public funds, the supply of which is for all practical purposes unlimited, will not be enforced; but it seems that, even in Government stocks, specific performance might be decreed if the plaintiff has claimed delivery of the bonds or scrip¹¹). It is probable that a contract to sell a life interest in public funds would be specifically enforced¹²). Specific performance, however, will be decreed in respect of shares in companies¹³), for it may be material for the buyer to obtain the shares, or for a seller to rid himself of a liability, and a remedy in damages might be inadequate. At the suit of a vendor the

¹) *Seymour v. Bridge* (1885) 14 Q. B. D. 460.

²) *Perry v. Barnett* (1885), 15 Q. B. D. 388, C. A.; *Coates v. Pacey* (1892), 8 T. L. R. 474, C. A.

³) *Neilson v. James* (1882), 9 Q. B. D. 546, C. A.

⁴) *Mitchell v. Glasgow Bank* (1879), 4 App. Cas. 624.

⁵) *Neilson v. James* (1882), 9 Q. D. B. 546; *Mitchell v. Glasgow Bank* (1879), 4 App. Cas. 624.

⁶) Now called Ticket-day.

⁷) *Dent v. Nickalls* (1874), 30 L. T. 644.

⁸) *Anderson v. Beard*, [1900] 2 Q. B. 261, following *Beckhusen v. Hamblet*, *ib.* p. 18.

⁹) *Heseltine v. Siggers* (1848), 1 Ex. 856.

¹⁰) *Holroyd v. Marshall* (1861), 10 H. L. C. 191, 211; *Hibblewhite v. Mc. Morine* (1839), 5 M. & W. 462.

¹¹) *Doloret v. Rothschild* (1824), 1 S. & S. 590, and similar cases. In *Gardener v. Pullen* (1700), 2 Vern. 393, specific performance was decreed of an agreement to transfer East India stock, which had risen in price.

¹²) *Withy v. Cottle* (1823), 1 S. & S. 174.

¹³) *Duncuft v. Albrecht* (1841), 12 Sim. 189, 199; *Cheale v. Kenward* (1858), 3 De G. & J. 27. A contract to accept a transfer of shares on which nothing has been paid is not a nudum pactum. Cf. *Mocatta v. Franco* (1781), 3 Doug. 11.

purchaser will be ordered to execute a proper transfer and register the same, and, if the shares are partly paid, indemnify the vendor against calls¹⁾.

Winding-up. A contract to purchase shares in a company which is ordered to be wound up before the transfer is lodged for registration will not be ordered to be specifically performed²⁾ save in exceptional cases³⁾; but the seller becomes trustee for the buyer, and, on the other hand, the buyer must indemnify the seller⁴⁾.

After a compulsory or supervised winding-up has commenced, the leave of the Court is required for altering the register; and in a voluntary winding-up only transfers made to or with the sanction of the liquidator are allowed⁵⁾. But the Court will not in general rectify the register so as to complete a transfer by the registration of the transferee⁶⁾, unless there has been undue delay or default on the part of the company⁷⁾, and then not at the instance of the company⁸⁾.

A shareholder who has sold his shares becomes trustee of them for the buyer until registration of the transfer⁹⁾.

Duty of purchaser to indemnify vendor. The duty of a purchaser to indemnify the vendor is exemplified by many cases¹⁰⁾ in which the transfer had been accepted by him or his broker, though not executed by him. So where the purchaser refused to register before the winding-up, alleging, more than a month after he had received the transfer, that the shares were bought by him on account of third persons, a decree was made for specific performance and indemnity¹¹⁾. Third persons, who have assented to transfers made out in their names, will be themselves liable to the transferor¹²⁾. Each successive transferee during the year has to indemnify his immediate transferor¹³⁾.

Damages. The market price of the day of breach, if ascertainable, will show the value for the purpose of assessing damages¹⁴⁾, but in one case¹⁵⁾ it was said that the complainant "ought to have time to turn round". When a contract is repudiated, the date of performance is still the crucial date for ascertaining the market price of goods, unless the repudiation is accepted, when the date of this acceptance is the material time¹⁶⁾.

VI. Members' defaults.

Hammering. A member unable to meet his engagements is declared a defaulter (*vulgo* hammered) by vocal publication in the Stock Exchange after three blows of a hammer on the boards of two waiters' "stands" in separate parts of the House, and this constitutes an act of bankruptcy available for all his creditors¹⁷⁾. He thereby

¹⁾ *Wynne v. Price* (1840), 3 De G. & Sm. 310; Seton on Decrees, 6th ed. vol. III, p. 2279, 2357, etc.

²⁾ *Birmingham v. Sheridan* (1864), 33 Beav. 660; *Emmerson's case* (1866), L. R. 1 Ch. 433; *Walker's case* (1866), L. R. 2 Eq. 554.

³⁾ *Robins v. Edwards* (1867), 17 L. T. 90, C. A.

⁴⁾ *Rudge v. Bowman* (1878), L. R. 3 Q. B. 689; *Chapman v. Shepherd* (1867), L. R. 2 C. P. 228; *Shepherd v. Murphy* (1868), Ir. R. 2 Eq. 544; *Evans v. Wood* (1867), L. R. 5 Eq. 9. In the absence of evidence, it is presumed that the directors would have registered the transfer the lodging of which has been delayed by the purchaser.

⁵⁾ *Taylor's, etc., cases*, [1897] 1 Ch. 298; *Onward B. S.*, [1891] 2 Q. B. 463; Companies (Consolidation) Act, 1908, s. 205.

⁶⁾ *Ward and Henry's case* (1867), L. R. 2 Ch. 431, 438; *Mitchell v. Glasgow Bank* (1879), L. R. 4 H. L. 624.

⁷⁾ *Nation's case* (1866), L. R. 4 Eq. 77; *Sussex Brick Co.*, [1904] 1 Ch. 598.

⁸⁾ *Sichel's case* (1867), L. R. 3 Ch. 189; *Massay & Griffin's case*, [1907] 1 Ch. 583.

⁹⁾ *Loring v. Davis* (1886), 32 Ch. D. 625; *Hardoon v. Belilios*, [1901] A. C. 118; *Stevenson v. Wilson*, [1907] A. C. 445.

¹⁰⁾ *Evans v. Wood* (1867), L. R. 5 Eq. 9; *Musgrave v. Hart's case*, *ib.*, 193; *Hodgkinson v. Kelly* (1868), L. R. 6 Eq. 496; *Davis v. Haycock* (1869), L. R. 4 Ex. 373; *Bouring v. Shepherd* (1871), L. R. 6 Q. B. 309, which two last cases are examples of "split" tickets.

¹¹⁾ *Paine v. Hutchinson* (1868), L. R. 3 Ch. 388, C. A.

¹²⁾ *Shepherd v. Gillespie* (1868), L. R. 3 Ch. 764; cf. *Shaw v. Fisher* (1855), 5 De G. M. & G. 596; *Wynne v. Price* (1849), 3 De G. & Sm. 310.

¹³⁾ *Kellock v. Enthoven* (1873), L. R. 8 Q. B. 458; (1874) 9 Q. B. 241.

¹⁴⁾ *Shaw v. Holland* (1846), 15 M. & W. 136; *Barned v. Hamilton* (1841), 2 Rail. Cas. 624; cf. *Waddell v. Blockey* (1879), 4 Q. B. D. 678, C. A.; *Hadley v. Bazendale* (1854), 9 Ex. 341.

¹⁵⁾ *Samuel v. Rowe*, (1892) 8 T. L. R. 488; but see *Pott v. Flather* (1847), 16 L. J. Q. B. 366.

¹⁶⁾ *Tredegar, etc., Co. v. Hawthorn & Co.* (1902), 18 T. L. R. 716; *Hooper v. Herts*, [1906] 1 Ch. 549, C. A.

¹⁷⁾ *Ponsford, Baker & Co. v. Union, etc., Bank*, [1906] 2 Ch. 444, C. A.

ceases to be a member (r. 160), as he does also if insolvent to outside creditors, though solvent towards members, and likewise on non-payment of membership fees (r. 161), and on ceasing to hold his qualifying shares (r. 39). Private arrangements with inside creditors are forbidden (r. 162), though frequent. The only penalty is the obligation to hand over for the benefit of subsequent creditors any money or securities received from a defaulter if he be hammered within two years (r. 163). There is no liability to hand over money or securities received from any one but the debtor.

Differences. Artificial Funds. All bargains open at the time of the declaration are automatically closed at the prices then current, so that purchasers from the defaulter sell back, and sellers to him buy back the same amount of securities that they have respectively bought and sold, leaving only differences in price to be accounted for (r. 164). Creditors for these differences have a prior claim on all differences received by or due to the estate (r. 166), and all must share in the same proportion (rr. 167, 168).

Claims against estates. No claim is admitted against a defaulter's estate unless it arises out of a Stock Exchange transaction (r. 169), and claims arising from certain unusual bargains and from differences in arrear are only payable after other claims have been paid in full (r. 170). Claims by members not receiving payment for securities delivered on the day of default are paid preferentially out of certain assets (r. 171).

The collection and distribution of "hammer differences" are solely matters domestic, and have nothing to do with outside debtors or creditors¹). The client has no claim to another artificial fund, which is formed by the passing of tickets for the arrangement of business as between members of the house only, at the price at which the respective securities stand on Contango-day²).

Jobber profiting must account. The client completes the bargain which is open between him and the jobber at the contract price³). This may result in a profit to the jobber over the hammer price, and if so, he has to hand over this profit to the official assignee for the benefit of the Stock Exchange creditors, and to prove for the same sum. A member completing a bargain with the principal of a defaulter must immediately notify the fact to the official assignees (r. 167). Speculative clients discharge their liabilities for differences by paying the official assignee, and, if creditors, must prove against the broker's estate⁴). The defaulting broker in some cases may sue for indemnity⁵).

Loans. A lender on securities "valued at less than the market price"⁶) must realize them within three clear days, unless the Stock Exchange creditors consent to a longer delay, or may retain them at a price to be fixed. If the security is insufficient the difference may be proved as a debt (r. 172). A loan without security cannot be claimed against differences, and when of longer duration than two business days cannot be admitted as a claim at all, and if paid on the day of default must be refunded unless paid out of assets belonging to the defaulter previous to that day (r. 173). Claims of non-members may be admitted (r. 174).

A member may not sell, assign, or pledge his claim to a non-member without the concurrence of the Committee (r. 175). Members of the Stock Exchange who obtain leave to take legal proceedings for the recovery of their debts, are not precluded by the fact that they have proved against the assets and received a portion of their claims, from taking proceedings in bankruptcy against the defaulters⁷).

Loan on securities. The result of "hammering" is to suspend certain operations as regards the debtor's estate until the three months has expired within which the "hammering" remains an available act of bankruptcy on which to found a petition⁸). The act of default of a member amounts to a transfer to the official assignee of the whole of the debtor's assets (r. 165), and thenceforth any sale or transfer made by

¹) *Stoneham v. Wyman* [1901], 6 Com. Cas. 174. In re *Plumbly* (1880) 13 Ch. D. 667, C. A. These differences are sufficient to support a bankruptcy petition. In re *Hardy* [1896] 1 Ch. 904; *Ex. p. Ward* (No. 2) (1883) 22 Ch. D. 132, C. A.; *Hinde v. Haskew* (1884), 1 T. L. R. 94.

²) In re *Woodd*, (1900) 82 L. T. 504.

³) *Anderson v. Beard*, [1900] 2 Q. B. 261; *Beckhusen v. Hamblet*, *ib.* 18; *Levitt v. Hamblet*, [1901] 2 K. B. 53, C. A.

⁴) *King v. Hutton*, [1900] 2 Q. B. 504, C. A.; In re *Woodd* [1900], 82 L. T. 504.

⁵) *Allen v. Wingrove* (1901), 17 T. L. R. 261, C. A.

⁶) *Qu.*: this probably means at the time of the loan or its last renewal.

⁷) *Ex. p. Ward* (No. 1), 20 Ch. D. 356, C. A. (1882); *Mendelssohn v. Ratcliff*, [1904] A. C. 456.

⁸) *Ponsford v. Union etc. Bank* [1906] 2 Ch. 444, C. A.; *Davis v. Petrie* [1906] 2 K. B. 786.

the debtor he makes as agent for the official assignee, so that a purchaser cannot set off a previous debt¹). There is no agreement to assign property acquired after the failure. The *cessio bonorum* is good as against outside creditors until it is invalidated by bankruptcy proceedings²). The result of the rules is to effect an equitable assignment of the assets of the defaulter to the official assignee so that the latter becomes equitable owner in trust of the assets of which the defaulter is legal owner. It is this position that enables the official assignee to bring actions in his own name³). It seems that a transfer to Stock Exchange creditors of less than a debtor's whole estate may amount to an act of bankruptcy and a fraudulent preference⁴).

Default of Jobbers. Rights of Broker and Client. In many cases the failure of a jobber who, it should be mentioned, is almost always a principal, and not an agent, does not materially affect the public, as it is quite a common practice with brokers to protect their clients, when the default happens, by carrying out their commissions at their (the brokers') own loss *de novo* with other jobbers at the same or better prices in case of sales, and also in case of purchases when the jobber does not deliver his own securities⁵). There is no obligation on the broker so to act, and if he declines, the client is left with his bargain open with the jobber⁶), as the broker is a mere agent and not liable to his client unless he has acted negligently, or against his instructions, or has agreed to be liable.

As promptly as possible the client or his broker should communicate with the official assignee, and ascertain if he proposes to complete the contract. If he elects to complete, the client will be entitled to claim a sufficient indemnity in case of bankruptcy ensuing within the three months⁷).

Default of Brokers. The failure of a broker, which, as we have seen, amounts to an act of bankruptcy, does not immediately affect the bargains made on behalf of a client with a jobber, although it does affect those made with the broker as a principal. The bargains therefore remain intact and must be carried out between the principals, unless cancelled with the consent of both parties⁸).

Bank balances. Upon failure of the broker the important question arises as to who may be entitled to his free balance at his bank. We say "free" because in most cases a broker has two accounts, one a secured loan account and the other a current account, and the bank would have the right by virtue of its general lien, unless expressly excluded, to appropriate the money in the current account towards the deficiency on the loan account, if the moneys have been paid in without notice of any trust or agency. This right as regards a cash balance is not strictly a lien but a right of set-off, and can of course be exercised in the first instance by the bank by way of reducing the loan account, unless it chooses to rely only upon the securities specifically pledged and to set free the cash for other creditors.

Client's securities. However, it sometimes happens that the broker has deposited his customer's securities to secure his own overdraft without notice to the banker that they are trust securities⁹). It is then the duty of the bank in the first place to reduce the loan account by the amount of the cash balance, and to that extent free the securities or their superfluous proceeds for the benefit of the broker's clients to whom they belong¹⁰). In a recent case the bank was directed to retain the balance after realization of the securities, and to allow interest on the amount pending a decision as to the rights of rival claimants¹¹). But where no such difficulty arises,

¹) *Richardson v. Stormont Todd*, [1900] 1 Q. B. 701. In *Nicholson v. Gooch* (1856), 5 E. & B. 999, it had been held: 1. that the official assignee was not the agent of the defaulter, and 2. that illegal gaming differences collected by him cannot be claimed by the trustee in bankruptcy of the defaulter.

²) *Lomas v. Graves & Co.*, [1904] 2 K. B. 557, C. A.; *Tomkins v. Saffery* (1877), 3 App. Cas. 213.

³) *Richardson v. Stormont*, [1900] 1 Q. B. 701.

⁴) *Tomkins v. Saffery* (1877), 3 App. Cas. 213.

⁵) Cf. *Wildy v. Stephenson* (1882), C. & E. 3.

⁶) *Gill v. Shepherd* (1902), 8 Com. Cas. 48.

⁷) *Ponsford, Baker & Co. v. Union, etc., Bank*, [1906] 2 Ch. 444, C. A.

⁸) *Levitt v. Hamblet*, [1901] 2 K. B. 53; *Scott v. Godfrey*, *ib.* p. 726.

⁹) Securities belonging to a principal, deposited with a bank for a special purpose, *e. g.* to raise a specific loan, cannot be retained by the bank for any other purpose, *e. g.* to liquidate the broker's balance. But the bank is under no responsibility to see that the broker carries out the purpose for which the loan is raised. *Cuthbert v. Roberts*, [1909] 2 Ch. 226.

¹⁰) *Mutton v. Peat*, [1900] 2 Ch. 79, C. A.

¹¹) *In re Starkey, Ex p. Jacks*, *Times*, Feb. 11, 1908.

and the current account is free, one of two states of affairs presents itself: a) The whole of the balance may represent the moneys of clients received for specific purposes. Where the money is sufficient to pay such clients in full, they are to be paid first¹⁾. In this case no competition arises between these claimants and a general creditor, as the money is trust money and not available for the latter²⁾; — b) The balance may be insufficient for payment of clients' moneys in full. Here the rule in *Clayton's case*³⁾ applies, and the clients who last paid in are preferred in the backward order to those who paid in before them⁴⁾.

It is, of course, essential that it be possible to trace money paid to a broker as client's money⁵⁾ paid for a specific purpose. And where this can be done, not only is the money repayable preferentially, but if it has been invested by the broker, whether for his own purposes or the client's, it may be followed and the securities reclaimed⁶⁾.

¹⁾ *In re Strachan* (1876), 4 Ch. D. 123.

²⁾ *Hancock v. Smith* (1889), 41 Ch. D. 456, C. A. *In re Hallett's Estate* (1879), 13 Ch. D. 696; *Taylor v. Plumer* (1815), 3 M. & S. 562; *In re Wreford* (1897), 13 T. L. R. 153.

³⁾ (1816) 1 Mer. 572.

⁴⁾ *In re Stenning*, [1895] 2 Ch. 433.

⁵⁾ Cf. *In re Hallett & Co.*, [1894] 2 Q. B. 237, C. A.

⁶⁾ *Taylor v. Plumer*, *u. s.*; *Frith v. Cartland* (1865), 2 H. & M. 417; *Re Hammond* (1869), 20 L. T. 547.

Title VIII. Guaranties.

By Wyndham A. Bewes, LL.B., Barrister-at-Law.

I. Nature of the contract.

The contract of guaranty or suretyship is a collateral or subsidiary contract whereby the guarantor or surety promises another person (the creditor) that if the debtor or principal fails to perform a present or future obligation in favour of the creditor, he, the guarantor, will perform it in his place.

This contract must be distinguished from the contract of indemnity, whereby the promisor undertakes "to keep a person who has entered or is about to enter into a contract of liability indemnified against that liability, independently of the question whether a third person makes default or not"¹⁾. Thus, a contract by an insurance company, in consideration of a premium, to keep a creditor indemnified against loss will not generally be a contract of suretyship, although the word "guaranty" is used²⁾.

From the fact that the contract is not one of insurance, it follows that the creditor is not bound to disclose to the surety every material fact which would influence the latter in entering into the contract³⁾. He must, however, avoid misrepresentation, which may be made even by failing to correct a known or natural impression on the mind of the surety⁴⁾. And any fraudulent secret arrangement between the creditor and the principal will entitle the surety to cancel the guaranty⁵⁾; and the same will happen if the alleged debt is the result of fraud on the part of the creditor⁶⁾, or the guaranty is given for an illegal consideration⁷⁾.

The right of the surety towards the creditor does not oblige the creditor to pursue his remedy against the principal debtor before proceeding against the surety for the balance of what may be due; although this may be modified by the contract between the parties. The right of the surety against the debtor is to be indemnified by the latter from his liability.

It is most important to ascertain in the first place whether a promisor is liable as a principal or as surety — a matter which is often discussed in cases which involve the application of the Statute of Frauds⁸⁾.

There are two sets of circumstances which occur with some frequency:

- a) When by the contractual document the promisor appears to be a principal;
- b) When by a collateral document, as a bill of exchange, he appears as a party liable to be sued in preference to the drawer, being in fact an acceptor for the accommodation of the drawer.

In the first case⁹⁾, the surety is liable as a principal only up to the time that he gives notice to the creditor of his position, and in the second case¹⁰⁾, the holder must respect all the rights of the surety if he has received a like notice, though a *bona fide* holder for value without notice before action brought is not so restrained.

The doctrine that a surety who has contracted as a principal has all the rights of a surety from the date that he gives notice of his position to the creditor was fin-

¹⁾ *Guild & Co. v. Conrad*, [1894] 2 Q. B. 895; *Harburg &c. Co. v. Martin* [1902] 1 K. B. 778.

²⁾ *Cf. S. C.; Dane v. Mortgage Insurance Corporation* [1894] 1 Q. B. 54: "an underwriter is not a surety. He is a person who undertakes to pay money in a certain event. The form of the policy is not that of a guarantee", per Lord Esher, p. 69.

³⁾ *Hamilton v. Watson* (1845), 12 Cl. & F. 109.

⁴⁾ *Davies v. London etc. Provincial & Co.* (1878), 8 Ch. D. 469; *Sutherland v. Low* [1901] F. 972; *Mc Kewan v. Thornton* (1861), 2 F. & F. 594.

⁵⁾ *Pendlebury v. Walker* (1841), 4 G. & C. Ex. 424; *Mayhew v. Boyes* (1910), 103 L. T. 1.

⁶⁾ *Allan v. Houlden* (1843), 6 Beav. 148.

⁷⁾ *Jones v. Merionethshire etc. Society* [1892] 1 Ch. 173, C. A.

⁸⁾ As to whether the debtor is in fact a principal or surety, see *Greenwood v. Francis* [1899] 1 Q. B. 312, C. A.; *Nicholas v. Ridley* [1904] 1 Ch. 192, C. A. A surety may become principal through subsequent dealings with the creditor; *Reade v. Lowndes* (1857), 23 Beav. 361.

⁹⁾ *Rouse v. Bradford Banking Co.* [1894] A. C. 586.

¹⁰⁾ *Oriental Financial Corporation v. Overend, Gurney & Co.* (1874), L. R. 7 H. L. 348; *Greenough v. Mc Leland* (1860) 2 E. & E. 424.

ally decided in the year 1894, though there were many cases before that date of a similar nature. The date of the notice has generally been important in relation to the release of the surety by the creditor giving time to the debtor after receiving notice. So that when one of several joint debtors subsequently became surety only as between themselves, notice to the creditor gave him the same position as regards the latter¹). Another effect of notice is to postpone the creditor to the surety in respect of any securities held by the former for advances subsequently made²).

The contract. In order that the contract of guaranty may be binding, it is essential that the contract which it guarantees should be a valid one and should not have lapsed³). Thus if there has been a novation of the guaranteed debt, whereby this has become non-existent in its original obligation, the surety is released⁴). It is not necessary, however, that the principal contract should already have come into operation, for the whole purpose may be the creation of some future relationship.

As to the right to withdraw from the guarantee, see *post* p. 335.

Consideration. When the contract of guaranty is not under seal, there must be some consideration to support it. If the debt which it is intended to secure is already existing, there is no consideration arising from its being incurred, and it is necessary that some fresh promise or performance on the part of the creditor should be given to the guarantor. This usually takes the form of a promise to forbear to sue the debtor, but it is sufficient if the guarantor requests the creditor not to sue and he in fact forbears⁵). It appears that the creditor must forbear for a reasonable time if no time is specified, but if a time is fixed for the guarantor to pay, then the creditor must forbear until then⁶): but this is not so if the creditor is to withdraw a specific process⁷).

If the consideration for the guaranty subsequently wholly fails, the surety is released⁸).

A guaranty of an existing debt in consideration of further credit being given is valid if the further credit is in fact given on the faith thereof⁹); but the words must be clear for the guaranty to extend to past as well as future debts¹⁰), and to a part only of an agreed credit, the whole not having in fact been granted¹¹). If a guaranty be given in consideration of the creditor agreeing to do or not to do something, it cannot be enforced if the creditor does not exactly perform his undertaking¹²).

Conditional guaranties. If a guaranty is given subject to a condition precedent in favour of the creditor, the guaranty is not binding until the condition is fulfilled or the creditor gives notice that he has waived it. But a conditional guaranty followed by performance of the condition by the creditor is binding without a communicated acceptance¹³). If the condition is secret, the creditor must give notice that he has performed it¹⁴).

In the same way, a surety is not bound if it was intended that the principal debtor or a co-surety should join in the assurance and he fails to execute it, or executes it for a less amount or is otherwise not bound as was intended¹⁵).

But the creditor's failure to perform one of the continuing conditions of the guaranty, will not discharge the surety unless it in fact occasions prejudice to him.¹⁶)

¹) *Rouse v. Bradford Banking Co.* [1894] A. C. 586.

²) *Leicestershire Banking Co. v. Hawkins* (1900), 16 T. L. R. 317.

³) *Walton v. Cook* (1888), 40 Ch. D. 325; *Hastings Corporation v. Letton* [1908] 1 K. B. 378; *In re Walker* [1907] 2 Ch. 120.

⁴) *Perry v. National Provincial Bank of England* [1910] 1 Ch. 464.

⁵) *Crears v. Hunter* (1887), 19 Q. B. D. 341.

⁶) *Rolt v. Cozens* (1856), 18 C. B. 673.

⁷) *Harris v. Venables* (1872), L. R. 7 Ex. 235.

⁸) *Walton v. Cook* (1888), 40 Ch. D. 325; see further as to the release of the surety *post* p. 335.

⁹) *Westhead v. Sproson* (1861), 6 H. & N. 728.

¹⁰) *Morrell v. Cowan* (1877), 7 Ch. D. 151, C. A.

¹¹) *Dimmock v. Sturla* (1845), 14 M. & W. 758.

¹²) *Burton v. Gray* (1873), L. R. 8. Ch. 932; *Tatum v. Evans* (1886), 54 L. T. 336. See further under "Discharge of the surety" *post* p. 335.

¹³) *Morten v. Marshall* (1863), 2 H. & C. 305; *Jay's Ld v. Sala* (1898), 14 T. L. R. 460.

¹⁴) *Alhusen v. Prest* (1851), 6 Ex. 720.

¹⁵) *Fitzgerald v. Mc Cowan* [1898] 2 Ir. R. 1. *Ellesmere Brewery Co. v. Cooper* [1896] 1 Q. B. 75, and cases cited. *Cooper v. Evans* (1867), L. R. 4 Eq. 45; *National Provincial Bank etc. v. Brackenbury* (1906) 22 T. L. R. 797.

¹⁶) *Donegal C. C. v. Life and Health Ass. Co.* [1909] 2 Ir. R. 700.

II. The Statute of Frauds.

The guaranty which is the subject of this section must be by a signed written document, for no action may be brought whereby to charge a defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised¹).

It is not now necessary that the consideration for the promise should appear in writing or by necessary inference from a written document²).

The effect of the statute is to take away the right of action in the absence of writing, but not to affect the validity of the contract³), nor to give a right of action in those cases in which the contract is otherwise bad⁴). It will be shown further on that there are certain relationships which give rise to the obligations arising from suretyship but which are not within the statute.

In order that a contract may be within the statute it must create a truly collateral or subsidiary liability, and if there is a dispute on this ground, the Court or jury must first find whether the liability is direct or subsidiary, which in some cases is a matter of difficulty.

If credit has in fact been given to the defendant, it will not avail him to show that the benefit of the contract was wholly for another person⁵). Where accounts have been kept, they will generally show to whom credit was in fact given, and if this person is also the one who obtains the benefit of the contract, the conclusion must be that, in the absence of unequivocal evidence to the contrary, the other promisor is only liable on a collateral contract⁶).

In order that the guarantor's promise may come within the statute he must be an independent person or rather a stranger to the original transaction and the property affected thereby. If he is himself interested therein either originally or by virtue of the consideration granted to him by the creditor, the statute does not apply. He is not making a true collateral or subsidiary contract⁷).

The question depends "on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the (guarantor) or his property, except such as arises from his express promise"⁸). If therefore he has an interest in the transaction which is the subject of the undertaking, the case is not within the Statute of Frauds⁹). Thus, where the guarantor is one of the persons originally liable, e.g. as a partner, the statute does not apply¹⁰). But if the guarantor is interested only e.g. as director and shareholder in the success of the company whose bills he promises to indorse, he has not a legal interest in or charge upon the goods represented by the bills, and the contract being one of guaranty and not of indemnity it must be in writing¹¹).

It not infrequently happens that the collateral contractor is acting or is assuming to act as the agent of another, who would therefore be his principal, and that the

¹) Statute of Frauds, (29 Car. II, c. 3), s. 4.

²) Mercantile Law Amendment Act, 1856, (19 & 20 Vict. c. 97), s. 3.

³) *Leroux v. Brown* (1852), 12 C. B. 801. The statute applies to contracts made abroad: *ibid*.

⁴) *Birkmyr v. Darnall* (1705), 1 Salk. 27 etc. See *ante* p. 330.

⁵) *Edge v. Frost* (1824), 4 D. & R. 243.

⁶) *Storr v. Scott* (1833), 6 C. & P. 241.

⁷) *Fitzgerald v. Dressler* (1859), 7 C. B. N. S. 374, where a subpurchaser promised to pay the vendor's lien. The promise must not, however, exceed the amount due to the creditor in respect of the property. It is bad for the excess: *Thomas v. Williams* (1830) 10 B. & C. 664.

⁸) Notes to *Forth v. Stanton*, Wms. Saund, 211c.

⁹) *Sutton v. Grey* [1894] 1 Q. B. 285, following *Couturier v. Hastie*, (1852), 8 Ex. 40. In *Sutton v. Grey* the defendant was liable also as one of the terms of his employment, under which he introduced customers and took an interest in commissions paid by them.

¹⁰) *Ex p. Harding*, (1879), 12 Ch. D. 557; cf. *Orrell v. Coppock* (1856) 26 L. J. Ch. 269.

¹¹) *Harburg India Rubber Comb. Co. v. Martin* [1902] 1 K. B. 778, C. A. In this case Vaughan Williams, L. J. said: "In each of those cases there was in truth a main contract — a larger contract — and the obligation to pay the debt of another was merely an incident of the larger contract . . . It is not a question of motive — it is a question of object . . . the mere fact that as an incident to (the object of the contract) — not as the immediate object, but indirectly — the debt of another to a third person will be paid, does not bring the case within the section". p. 786.

former only intends to bind himself as surety. It is here important to bear in mind that no one can be a surety unless there is at the same time a principal debtor in existence¹). If there is no such principal debtor, the person who assumes to act as debtor will be liable, either on his contract, which will then be a principal and not a subsidiary contract, or upon his warranty of authority to act as agent in making the contract²). It seems probable that while the subsequent ratification or adoption of the contract by the person on whose behalf the agent assumed to act will bind the principal, it will not make the agent liable as surety in the absence of writing³).

As the statute only applies to a promise to answer for another, it seems that if the other person is not admitted to be liable, writing is not necessary⁴), as the promise by this surety is in the case a promise by a principal.

Nor does the statute apply when the liability of the other person is extinguished and the liability of the promisor is substituted, as in cases of novation⁵).

The substance rather than the form of the transaction must be regarded, and if the result of the former is that a guaranty is intended, the statute will apply⁶).

A promise made to a person other than the one to whom the debt is due or to whom a future debt is to become due, is not within the statute, as there is no privity of contract between the debtor and promisee⁷).

III. Interpretation of the Contract.

In order to be the foundation of a successful action, the necessary memorandum or note of the agreement must already be in existence; although an admission of the contract by the pleadings of the defendant will also be an admission that there was a sufficient memorandum. If he desires the protection of the statute he must plead that it has not been complied with⁸).

The requirement of a memorandum or note in writing is a matter of evidence only, so that the particulars need not exist in the form of a written contract, provided that they are in fact in writing and properly signed⁹).

It has already been stated that it is not now necessary that the consideration for the promise by the guarantor should be in writing. It is, however, still necessary that all other elements of a good contract should so appear, while the consideration may be proved by parol. Here the ordinary rules for the interpretation of contracts apply, and therefore no evidence can be given to vary the terms of the contract or to import into it terms or conditions which are omitted. But where words are used which require explanation, that is where there is a latent ambiguity, the explanation may be given by parol. Thus, the person to whom the promise is given must be possible of identification from the description in the instrument itself, supplemented, if necessary, by parol evidence as to which of several persons answering the same description is the one intended, or that the person named is an agent for the real promisor or promisee¹⁰). No parol evidence may be given to construe the document or promise itself, nor can it be varied by parol¹¹).

Although the consideration need not now appear in writing or by necessary implication from a written document¹²); still if it is stated therein, no evidence is admissible to vary the terms thereof¹³); though evidence may be given to explain

¹) *Lakeman v. Mountstephen* (1874), L. R. 7 H. L. 17: where the jury found as a fact that the appellant was directly and not collaterally liable.

²) S.C.; and see title "Agency" *ante*; and *Kelner v. Baxter* (1866), L. R. 2. C. P. 174.

³) *Lakeman v. Mountstephen*, *u.s.*

⁴) *Read v. Nash* (1751), 1 Wils. 305; *Bird v. Gammon* (1837), 3 Bing. N. C. 883, 889.

⁵) *Hodgson v. Anderson* (1825), 3 B. & C. 842; *Ex. p. Lane* (1846), De Gex. 300.

⁶) *Mallet v. Bateman* (1865), L. R. 1 C. P. 163; *Harburg etc. Co. v. Martin* [1902] 1 K. B. at p. 786.

⁷) *Hargreaves v. Parsons* (1844), 13 M. & W. 561; *Lakeman v. Mountstephen* (1874), L. R. 7. H. L. 17.

⁸) *Lucas v. Dixon* (1889), 22 Q. B. D. 357.

⁹) *Bateman v. Phillips* (1812), 15 East, 272; and see further title "Contracts", *ante*.

¹⁰) *In re Hoyle* [1893] 1 Ch. 84, C. A., where a will executed by the guarantor was held sufficient.

¹¹) *Holmes v. Mitchell* (1859), 7 C. B. N. S. 361; *Ulster Bank v. Synnott* (1871), L. R. 5 Eq. 595; *Sheers v. Thimbleby* (1897) 76 L. T. 709.

¹²) 19 & 20 Vict. c. 97, s. 3.

¹³) *Emmet v. Dewhurst* (1851), 3 Mac. & G. 587. This does not affect such a defence as "non est factum" or an action for rescission.

the terms used, such as whether the consideration intended was future credit¹⁾ or past credit coupled with forbearance to sue, or past credit only, in which case there would be no consideration, unless the guaranty followed a promise to guarantee, which was itself prior to giving the credit²⁾.

As a general rule it may be said that parol evidence may be admitted for the purpose of explaining the relation and situation of the parties and expressions in the writing which require explanation, considering the situation of the parties, but not verbal agreements between the parties³⁾.

An illustration of the reason for considering the surrounding circumstances may be seen in the case of a fidelity guaranty, which will not cover services subsequently materially altered⁴⁾, as the liability is not to be extended without clear words to that effect.

In the construction of guaranties made or intended to operate abroad, the *lex loci solutionis* generally governs⁵⁾.

"The language of one guaranty affords little or no guide to the construction of another which is given under other and different circumstances"⁶⁾; it is not therefore intended to refer to the numerous decisions on the varying documents. But among the more formal documents and some less formal there may be a recital which does not altogether agree with the operative part; and as to this it may be said that if both the recitals and the operative part are clear and unambiguous, but they are inconsistent with each other, the operative part is to be preferred; but if the recitals are clear and the operative part is ambiguous, the recitals govern the construction⁷⁾.

Where there is an existing credit and no words are used to show that the creditor is to forbear the prosecution of his claim, the guaranty will be construed to refer to future credit, since it would otherwise be invalid as without consideration⁸⁾, and also the guaranty would be extinguished by subsequent payments by the principal to the creditor⁹⁾.

That the guarantor is to pay interest from the date of the guaranty and that the bond is payable on demand are circumstances which show that the guaranty is confined to a debt already owing¹⁰⁾.

Where a surety gives a continuing guaranty, limited in amount, to secure a floating balance, the guaranty is to be construed, *prima facie*, as applicable to a part only of the debt, co-extensive with the amount of the guaranty. But a guaranty limited in amount for a debt already ascertained, which exceeds that limit, is not *prima facie* to be construed as a security for a part only of the debt. Whether the intention was to guarantee the whole debt with a limitation on the liability of the surety, or to guarantee part only of the debt, is a question of construction¹¹⁾.

The Statute of Limitations begins to run as to each item of the account, whether principal, interest, commission or other proper charge, as soon as that item becomes due and is not paid¹²⁾.

Subsequent conduct of the parties, such as letters written by the guarantor to the creditor, is evidence to show their intention at the time of the guaranty being given¹³⁾.

¹⁾ *Wood v. Priestner* (1866), L. R. 2 Ex. 282; and see title "Contracts", *ante*.

²⁾ *Dodge v. Pringle* (1860), 29 L. J. Ex. 115.

³⁾ *Brunning v. Odhams Brothers Ltd.* (1897), 75 L. T. 602, H. L.; approving *Morrell v. Cowan* (1877), 7 Ch. D. p. 155. "The Court is entitled to look at the surrounding circumstances; that is to say, it is entitled to consider, first, who the parties were; secondly, in what position they were, and thirdly, what the subject-matter of the agreement was." See *Laurie v. Scholefield* (1869) L. R. 4 C. P. 622; *Heffield v. Meadow*, ib. p. 595.

⁴⁾ *R. v. Herron* [1903] 2 Ir. R. 474.

⁵⁾ *Rouquette v. Overmann* (1875), L. R. 10 Q. B. 525; where it was held that a transferor for value of a bill drawn on a foreign place and accepted there was surety for payment of the bill subject to the effect of the foreign law in enlarging the time for payment.

⁶⁾ *Codes v. Pack* (1869), L. R. 5 C. P. p. 70.

⁷⁾ *Norton on Deeds*, pp. 181, 185;

⁸⁾ *Wood v. Priestner* (1866), L. R. 2 Ex. p. 71, 282; *In re O'Shea* [1911] 2 K. B. 981.

⁹⁾ *Clayton's Case* (1816), 1 Mer. 372; *Kirby v. Duke of Malborough* (1813) 2 M. & S. 18.

¹⁰⁾ *Walker v. Hardman* (1837), 4 Cl. & F. 258, 11 Bligh N. S. 229.

¹¹⁾ *Ellis v. Emmanuel* (1876), 1 Ex. D. 157. C. A.

¹²⁾ *Parr's Banking Co* [1898] 2 Q. B. 460, C. A.

¹³⁾ *Henniker v. Wigg* (1843), 4 Q. B. 792; *Burgess v. Eve* (1872) L. R. 13 Eq. p. 455.

IV. Extent of surety's liability.

The extent of the liability of a surety is governed by the instrument under which the liability arises, taking into account the circumstances under which the guaranty was given¹).

In order that the liability should attach at all, it is necessary that the benefit which the creditor is to give to the debtor should in fact be extended to him, and to the full amount and in the particular manner bargained for.

The exactness which is required may be illustrated by cases which show that a guaranty for a loan of money will not be binding if cheques are honoured to a less amount only, and a guaranty for a bill for a named sum will only apply to a bill for the amount named, and not to part of a larger bill²).

Surrounding circumstances may be inquired into in order to determine whether a guaranty, which is apparently limited, is intended to be a continuing security³). But where no inquiry is made by the surety into these circumstances, they will not modify the contract. Thus, a guaranty for accounting by an agent will not be confined to the method practised at the date thereof, but any reasonable method may be adopted from time to time⁴). So the usual credit given to the principal may still be allowed⁵). This accords with the rule that a guaranteed advance may be made by bills or notes, at any rate when a bank is the lending creditor⁶); but this will not extend to discounting transferred bills⁷).

Where a surety gives a continuing guaranty, limited in amount, this is *prima facie* to be construed as applicable to a part only of the debt, co-extensive with the amount of the guaranty. But a guaranty limited in amount for a debt already ascertained which exceeds that limit is not *prima facie* to be construed as a security for only part of the debt⁸). In the former case, when there are several sureties, each liable for a separate part, there will be no right of contribution, but each surety will pay in proportion to the limit of his liability; and in the latter case there will be no right on the part of the sureties to apportion payments made by the debtor⁹).

Apart from the terms of his contract a surety is not liable to pay interest on the sum guaranteed unless he has given his guaranty for the payment of a bill of exchange which by law carries interest from its maturity¹⁰). But the words of guaranties are often large enough to include interest although not specifically mentioned. This would be so if they are framed as indemnities against loss or damage¹¹).

V. Determination of the contract.

The length of time for which a guaranty is to continue in force must generally be ascertained as a matter of construction from the terms of the particular document, but in certain cases, as those in which a guaranty is given for good service, it is possible to perceive some more general rules of construction. First, as to the right of the surety to end a guaranty which appears to be indefinite in point of time. Here the rule has been laid down that where the consideration is entire, e. g. that a person should take a servant into his employ and that the guarantor would be answerable for him as long as he continued in that service, the surety cannot end his liability, which continues even after his death¹²).

¹) *Blest v. Brown* (1862), 4 De. G. F. & J. 367.

²) *Burton v. Gray* (1873), L. R. 8 Ch. 932; *Philips v. Astling* (1800), 2 Taunt. 206; *Archer v. Hudson* (1844), 7 Beav. 551.

³) *Laurie v. Scholefield* (1869), L. R. 4 C. P. 622; *Heffield v. Meadows*, ib. p. 595.

⁴) *Stewart v. Mc Kean* (1855), 10 Ex. 675.

⁵) *Simpson v. Manley* (1831), 2 C. & J. 12.

⁶) *Grahame v. Grahame* (1887), 19 L. R. Ir. 249.

⁷) *Evans v. Whyte* (1829), 5 Bing. 485.

⁸) *Ellis v. Emmanuel* (1876), 1 Ex. D. 157, C. A.

⁹) *Ibid*; *Coope v. Twynam* (1823), T. & R. 426; cf. *Ellesmere Brewery Co. v. Cooper* [1896] 1 Q. B. 75.

¹⁰) *Ackermann v. Ehrensperger* (1846), 16 M. & W. 99.

¹¹) Cf. *Board of Trade v. Employers Liability etc.* [1910] 2 K. B. 649. C. A., where it was held that penal interest under the Bankruptcy Act was not payable.

¹²) *Calvert v. Gordon* (1828), 3 Man. & Ry. 124; *Lloyd's v. Harper* (1880), 16 Ch. D. 290; *In re Crace* [1902] 1 Ch. 733. As to the extent of liability of sureties to an administration bond, see *Blake v. Bayne* [1908] A. C. 371.

Secondly, if consideration is fragmentary, supplied from time to time, and therefore divisible, such as a guaranty for a running account in money or goods, the liability can be terminated by giving notice to the person guaranteed not to supply further money or goods¹). It follows as a corollary from this proposition that in this case the guaranty is revoked from the time that the person guaranteed receives notice of the death of the guarantor²). So also when the guaranty is for the good service of an employé whose office is subject to re-appointment, notice may be given to terminate the liability at the end of any of the terms; and even without this notice the guaranty will not in general extend beyond the first term, even when the employment is continued with the assent of the guarantor³). Words which can be satisfied by their being confined in their operation to the first year, will not extend the obligation further⁴). And a fixed date for the continuing guaranty to end does not preclude notice to terminate it earlier, or even before it has been acted on⁵).

It seems that a continuing guaranty which is determinable by notice is determined by notice of the death of the surety, in the absence of provision to the contrary⁶). But where there is a stipulation as to the length of notice, notice of death will not terminate the guaranty unless in circumstances which should show the creditor that it would be a breach of trust on the part of the executors if they omitted to terminate the guaranty⁷).

Notice of the death of one co-surety under a joint and several continuing guaranty does not by itself determine the future liability of the surviving co-surety⁸). If the guaranty is joint only the liability of the deceased guarantor entirely ceases on his death nor is there any right existing in his co-surety to require contribution⁹). It may be that the death of one joint guarantor revokes the guaranty so that there is no future liability on the part of the survivors, unless they act as if the guaranty were subsisting¹⁰).

Guaranty to or for a partnership. A continuing guaranty or cautionary obligation given either to a partnership or to a third person in respect of the transactions of a partnership, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given¹¹).

Again, a guaranty for the acts or debts of one person does not cover the acts and debts of a partnership of which he is a member, because "the surety may be willing to be accountable for one individual, but not for him and his partner¹²"); but a guaranty which is renewed after a change in the firm will be construed according to the circumstances existing at its renewal¹³).

If a promissory note or bill of exchange is given to a partnership as security for the debt of another a change in the partnership firm is not an answer to the claim when the security was meant to be a continuing security¹⁴).

VI. Discharge of the surety.

Any variation in the guaranty, made without the knowledge or consent of the surety, and which may prejudice him or amount to a new agreement, will discharge

¹) *Beckett v. Addyman* (1882), 9 Q. B. D. p. 791; *Lloyd's v. Harper*, u.s.

²) *Coulthart v. Clementson* (1879) 5 Q. B. D. 42; *In re Silvester* [1895] 1 Ch. 573.

³) *Kitson v. Julian* (1855), 4 E. & B. 854.

⁴) *Mayor of Cambridge v. Dennis* (1858), E. B. & E. 660, where a subsequent Act of Parliament made the office terminable at the pleasure of the employer.

⁵) *Offord v. Davies* (1862), 12 C. B. N. S. 748.

⁶) *In re Whelan* [1897] 1 Ir. R. 575.

⁷) *In re Silvester* [1895] 1 Ch. 573; *Harris v. Fawcett* (1873), L. R. 8 Ch. 866.

⁸) *Beckett v. Addyman* (1882), 9 Q. B. D. 783, C. A.

⁹) *Other v. Iveson* (1855), 3 Drew. 177; *Batard v. Hawes* (1853), 2 E. & B. p. 298.

¹⁰) *Ashby v. Day* (1885), 33 W. R. 631, 34 W. R. 312.

¹¹) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18, repealing the section of the Mercantile Law Amendment Act, 1856, to the same effect. This section of the Act specifically applies to partnerships the law which also governs the relationship when a guarantee is given to persons who are not partners. It crystallises also the previous case law: see *Holland v. Teed* (1848) 7 Hare, 50. This is the law even when the time of the guaranty has not expired. s.c.

¹²) *Mills v. Alderbury Union* (1849), 3 Ex. 590.

¹³) *Leathley v. Spyer* (1870), L. R. 5 C. P. 595.

¹⁴) *Pease v. Hirst* (1829), 10 B. & C. 122.

the surety, although the original agreement, as still subsisting, notwithstanding such variation, may be that on which the liability is substantially incurred¹).

If any new agreement is made between the creditor and the principal, which makes any substantial or material difference in the relation of the parties as regards the capacity of the principal or in any way prejudicing the surety, the latter will be released from his bargain²).

If it is not self-evident without inquiry that the alteration is unsubstantial, or one that cannot be prejudicial to the surety, the Court will not inquire into the effect of the alteration but will leave the surety to judge whether he will consent to remain liable under the altered circumstances³).

The discharge of the principal will of itself discharge the surety, because it takes away the remedies of the latter against the principal⁴). And not only so, but if the creditor binds himself to give time to the principal in which to pay his liability, without reserving his rights against the surety, the latter is discharged even though he is not prejudiced, or is in fact benefited thereby⁵). Thus, the novation of the guaranteed debt will extinguish the liability of the surety⁶). And the subsequent failure of the consideration will have the same effect⁷).

He may also be released by payments made from time to time by a principal whose running account is guaranteed, although the account is still indebted, if the guaranty does not exclude the rule which applies payments to the satisfaction of debts in order of date⁸).

If the document is something more than a guaranty, e. g. in the nature of a policy of insurance, the liability will continue, in spite of the disappearance of the principal debt⁹).

Mere delay to take proceedings to enforce the debt against the principal does not release the surety, unless he has expressly stipulated that the principal should so act with promptitude¹⁰); not even when the principal is released by the Statute of Limitations.

The giving of additional security by the principal will not discharge a surety, unless it is really a consideration for giving time¹¹).

A surety for several debts is not discharged from his liability as to the rest, by time being given as to one or more¹²).

No agreement that is not a binding contract will release the surety¹³), but a guaranty given on a condition which is not fulfilled is not effective¹⁴).

A surety who is not known by the creditor to be such, seeing that he has contracted as a principal, is protected from the time that he gives notice to the creditor of the actual position, although he has changed from being principal to surety after the agreement¹⁵).

If the creditor can show that the guarantor consented to the variation in the agreement, even after the variation had been made and for no consideration, the guarantor will not be released. And if the guarantor acts so as to induce the creditor to think that he has consented, and the creditor acts on that belief, the

¹) *Bonar v. Macdonald* (1850), 3 H. L. C. 226.

²) *Holme v. Brunskill* (1877), 3. Q. B. D. 495, C. A.

³) S. C. p. 505; *Whitcher v. Hall* (1826), 5 B. & C. 269; *Skillett v. Fletcher* (1867), L. R. 2 C. P. 469.

⁴) *Harborton v. Bennett* (1829), Beatty, 386.

⁵) *Rees v. Barrington* (1795), 2 Ves. 540; *Samuel v. Howarth* (1817), 3 Mer. 272; *Overend Gurney & Co. v. Oriental Financial Corporation* (1874), L. R. 7 H. L. 348; *Polak v. Everett* (1876), 1 Q. B. D. 669.

⁶) *Perry v. National Provincial Bank, etc.* [1910] 1 Ch. 464.

⁷) *Walton v. Cook* (1883), 40 Ch. D. 325.

⁸) *City Discount Co. v. Mc. Lean* (1874), L. R. 9 C. P. 692; *In re Sherry* (1884), 25 Ch. D. 692. C. A.; and see title "Banking" ante.

⁹) *Dane v. Mortgage Insurance Corporation* [1894] 1 Q. B. 54, C. A.; *Finlay v. Mexican Investment Corporation* [1897] 1 Q. B. 517.

¹⁰) *Lawrence v. Walsley* (1862), 12 C. B. N. S. 799; *Carter v. White* (1883), 25 Ch. D. 666; *Holl v. Hadley* (1835), 2 A. & E. 758.

¹¹) *Overend Gurney & Co. v. Oriental Financial Corporation, u.s.*

¹²) *Croydon Gas Co. v. Dickinson* (1876), 2 C. P. D. 46, C. A.

¹³) *Rouse v. Bradford Banking Co.* [1894] A. C. 586.

¹⁴) *Watson v. Alcock* (1853), 22 L. J. Ch. 858, C. A.

¹⁵) *Rouse v. Bradford Banking Co. u. s.*

former will be estopped from denying his consent¹). This principle even extends to the discharge of the principal, assented to after the execution of the document of discharge²).

A surety is not released by time being given to the debtor, if the former has already been sued to judgment³); nor if the right of the surety against the principal has already accrued⁴).

Other instances of sureties being released by variation may be seen in the case of fidelity guaranties, when the duties of the principal have undergone alteration without the consent of the guarantor⁵). But this will not apply to an increase of duties connected with those guaranteed⁶).

A surety will also be discharged by the resignation and re-appointment of the principal, if that is not contemplated by the bond⁷).

Neither discharge of the principal in bankruptcy nor the acceptance of a composition⁸) or scheme releases a surety, nor does a disclaimer of onerous property⁹); his remedy is to prove against the estate of his principal for his present or contingent liability, even if he has not been called upon to pay¹⁰).

In fidelity guaranties connivance in dishonest acts of the principal will discharge the surety, but this connivance must be active, amounting almost, if not entirely, to fraud. Mere laches or passive acquiescence by the obligee in acts which are contrary to the conditions of a bond are not sufficient¹¹). The surety cannot be discharged on the ground that the obligee did not see that the principal did his duty¹²).

Knowledge of dishonest acts or of facts which suggest dishonest acts on the part of the principal must promptly be divulged to the surety, who will otherwise be discharged from the time when the discovery is made or might be made, and if known but concealed at the time of the guaranty, this will not be binding¹³). But a surety is not entitled to notice by the creditor that the principal debtor is in default¹⁴); or that certain conditions to be observed by the principal are not being adhered to, unless loss or prejudice is in fact caused thereby to the surety¹⁵).

It has been held that an arrangement, which in law is fraudulent, made by a creditor in secretly reserving his right against the debtor when joining in a composition deed, discharges the surety¹⁶).

As the surety has a right to the benefit of all the securities on the faith of which he has contracted his liability, if these are released by the creditor the surety is also released¹⁷). This rule does not apply where he contracts by an entirely separate and isolated contract, so that it cannot be held that the creditor in releasing another security commits a breach of faith¹⁸). In such a case, while the surety is not abso-

¹) *Torrance v. Bank of British North America* (1873), L. R. 5 P. C. 246; *General Steam Navigation Co. v. Rolt* (1859), 6 C. B. N. S. 550; *Smith v. Winter* (1838), 4 M. & W. 454.

²) *Poole v. Willats* (1869), L. R. 4 Q. B. 630.

³) *Jenkins v. Robertson* (1854), 2 Drew. 351.

⁴) *Reade v. Lowndes* (1857), 23 Beav. 361.

⁵) *R. v. Herron* [1903] 2 Ir. R. 474; *Bonar v. Macdonald* (1850), 3 H. L. C. 226; *Pibus v. Gibb* (1856), 6 E. & B. 902; *Wembley Urban D.C. v. Poor Law etc., Association* (1901), 17 T. L. R. 516.

⁶) *Skillett v. Fletcher* (1867), L. R. 2 C. P. 469.

⁷) *Toames Cooperative Society v. Foley* [1910] 2 Ir. R. 277.

⁸) Bankruptcy Act, 1883, (46 & 47 Vict. c. 52), ss. 18 (15), 30.

⁹) *Ib.* s. 55. See further title "Bankruptcy" *post*.

¹⁰) *Ib.* s. 37; *In re Blackpool Motor Car Co.* [1901] 1 Ch. 77.

¹¹) *Mayor etc. of Durham v. Fowler* (1889), 22 Q. B. D. 394, following *Dawson v. Lawes* (1854), Kay, 280.

¹²) *S. C. and Mactaggart v. Watson* (1835), 3 Cl. & F. p. 540.

¹³) *Smith v. Bank of Scotland* (1813), 1 Dow. 272; *Phillips v. Foxall* (1872), L. R. 7 Q. B. 666; *dist. in Caxton v. Dew* (1899), 68 L. J. Q. B. 380; *Snaddon v. London etc. Assurance Co.* (1902), 5 F. 182.

¹⁴) *Britannia SS. Insurance Ass. v. Duff* [1909] S. C. 1261.

¹⁵) *Donegal C. C. v. Life & Health Assce. Ass.* [1909] 2 Ir. R. 700.

¹⁶) *Mayhew v. Boyes* (1910), 103 L. T. I.

¹⁷) *Carter v. White* (1883) 25 Ch. D. 666, where Cotton L. J. said "If there is a contract express or implied that the creditor shall acquire or preserve any right against the debtor, and the creditor deprives himself of the right which he has stipulated to acquire, or does any thing to release the right which he has, that discharges the surety".

¹⁸) *Ward v. National Bank of New Zealand*, (1883) 8 App. Cas. 755.

lutely released, he is exempted from liability to the extent of the contribution which would have been obtained from the other security¹).

Mere negligence, which does not in fact injure the surety, will not release him at all²), but if it results in injury such as the loss of a security the surety is released *pro tanto*³). Where the surety is only released *pro tanto* he cannot rely on this except as to the excess of his share of the burden⁴).

It will be borne in mind that a judgment or release affecting one joint or joint and several contractor only, will release the other contractor⁵). But this is not the case where the liability is several only⁶).

Reservation of rights against surety. A surety is not released by time being given to the debtor, if the rights of the creditor against the surety are expressly reserved by the same agreement, for the surety is not prejudiced by this⁷). But if the creditor absolutely releases the debtor, any reservation of the remedies will be illusory and of no effect, for the debt is no longer in existence⁸).

Where there is only a covenant not to sue, the surety remains liable, if his rights are reserved: and there is a tendency in the courts so to construe an apparent release, when coupled with such a reservation⁹).

An express reservation is not necessary where the instrument of guaranty provides for the continuance of liability on discharge of the debtor¹⁰).

VII. Action against the surety.

In the absence of any special bargain, the surety may be sued by the creditor as soon as default has been made by the principal and without any previous notice of the default¹¹) or demand made upon him¹²). It is otherwise when the liability is a principal liability assumed by the surety, or there is a covenant to pay on demand¹³).

Any bargain varying the *prima facie* obligations of the surety must be expressed and cannot be proved by word of mouth¹⁴).

VIII. Rights of the surety.

Contribution. When the principal is insolvent¹⁵) and one of several sureties pays more than his just proportion of the debt, he is entitled to a rateable contribution from the others¹⁶). This is a right which is independent of contract and is granted by the courts on equitable grounds, as it would be unjust that a burden which several should bear, should be borne by one alone. This is, in fact, a part of the law which gives a paying surety the benefit of all the securities held by the creditor for the same debt.

¹) *Pearl v. Deacon* (1857), 24 Beav. 186; 1 De. G. & J. 461; *In re Wolmershausen* (1890) 62 L. T. 541.

²) *Carter v. White*, u.s.; *Donegal C.C. v. Life & Health Assce* [1909] 2 Ir. R. 700; *Taylor v. Bank of New South Wales* (1886), 11 App. Cas. 596.

³) *Wulff v. Jay* (1872), L. R. 7 Q. B. 756; *Rainbow v. Juggins* (1889), 5 Q. B. D. 422. It is an implied term of the contract that the creditor may surrender a security on the bankruptcy of the debtor.

⁴) *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755.

⁵) *Kendall v. Hamilton* (1879), 4 App. Cas. 504; *Nicholson v. Revill* (1836), 4 A. & E. 675; *In re E.W.A.* [1901], 2 K. B. 642. C. A.

⁶) *Ward v. National Bank of New Zealand* (1883), 8 App. Cas. 755.

⁷) *Overend Gurney & Co. v. Oriental Financial Corporation* (1874), L. R. 7 H. L. p. 358. It is not necessary that the reservation should in all cases be expressed in the same document; *Ex p. Harvey* (1854), 4 D. M. & G. 881, and note to *Lewis v. Jones* (1825), 4 B. & C. p. 515.

⁸) *Webb v. Hewitt* (1857), 3 K. & J. 438; *Perry v. National Provincial Bank* [1910] 1 Ch. 464, and the cases there cited.

⁹) *Bateson v. Gosling* (1871), L. R. 7 C. P. 9.

¹⁰) *Perry v. National Provincial Bank etc.* u.s.; *Greenwood v. Francis* [1899] 1 Q. B. 312. C. A.

¹¹) *In re Lockey* (1844), 1 Ph. 509.

¹²) *In re Brown's Estate* [1893] 2 Ch. 300. *Colvin v. Buckle* (1858), 8 M. & W. 680.

¹³) *In re Brown's Estate*, *supra*; *Nicholson v. Ridley* [1904] 1 Ch. 192, C. A.

¹⁴) *New London Credit Syndicate v. Neale* [1898] 2 Q. B. 487, and cases there cited.

¹⁵) *Hitchman v. Stewart* (1855), 3 Drew. 271.

¹⁶) *Dering v. Lord Winchelsea* (1787), 1 Cox 318; *Ex p. Snowden* (1881), 17 Ch. D. 44; *Stirling v. Burdett* [1911] 2 Ch. 418; *In re Ennis* [1893] 3 Ch. 342.

This rateable contribution is in proportion to the respective liabilities of the sureties, if they are not equally liable¹⁾; and may be enforced as often as the payments by one surety exceed his just proportion²⁾, or, it seems, as soon as judgment has been entered against him³⁾.

It has been held in Scotland that a surety who has paid the whole debt for which several are jointly liable, can sue one of the co-sureties only, without regard to the rest, and force him to divide the liability equally with himself⁴⁾.

The equity to contribution applies notwithstanding the fact that the sureties are bound under different instruments of different dates and without communication with one another⁵⁾.

Parol evidence may be given to show that several indorsers of a bill of exchange are in fact sureties for the payment of the bill, and therefore liable to contribute⁶⁾, and parol evidence may also be given to rebut the presumption of a right to contribution⁷⁾.

A surety for payment by a surety is not liable to contribute⁸⁾, nor can he force any surety to contribute to a payment made by him⁹⁾, though of course his own principal must indemnify him.

If the co-sureties contract that each shall be liable only for a given part of a larger sum of money, the debts being therefore separate debts as between the sureties, there is no right of contribution between them¹⁰⁾.

A surety who is entitled to contribution, is entitled also to interest from the time of his payment¹¹⁾, and to any costs reasonably incurred¹²⁾.

A surety can prove for his actual or contingent liability in the bankruptcy of his co-surety¹³⁾.

Right to benefit of securities. Every person who is surety for the debt or duty of another, or is liable with another for any debt or duty, and pays such debt or performs such duty, is entitled to have assigned to him or a trustee for him, every judgment, specialty or other security which is held by the creditor in respect of such debt or duty, and is entitled to stand in the place of the creditor¹⁴⁾ and to use all his remedies in order to obtain from the principal debtor or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and loss sustained by him; so that, however, only the just share of the latter shall be recovered¹⁵⁾.

An indorser of a bill of exchange is in the position of a surety for the acceptor only from the time that he receives notice of its dishonour. He is then entitled to the benefit of securities held by the creditor to secure the debt, whether he knew of their existence before or not. This is an equitable right independent of contract. Previous to the indorser receiving such notice, the creditor may deal with the securities as he thinks best¹⁶⁾.

A surety is not entitled to assignment of the securities until the debt is paid in full. Payment of a dividend in bankruptcy is not sufficient¹⁷⁾.

Where a creditor has a right to come upon more than one person or fund for the payment of a debt, there is an equity between the persons interested in the different funds that each person or fund shall bear no more than his or its due proportion¹⁸⁾.

1) *Ellesmere Brewery Co. v. Cooper* [1896] 1 Q. B. 75; *Berridge v. Berridge* (1890), 44 Ch. D. 168.

2) *Davies v. Humphreys* (1840), 6 M. & W. 153.

3) *Wolmershausen v. Gullick* [1893] 2 Ch. 514.

4) *Buchanan v. Main* (1900), 3 F. 215. This would not be so in England.

5) *Whiting v. Burke* (1871), L. R. 6 Ch. 342.

6) *Macdonald v. Whitfield* (1883), 8 App. Cas. 733.

7) *Rae v. Rae* (1857), 6 Ir. Ch. R. 490.

8) *Craythorne v. Swinburne* (1807), 14 Ves. 160.

9) *In re Denton's Estate* [1904] 2 Ch. 178, *C. A. Thow's Trustee v. Young* [1910] S. C. 588; *Shaw v. Royce* [1911] 1 Ch. 138.

10) *Pendlebury v. Walker* (1841), 4 Y. & C. Ex. 424; *Coope v. Twynnam* (1823), T. & R. 426.

11) *Ex p. Bishop* (1880), 15 Ch. D. 400, C. A.; *Hitchman v. Stewart* (1855), 3 Drew, 271.

12) *Dixon v. Steel* [1901] 2 Ch. 602, C. A.; *In re Lockey* (1844), 1 Ph. 509.

13) *Wolmershausen v. Gullick* [1893] 2 Ch. 514.

14) *In re Churchill* (1888), 39 Ch. D. 174; and cases cited.

15) Mercantile Law Amendment Act, 1856, (19 & 20 Vict. c. 97), s. 5.

16) *Duncan Fox & Co. v. North & South Wales Bank etc.* (1880), 6 App. Cas. 1.

17) *Ewart v. Latta* (1865), 4 Macq. H. L. 983.

18) *Duncan Fox & Co. v. North & South Wales Bank* (1880), 6 App. Cas. at p. 19.

In order that a surety may be entitled to the benefit of other securities, it is necessary that these should be for the same debt¹), and if they include other debts or other parts of the same total debt, the benefit will be apportioned²).

A surety who knows of the existence of a security given by the debtor to the creditor, and himself takes a security from the debtor, will lose his rights on the former³). The creditor is not entitled to the benefit of securities given to indemnify the surety⁴).

A creditor is not entitled to tack subsequent advances, although he has contracted to make them, as against a surety who has paid off the secured debt⁵).

The right of a creditor to consolidate two or more mortgages, when such right is reserved by one or more of the mortgage deeds⁶), will depend on the rights which he has at the time that he receives notice of the suretyship as affecting one of the mortgage debts⁷).

A surety is entitled to the same right as the creditor whose debt he has paid as to marshalling securities for his benefit⁸).

A surety who has paid more than his just share of the principal's debt has also a right to be recouped out of any security given by the debtor to another surety, such security in fact ensuring for the benefit of all the sureties⁹); and this is so even though the other surety has consented to be surety only upon the terms of having the security, and the co-sureties were ignorant of this security being given at the time they entered into the contract of suretyship¹⁰).

If a surety pays the creditor and thereby receives securities held by the latter, these benefit all co-sureties in proportion to their guaranty¹¹).

Right of surety to be indemnified by the principal. A surety who pays the debt of the principal is entitled to be indemnified by the latter; and this applies to persons who are not perhaps strictly sureties, such as indorsers of a bill as against the acceptor, and other persons who are compelled by law to pay a debt which in the first place is due by another¹²).

Where there is an actual accrued debt secured by a guaranty and the surety admits liability for the amount guaranteed, he has an equitable right to compel the principal debtor to relieve him from his liability by paying the debt¹³).

Where there is an express indemnity given by the debtor to the surety, it will exclude the implied indemnity¹⁴). If it is given by a third person the surety can sue as soon as he is called upon to pay, and before he has actually paid¹⁵).

A surety may abandon his right to indemnity by the debtor, if he assents to the release of the debtor in such a manner as to show his intention to abandon his right¹⁶).

A surety is entitled to interest on the sums paid by him to the creditor¹⁷), and to costs which have been properly incurred¹⁸).

¹) *Wilkinson v. London & County Bkg. Co.* (1884), 1 T. L. R. 63; cf. *Napier v. Bruce* (1842), 8 Cl. & F. 470.

²) *Goodwin v. Gray* (1874), 22 W. R. 312.

³) *Cooper v. Jenkins* (1863), 32 Beav. 337; cf. *Mills v. United Counties Bank* [1912] 1 Ch. 231.

⁴) *In re Walker* [1892] 1 Ch. 621.

⁵) *Forbes v. Jackson* (1882), 19 Ch. D. 615; *In re Kirkwood's Estate* (1878), 1 L. R. Ir. 108; *West v. Williams* [1899] 1 Ch. 132 C. A.

⁶) Conveyancing Act, 1881, (44 & 45 Vict. c. 41), s. 17.

⁷) *In re Toogood's Legacy Trusts* (1889), 61 L. T. 19; *Rouse v. Bradford Banking Co.* [1894] A. C. 586; *Leicestershire Banking Co. v. Hawkins* (1900) 16 T. L. R. 317.

⁸) *South v. Bloxham* (1865), 2 H. & M. 457; *Heyman v. Dubois* (1871) L. R. 13 Eq. 158.

⁹) *Berridge v. Berridge* (1890), 44 Ch. D. 168.

¹⁰) *Steel v. Dixon* (1881), 17 Ch. D. 825.

¹¹) *In re Arcedecture* (1883), 24 Ch. D. 709.

¹²) *Duncan Fox & Co. v. North & South Wales Bank* (1889), 6 App. Cas. p. 14; *Ex p. Bishop* (1880), 15 Ch. D. p. 416.

¹³) *Ascherson v. Tredegar Dry Dock Co* [1909] 2 Ch. 401.

¹⁴) *Mills v. United Counties Bank* [1911] 1 Ch. p. 677.

¹⁵) *Woodridge v. Norris* (1868), L. R. 6 Eq. 410.

¹⁶) Note to *Lewis v. Jones* (1825), 4 B. & C. p. 515.

¹⁷) *In re Watson* [1896] 1 Ch. 925.

¹⁸) *Dixon v. Steel* [1901] 1 Ch. 602; *Hornby v. Cardwell* (1881), 8 Q. B. D. 329.

Title IX. Sale of Goods.

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I. Introduction.

The English law of Sale of Goods is a branch of the Common Law and has its origin in the remotest times. Its principles were originally contained in decided cases, and until the year 1893 the only part having a statutory origin was contained in the statutes 1 Jac. I, c. 21 ("An Act against Brokers"); 29 Car. II, c. 3 (The Statute of Frauds) ss. 16 and 17; 9 Geo. IV, c. 14 (Lord Tenterden's Act), s. 7; 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act, 1856) ss. 1 and 2. In the year 1893, the whole of these were repealed and the effect of their provisions and of the decisions thereon, and of the decisions in which the provisions of the Common Law relating to sale of goods were contained, modified in some slight respects which were deemed advisable, was re-enacted in the form of a statute called the Sale of Goods Act, 1893. This statute is substantially a code containing almost the whole of the law on sale of goods now in force. But the Act did not repeal the whole of the law existing before it was passed, but only the statutes mentioned above and the effect of such decisions as were inconsistent with its provisions. The rules of the Common Law, including the Law Merchant, save in so far as they are inconsistent with the express provisions of the Sale of Goods Act, still obtain with regard to contracts of sale of goods, particularly the rules relating to principal and agent, and the effect of fraud, misrepresentation, duress, coercion, mistake or other invalidating cause¹). Transactions in the form of a sale but intended to operate in some other way, e.g. by way of mortgage, pledge, or other security, are not affected by the Act¹).

Speaking generally, the effect of the passing of the Sale of Goods Act is that the only portions of the law of sale of goods not expressly contained in its provisions are:

- i) The general law of contract which applies to all contracts of sale or otherwise, e.g. the provision in s. 4 of the Statute of Frauds that a contract not to be performed within a year cannot be enforced unless it is proved by a memorandum in writing²).
- ii) Statutory provisions on particular points contained in:
 - a) The Factors Act, 1889;
 - b) The Statutes relating to the Sale of Horses (2. Ph. & Mary, c. 7 and 31 Eliz. c. 12);
 - c) The Bills of Lading Act, 1855;
 - d) The Merchandise Marks Act, 1887.

Sale of Goods Act, 1893. The effect of the Sale of Goods Act has been to codify and amend the unwritten law as it existed in the year 1893, and to clear up some points on which the law was doubtful. Decisions in the Courts of Law of an earlier date, though sometimes useful as showing the principles according to which that Act must be interpreted, must not be relied on as showing what is the present law, where they in the least degree conflict with the language of the statute. "The object and intent of the statute of 1893 was, no doubt, simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law"³).

The English law of sale of goods obtains in England, Wales and Ireland, but does not extend to Scotland, nor does it of necessity apply in the British Dominions beyond the seas. In India the law is in some slight respects different and is contained in ss. 76 to 123 of the Indian Contract Act. Several British Dominions have, however, adopted the Sale of Goods Act in full, with small variations to suit local circumstances. Among such Dominions are Ceylon, Gibraltar, Hongkong, Jamaica, Manitoba, Newfoundland, New Zealand, Queensland, South Australia, Tasmania, Trinidad and Tobago, Victoria and Western Australia. In countries such as China

¹) Sale of Goods Act, s. 61.

²) *Prested Miners Company Ltd. v. Gardner Ltd.* [1910] 2 K. B. 776; [1911] 1 K. B. 425.

³) Per Cozens Hardy, M.R. in *British Tramways Ltd. v. Fiat Motors Ltd.* [1910] 2 K. B. at p. 836; and see also remarks of Lord Robertson in *Laing v. Barclay* [1908] A. C. at p. 45.

and Turkey, where by reason of capitulations and treaties of various kinds, Great Britain has extra-territorial jurisdiction, in virtue of which cases against British subjects are tried in local British Courts, the law administered is the law of England, notwithstanding that the British subject to whom it is applied is a native not of England, Wales or Ireland, but of some other part of the British Empire.

The law of sale of goods in England is entirely different from the law of sale of land and interests in land. By "goods" is meant all moveables of a concrete nature, industrial growing crops, and things growing in or attached to the land which are agreed to be severed from the land before the sale or under the contract of sale. "Goods" does not include slagheaps¹⁾, tenant's fixtures, money, negotiable instruments, shares or valuable securities, or choses in action²⁾.

II. Nature of a Contract of Sale of Goods.

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. Such a contract may be verbal or in writing, or partly verbal and partly in writing, or may be implied from the acts and conduct of the parties which show an offer by one to enter into such a contract and an acceptance of that offer by the other. The parties entering into the contract must have capacity to contract as required by the law of England, as well as the capacity to transfer and acquire property.

For example, a person under the age of 21 years is not bound by a contract for the sale of goods; but where such goods are necessities to a minor in his station of life and to his actual requirements at the time of sale and delivery, he is bound to pay a reasonable price therefor. Similarly in the case of a person who by reason of mental incapacity or drunkenness is deemed to be incapable of entering into a binding contract. This obligation to pay a reasonable price is not really a contractual one, but arises *quasi ex contractu*, the law saying that as the necessities are for his benefit it will attach to such a transaction an obligation that they be fairly paid for.

III. Formation of the Contract.

What formalities are necessary. If a contract of sale is made with a corporation, it may be necessary that the contract should be in writing and under seal, as some corporations cannot be bound by any other form of contract. But if the corporation is a registered company limited by shares, which is the usual form of trading corporation, it is bound by any contract entered into by a duly authorised agent, if the circumstances are such that an ordinary person would have been bound. And whenever the corporation is one which has been created for purposes which render it necessary that work should be done or goods supplied in order that those purposes may be carried into effect, and orders are given by the corporation in relation to the supply of goods for the effecting of such purposes, then the corporation is bound to pay for such goods when everything has been done by the seller that would entitle him to payment from an ordinary person, the law implying from the acts of the corporation an obligation to pay for goods so supplied³⁾.

When memorandum in writing necessary. We have said above that a contract of sale of goods may be verbal or in writing or may be implied from the acts and conduct of the parties. But where the contract is for the sale of any goods of the value of ten pounds or upwards it cannot be enforced by action in the Courts unless the buyer accepts part of the goods and actually receives that part, or gives something in earnest to bind the contract, or pays part of the price, or unless some note or memorandum in writing of the terms of the contract be made and signed by the party against whom the action is brought or his duly authorised agent⁴⁾.

The note or memorandum in writing must designate the parties by name or description, the goods sold or agreed to be sold, and the price if agreed upon, and must show directly or by implication the nature of the promise of the party to be charged⁵⁾.

¹⁾ *Morgan v. Russel* [1909] 1 K. B. 257.

²⁾ Sale of Goods Act, s. 62.

³⁾ *Lawford v. Billericay R. D. C.* [1903] 1 K. B. 772.

⁴⁾ Sale of Goods Act, s. 4, sub-s. 1.

⁵⁾ *Vandenberg v. Spornier* (1866) L. R. 1. Ex. 316; *Newell v. Radford* (1868) L. R. 3 C. P. 52.

This provision of English law (which has no force in Scotland) is applied in the English Courts to every contract for the sale of goods of a value of ten pounds or more, notwithstanding that it is the intention of the parties that the goods should be delivered at some future time, or may not at the date of the contract be actually in existence, or in the possession or at the disposition of the seller, or fit or ready to be delivered.

Goods are said to be "accepted" within the meaning of this section, and a memorandum in writing therefore becomes unnecessary, when the buyer does some act in relation to the goods which recognizes a pre-existing contract of sale, whether such act be done in carrying out the terms of the contract or not. If the seller attorns to the buyer and holds the goods as his bailee, or if the goods are in the possession of a third person who attorns to the buyer it is sufficient to satisfy the statutory provision¹).

The object of the section is to prevent unfounded claims from being brought in the Courts, and provides that adequate proof of the contract shall be produced before the tribunal which tries the case. If this is forthcoming in the form of a written document or series of documents, well and good: but if not, proof must be given of conduct of the kind mentioned in the section, which conduct can only be satisfactorily explained on the assumption that a contract has been entered into. The provisions of the section, being part of the law of procedure in the courts, are *lex fori*, and will therefore be applied in any action brought in an English Court to enforce a contract for the sale of goods of the value of ten pounds or upwards, even though the contract may have been made in a country, or between the subjects of a State, in whose law there is no such provision.

While considering this provision we may advantageously discuss another rule of law²) which applies to the sale of goods and requires the formality of writing, namely, that if the contract is not to be performed within a year, the Courts will not enforce it unless it be evidenced by a written document showing its terms and signed by the party to be charged or by his duly authorised agent. This provision applies, however small may be the value of the goods, and notwithstanding that part of the price has been paid, or part of the goods accepted and received, or something given in earnest to bind the bargain³). This again is a rule of procedure and part of the *lex fori*, and will be enforced in every case of a contract not to be performed within a year that comes before the Courts.

As a result of these provisions being only rules of procedure it follows that, although such a contract cannot be enforced in the Courts, because some of the necessary formalities have not been complied with, it is nevertheless good as between the parties. Therefore, if for example, under a contract not to be performed within a year, the purchaser pays the price, he cannot recover his money back, and if the seller attempts, in the absence of any stipulation allowing him to do so, to sell the goods to any other person, he may be sued in damages for wrongful conversion⁴).

It is a sufficient memorandum in writing if the party desiring to enforce such a contract can produce a letter, or series of letters or other documents, which together show what the terms of the contract are and that such terms have been assented to either by actual signature of one or more of the documents by the party charged, or by his agent, or by his name or that of his agent being allowed to appear in print or in writing on one or more of the documents.

If a series of letters or documents is relied upon as together amounting to a note or memorandum in writing, they must show from their own terms that they are connected. Oral evidence is not admissible to show the connection. But an envelope may be read with the letter contained in it, and an agreement referred to in a document may be identified by parol evidence. The memorandum need not be contemporaneous with the contract; it is sufficient if it has come into existence before action brought. Where the signature is not that of the party himself, but of his agent, it is not necessary that the agent should have been authorised in writing: it is enough if the party desiring to enforce the contract can show that the person whose signature

¹) *Elmore v. Stone* (1809) 1 Taunt. 458; *Marvin v. Wallace* (1856) 25 L. J. Q. B. 369; *Castle v. Sworder* (1861) 30 L. J. Ex. 310; *Abbott v. Wolsey* [1895] 2 Q. B. at p. 100; *Taylor v. G. E. Rail. Co.* [1901] 1 K. B. 774.

²) S. 4 of the Statute of Frauds (29 Car. II, c. 3).

³) *Prested Miners Ltd. v. Gardner* [1910] 2 K. B. 776; [1911] 1 K. B. 425.

⁴) *Taylor v. G. E. Ry.* [1901] 1 K. B. 774.

is relied upon was in fact the agent of the person sought to be charged in the action, and was in fact authorized to enter into the contract of sale.

A broker is an agent to sign for both seller and buyer, and his "sold note" is, if it contains the terms of the bargain as mentioned above, sufficient to satisfy the statute in an action by the buyer against the seller, and similarly his "bought note" is sufficient in an action by the seller against the buyer.

If a contract required to be evidenced by writing is subsequently varied so as to create in contemplation of law a new contract, the variation must be proved by writing signed by the party to be charged or his agent. For example, an oral agreement to extend the time for performance of a contract in writing, cannot be proved in defence to an action for non-performance¹).

Earnest. The phrase "give something in earnest to bind the contract" in section 4 of the Sale of Goods Act requires some explanation. This is a survival from the practice of great antiquity of giving some symbol to signify that the contract is concluded, such as a ring or other object, to be delivered back on the completion of the contract²). It was familiar to the law of Rome under the name of *arrha*. Payment of a deposit in money may be the giving of an earnest to bind the bargain, but more commonly is part payment of the price, but in either case such a payment is sufficient to satisfy the statute³). An agreement to set off a debt due to the buyer from the seller as part of the price is good part payment within the meaning of the statute⁴), and a contract under which the seller purports to effect a sale of "future goods" operates and will be construed as an agreement to sell the goods.

Sales by auction. An auctioneer, though employed by the seller, is an agent for both parties, and therefore an agent for the buyer, to sign a memorandum in writing where such a document is necessary; but his clerk, unless specially authorized, is not such an agent. If, however, an auctioneer sells by private treaty he is only an agent to sign for the seller.

In the case of a sale by auction the following rules govern the formation of the contract⁵):

1. Each lot offered for sale by auction is deemed to be the subject of a separate contract of sale.
2. A sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Until such announcement is made the bidder may retract his bid.
3. Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller it is not lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer⁶).
4. A sale by auction may be notified to be subject to a reserved or upset price and a right to bid may also be reserved expressly by or on behalf of the seller.
5. Where a right to bid is expressly reserved, but not otherwise, the seller, or any person on his behalf, may bid at the auction.

Sale of goods which have perished. Where there is a contract for the sale of specific goods and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void⁷).

By specific goods are meant goods identified and agreed upon as the subject of the contract at the time when the contract is made. The rule laid down by this section is confined to specific goods, and does not extend to goods *ejusdem generis*. Where goods of a generic kind are agreed to be sold and are identified merely by description, the seller is bound to deliver goods of that kind even though the particular goods he intended to deliver under the contract have been destroyed. Thus, where a specific cargo of corn was sold as being at sea, and it turned out that at the time the contract was entered into the corn had been so damaged as not to answer the description

¹) *Noble v. Ward* (1867) L. R. 2 Ex. 135.

²) *Howe v. Smith* (1884) 27 Ch. D. at p. 101.

³) *Soper v. Arnold* (1887) 14 App. Cas. at p. 435.

⁴) *Walker v. Nursey* (1847) 16 M. & W. 302.

⁵) Sale of Goods Act, s. 58.

⁶) See *post*, p. 346.

⁷) Sale of Goods Act, 1893, s. 6.

under the contract, the sale was held void¹). But if the seller agrees to sell corn of the kind on a certain vessel, meaning to perform the contract by means of the corn on that vessel but not binding himself to do so, he must deliver corn of that kind notwithstanding that the vessel and cargo may have perished at the time when the contract was entered into.

Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the buyer or seller, perish before the risk passes to the buyer, the agreement is thereby avoided²). This rule applies even if the goods are "future goods", provided they are also "specific" in the sense mentioned above. Thus, if a man agrees to sell 200 tons of potatoes out of a crop to be grown on specific land and the crop fails, the agreement is thereby avoided³).

Fixing the price. The consideration which passes to the seller in a contract of sale is always a money consideration, called the price. If the consideration for agreeing to pass the property in goods is not a money consideration, the contract is not one of sale, but is exchange or barter or an agreement to make a gift. The price in a contract of sale may be fixed by the contract, or it may be left to be fixed in a manner thereby agreed, or may be determined by the course of dealing between the parties⁴). Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances in each particular case⁵). In an action on a contract of sale of goods for which the price was not agreed, if there is a dispute as to what is a reasonable price, evidence may be given as to the condition of markets and the quotations for goods of that kind, and the question becomes one of fact to be determined by the jury. A man is at liberty to sell at any price, even less than cost price, but if he has acquired the goods under a contract which prevents him selling at less than a minimum price, he will be liable in damages to the person from whom he so acquired them if he sells at less than the agreed minimum⁶).

Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third person, and such third person cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor. Where such third person is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault⁷). A party is said to be in fault when either by his wrongful act or his neglect or default he prevents the valuation being made⁸). The right to sue for damages thus confirmed by statute is based on a general principle of law, that where a party to a contract by his act or default prevents a contract from being performed, he is liable to the other party in damages. If the amount in dispute is to be determined by two arbitrators, one appointed by each party, and an umpire, and one party on receiving notice from the other to appoint an arbitrator, fails to do so in a reasonable time, he is liable in damages notwithstanding that the other party has not appointed his arbitrator⁹).

Stipulations as to time. Unless a different intention appears from the terms of the contract, stipulations as to the time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract¹⁰). In a contract of sale "month" *prima facie* means calendar month¹¹). As regards other stipulations as to time, for example time of delivery, these are usually regarded as of the essence of the contract in mercantile transactions¹²). For example, where 25 tons of pepper were sold on the terms "names of vessel or vessels, marks and particulars to be

1) *Couturier v. Hastie* (1855) 5 H. L. Cas. 673.

2) Sale of Goods Act, s. 7.

3) *Howell v. Coupland* (1874) L. R. 9 Q. B. 462, 465; (1876) 1 Q. B. D. 258, 262.

4) Sale of Goods Act, s. 8, sub-s. 1.

5) Sale of Goods Act, s. 8, sub-s. 2.

6) *Elliman v. Carrington* [1901] 2 Ch. 275.

7) Sale of Goods Act, s. 9, sub-s. 1 and 2.

8) S. 62.

9) *Thomas v. Fredericks* (1847) 10 Q. B. 775.

10) Sale of Goods Act, 1893, s. 10, sub-s. 1.

11) Sub-s. 2.

12) *Bowes v. Shand* (1877) 2 App. Cas. at p. 463.

declared within sixty days of bill of lading", it was held that the time within which the pepper was to be declared was an essential condition of the contract¹).

IV. Conditions and Warranties.

The phrase "of the essence of the contract" is applied to a stipulation in the contract when the stipulation is such that if it is not observed by one party the other party will be discharged from all performance under the contract. Such a stipulation is called in English law a condition and may be express or implied. On breach of a condition by one party the other party is absolved from all performance of the obligations imposed upon him by the contract and may treat it as at an end. The party not in fault may, however, if he pleases, still hold the party guilty of the breach of condition to his contract and content himself with claiming damages resulting to himself from the breach. A stipulation in a contract of sale which does not go to the root of the bargain, but is collateral to the main purpose of the contract, and is such that on breach of it by one party the other only has a right to sue for any damage occasioned by such breach, is called a warranty²). The law in England and Ireland as to the rights of a party on breach of condition or breach of warranty is thus laid down by the Sale of Goods Act, s. 11, sub-s. 1:

- a) "Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated";
- b) "Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract";
- c) "Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

A contract of sale of goods is said to be severable when its terms are such that the goods may be delivered in parcels and the buyer is bound to take delivery of each parcel as it comes along, provided it is in accordance with the terms of the contract. Sometimes it is clear from the terms of the contract that it is severable, but in other cases it may be a matter of some difficulty to determine whether the goods are all to be delivered in one delivery or may be split up over several deliveries³).

Any affirmation made at the time a contract is entered into and intended to form part of the contract is a warranty a breach of which gives rise to a claim in damages. Whether an affirmation proved to have been made is or is not a warranty is a question of fact for the jury. If, however, the contract is reduced into writing, evidence of a contemporaneous verbal warranty is inadmissible⁴), but if the writing is only a memorandum of the terms of the contract and not the contract itself, evidence of such a warranty is admissible⁵). If an untrue representation of fact made fraudulently induces either party to enter into a contract of sale, such party, on discovering the fraud may repudiate the contract and refuse to be bound thereby or he may at his option affirm the contract, and in either case sue in tort for any damage accruing to him from the fraudulent misrepresentation⁶). If a misrepresentation of fact is not made fraudulently, a person who has been induced to enter into a contract by the misrepresentation may apply to the Court for an order that the con-

¹) *Reuter v. Sala* (1879) 4 C. P. D. 246.

²) Sale of Goods Act, s. 62.

³) See *Simpson v. Crippen* (1872) L. R. 8 Q. B. 74; *Brandt v. Lawrence* (1876) 1 Q. B. D. 314.

⁴) *Harnor v. Groves* (1855) 5 C. B. 667.

⁵) *Allen v. Pink* (1838) 4 M. & W. 140.

⁶) *Re Eastgate, Exp. Ward* [1905] 1. K. B. 465; *Kennedy v. Panama Canal Co.* (1867) L. R. 2 Q. B. at p. 587.

tract be rescinded¹). If the contract of sale is executory, the Court will rescind it, but when a contract for the sale of a chattel has become executed the Court will not rescind, and if the representation which is proved to be untrue was made anterior to the sale and not made fraudulently, the party induced thereby to enter into the contract remains bound²). But if a stipulation made before a contract of sale is such that it is a condition precedent to there being a contract at all, then in the event of the condition not being fulfilled, the other party is not bound and may refuse to perform any part of the contract. Thus, on an agreement for the sale of hops where the purchaser, before entering into the contract, had clearly stated that he would not buy hops treated with sulphur, and the seller in purporting to perform the contract delivered hops some small portion of which had been treated with sulphur, it was held that the buyer was entitled to reject the whole³). And where on a sale of "common English Sanfoin" the seller delivered an inferior seed known as "giant sanfoin", which the buyer resold as "common English sanfoin" to persons who recovered damages against him, it was held there had been a breach of condition which the buyer might treat as a breach of warranty and for which the seller was liable to him in damages⁴).

The term "condition" is not defined by the Sale of Goods Act, but "warranty" is defined⁵) "as an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated". This definition defines the term warranty purely with reference to the remedy given for a breach, without dealing with the nature of a warranty. The following passage from a recent judgment of Fletcher Moulton L. J., approved in the House of Lords ([1911] A. C. 394) better shows the nature of a warranty:

"A party to a contract who has performed, or is ready and willing to perform his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognized that such obligations are not all of equal importance. There are some which go so directly to the substance of the contract, or, in other words, are so essential to its very nature, that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. Although the decisions are fairly consistent in recognizing this distinction between the two classes of obligations under a contract, there has not been a similar consistency in the nomenclature applied to them. I do not, however, propose to discuss this matter, because later usage has consecrated the term "condition" to describe an obligation of the former class and "warranty" to describe an obligation of the latter class. I do not think that the choice of terms is happy, especially so far as regards the word "condition", for it is a word which is used in many other connections and has considerable variety of meaning. But its use with regard to the obligations under a contract is well known and recognized, and no confusion need arise if proper regard be had to the context"⁶).

Conditions and warranties may be either expressly agreed between the parties, or they may be implied from the circumstances under which the contract was entered into. The cases in which conditions or warranties will be implied are defined in sections 12 to 15, both inclusive, of the Sale of Goods Act. An express warranty

¹) *New Brunswick Ry Co. v. Conybeare* (1862) 9 H. L. Cas. 711; *Redgrave v. Hurd* (1882) 20 Ch. D. 1.

²) *Seddon v. North Eastern Salt Co.* [1905] 1 Ch. 326; *Angel v. Jay* [1911] 1 K. B. 666.

³) *Bannerman v. White* (1861) 31 L. J. C. P. 28.

⁴) *Wallis v. Pratt* [1911] A. C. 394.

⁵) S. 62.

⁶) *Wallis v. Pratt* [1910] 2 K. B. at p. 1012.

or condition does not negative a warranty or condition implied by the Act unless the two are inconsistent¹).

It is important to remember that apart from the cases where the Act provides that there shall be an implied condition, one of these sections²) lays it down that an implied warranty or condition as to quality or fitness for a particular purpose may be annexed to a contract by the usage of trade; and also that it is provided by s. 55 of the Act that where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement, or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract. It should therefore be borne in mind that the legal rights and obligations of the parties as here stated, may in any given case, be modified owing to express agreement, the course of dealing between the parties, the usage of trade, or custom.

Undertaking as to title. These sections we shall now discuss in detail. The first (s. 12) deals with the seller's undertaking as to title.

"In a contract of sale, unless the circumstances of the sale are such as to show a different intention, there is:

1. An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.
2. An implied warranty that the buyer shall have and enjoy quiet possession of the goods.
3. An implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made."

The only exception to these provisions recognized is that of a sheriff, or the bailiff of a County Court, who if he sells goods taken in execution under an order of a Court, gives no undertaking as to title³). But if he knows that he has no title to sell he is liable in damages⁴).

Sale by description. The next kind of condition and warranty we have to discuss is that implied by law where there is a sale by description, that is to say, a sale of goods of a kind which is defined as between the seller and buyer by describing their qualities, or attributes, or name by which such goods are usually known. For example a sale of sulphuric acid known in the trade as "B.O.V." and commercially free from arsenic is a sale by description⁵). The most usual case of a sale by description is a sale of unascertained goods, but the term applies to all cases where the buyer has not seen the goods, but relies on description alone⁶). Under such a contract the seller is not bound to deliver any particular lot of sulphuric acid, but he is bound to deliver sulphuric acid of a kind answering to the trade description "B.O.V." and also commercially free from arsenic. "Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description⁷)". If the goods supplied do not correspond with the description, the buyer may reject them, or he may treat the implied condition as an implied warranty and sue for damages. Where sulphuric acid of the kind mentioned above was ordered, and the seller supplied sulphuric acid containing arsenic, which the buyer sold to brewers, who used it in making beer, whereby the buyer lost his business, it was held that the buyer could recover from the seller damages for breach of warranty⁸). So where a reaping-machine was sold as being "nearly new and having been used to, cut only about 50 or 60 acres", it was held that this was a sale by description, and the buyer was entitled to reject it when on delivery it proved to be a very old one that had been mended⁹).

A buyer is always entitled to a reasonable opportunity for examining goods

¹) Sale of Goods Act, 1893 s. 14, sub-s. 4. See also *Wallis v. Pratt* [1911] A. C. 394.

²) S. 14, sub-s. 3.

³) *Exp. Villars* (1874) L. R. 9 Ch. 434.

⁴) *Peto v. Blaydes* (1814) 5 Taunt, 657.

⁵) *Bostock v. Nicholson* [1904] 1 K. B. 725.

⁶) Per Channell J. in *Varley v. Whipp*s [1900] 1 Q. B. at p. 516.

⁷) Sale of Goods Act, s. 13.

⁸) *Bostock v. Nicholson* [1904] 1 K. B. 725.

⁹) *Varley v. Whipp*s [1900] 1 Q. B. 513.

before he is deemed to have waived a breach of condition and so to have deprived himself of the right to reject¹).

Where there is a sale by description and the seller is a person who deals in goods of that description, then, whether he be the manufacturer or not, there is further an implied condition that the goods shall be of merchantable quality; but if the buyer has examined the goods, there is no implied condition or warranty as regards defects which such examination ought to have revealed²). For example, where a customer went into a public-house and asked for "Holden's Beer", and was served with beer which contained arsenic and brought on arsenical poisoning, it was held that he could sue the seller for damages for breach of warranty on the ground that the beer was not of merchantable quality and the defect was not one that examination would have revealed³). To be of merchantable quality, goods must be in such a condition that they are immediately saleable. The warranty is broken and they are damaged so as not to be immediately saleable, even though the damage be such that at slight expense it could be remedied. Thus where motor-horns of the value of £398 were delivered under a contract of sale by description, and the horns were substantially in accordance with the contract but some of them were dented, others scratched, others discoloured and badly finished and polished, but only to the extent that all the damage could have been remedied at a cost of £35, it was held that the buyer was entitled to reject the whole⁴).

Sale by Sample. We have now to consider the case of a sale by sample. If the sale is also one by description there is an implied condition that the goods will correspond with the description, and it is not sufficient that the bulk of the goods correspond with the sample⁵).

A contract of sale is said to be a contract for sale by sample where there is a term in the contract, express or implied, that the goods are to correspond to a specimen, called a sample, submitted before the contract is entered into. In the case of any contract for sale by sample there is:

- a) An implied condition that the bulk shall correspond with the sample in quality;
- b) An implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
- c) An implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample⁶).

"Quality of goods" includes their state or condition (s. 62). These implied conditions have to be satisfied as to the whole of the goods. Where, however, on a sale by sample, it is shown that there is a custom that the buyer shall not reject for inferiority to the sample if such inferiority is not excessive, but shall accept a diminution in price, such custom is good and may be enforced as part of the bargain⁷).

Sale for a particular purpose. We have dealt with the conditions and warranties that are implied when there is a sale by description or a sale by sample. We now have to consider the very important case of goods sold for a particular purpose, which is provided for by sec. 14, sub-s. 1 of the Sale of Goods Act as follows:

"Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

This section has received a liberal construction and the Courts will give effect to its full meaning notwithstanding that such meaning may extend the law as laid

¹) Sale of Goods Act, s. 34.

²) Sale of Goods Act, s. 14, sub-s. 2.

³) *Wren v. Holt* [1903] 1 K. B. 610.

⁴) *Jackson v. Rotax Motor & Cycle Co.* [1910] 2 K. B. 937.

⁵) Sale of Goods Act, s. 13.

⁶) Sale of Goods Act, s. 15.

⁷) *Re Walkers* [1904] 2 K. B. 152.

down in the cases decided before the Act was passed¹). Thus where the plaintiff went to a retail chemist and said he wanted for his wife a hot-water bottle but not an expensive article, and was shown an india-rubber hot-water bottle which he examined and bought for 3s. 6d. after being told it was meant for hot water but would not stand boiling water, and the hot-water bottle burst when being used by the plaintiff's wife, it was held that the defendant, who knew nothing about the composition of the material of which the bottle was made, was liable under this section for the expenses incurred by the plaintiff in the treatment of the injury occasioned to his wife by the bursting of the bottle²). Where the sale is of food the Court will presume that the buyer made known to the seller and that the seller knew that it was to be used as food. Under the section the seller is liable for latent as well as patent defects, e.g. a hidden defect in a carriage pole which caused it to snap³), and typhoid germs in milk which caused the death of the buyer's wife⁴). Where there was a sale of motor omnibuses and the seller was told that they were wanted for heavy passenger traffic at Bristol, the Court was of opinion that such a statement was sufficient to show that the buyer relied on the seller's skill or judgment⁵). In this case it was held that a sale of a "24/40 h.p. Fiat omnibus with body tyres and lamps complete" was not a sale of an article under its patent or trade name within the meaning of the proviso to s. 14 and that there was an implied condition that the goods should be reasonably fit for the purpose for which they were required.

Where a vendor desires to protect himself from the warranties implied by the Sale of Goods Act he must do so in clear and precise language. Therefore if goods are sold "with all faults" and the seller says that he gives no warranty and will pay no compensation for any error in description, he will not be liable for defects in the goods, unless he has been guilty of fraudulent conduct that would make him liable in an action of tort⁶). But where goods of a different kind from those bargained for are delivered the seller is not protected by a term in the contract that "he gives no warranty express or implied"⁷).

Goods bearing a trade mark or trade description. There is one more case in which a warranty is implied in law on a sale of goods, and that is where the goods sold are goods to which a trade mark or trade description has been applied. In such a case if it is a trade mark that has been applied there is an implied warranty by the seller that the trade mark is a genuine trade mark and not forged or falsely applied; and if it is a trade description that has been applied, then, if it has been applied in writing⁸), there is an implied warranty that it is not a false trade description. But the implied warranty may be negatived by a writing signed by or on behalf of the seller and delivered to the buyer and accepted by him at the time when the contract of sale is made⁹).

V. Transfer of Property.

We now pass to the consideration of the rules with regard to the transfer of the property in goods the subject of a contract of sale. The ordinary rule in Roman law was that the property did not pass till delivery, but in English law this rule does not hold unless it be the intention of the parties that the property shall not pass at an earlier time. In discussing this topic a clear distinction must be drawn between "unascertained goods" and "specific goods". Unascertained or generic goods are goods defined by description only. "Specific goods" means goods identified and agreed upon at the time when the contract is made. By "the property" in goods is meant the general property giving absolute ownership, and not merely "a property", e.g. the "special property" acquired by carriers and some other kinds of bailees.

Property in unascertained goods. "Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless

¹) *Bristol Tramways v. Fiat Motors Ltd.* [1910] 2 K. B. 831.

²) *Preist v. Last* [1903] 1 K. B. 148.

³) *Randall v. Newson* (1877) 2 Q. B. D. 102.

⁴) *Frost v. Aylesbury Dairy Co* [1905] 1 K. B. 608.

⁵) *Bristol Tramways Co. v. Fiat Motors Ltd.* [1910] 2 K. B. at p. 836.

⁶) *Ward v. Hobbs* (1878) 4 App. Cass. 13.

⁷) *Wallis v. Pratt* [1910] 2 K. B. 1003; [1911] A. C. 394; *Clarke v. Army & Navy Stores* [1903] 1 K. B. 1551.

⁸) *Coppen v. Moore* (No. 1) [1898] 2 Q. B. 300. As to the meaning of trade description, see title "Trade Marks and Trade Names", *post*.

⁹) Merchandise Marks Act, 1887, s. 17.

and until the goods are ascertained¹⁾). Thus if A sells to B. "50 tons of kidney potatoes" no property passes until A has appropriated sufficient potatoes of this kind to the contract, e.g. looked out 50 tons of potatoes of this kind and set them apart for delivery, or done some other act showing an unequivocal intention to appropriate them to the contract. But if A agrees to sell to B "the 50 bags of kidney potatoes now on my farm", that is a sale of specific goods, namely, the 50 bags of potatoes identified as being on the farm and of the kind called "kidney", and in the absence of any stipulation or expression of intention to the contrary the property passes at once.

Property in specific goods. 1. "When there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

2. For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case²⁾".

Therefore, if it be the intention of the parties, the property in the goods will pass when the contract is made. Thus a contract of sale may be also a conveyance. "Where by the contract itself the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of this contract, therefore, is to vest the property in the bargain³⁾".

Rules to ascertain the intention of the parties. As stated above the passing of the property depends on the intention of the parties as to when it should pass. If this intention is clearly expressed no difficulty arises, but if it is not so expressed, it has to be determined from all the circumstances of the case, including the conduct of the parties. But s. 18 of the Sale of Goods Act itself lays down rules with regard to this aspect of the contract, with which we now proceed to deal. The Courts have taken the view that these rules are explicit in their language and require no illustration from the cases decided before the passing of the Act⁴⁾.

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

Rule 1. "Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed."

Goods are said to be in a "deliverable state" within the meaning of the Act when they are in such a state that the buyer would under the contract be bound to take delivery of them⁵⁾.

Rule 2. "Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof".

Where a contract for the building and sale of steamships contained a stipulation that when completed there were to be certain steam trials at the builders' expense and that the ships would not be considered as delivered to and finally accepted by the purchaser until they had passed the official trip to Genoa, it was held that they were not in a deliverable state prior to the steam trials and official trip⁶⁾.

Rule 3. "Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof".

¹⁾ Sale of Goods Act, s. 16.

²⁾ Sale of Goods Act, s. 17.

³⁾ Per Parke, B., in *Dixon v. Yates* (1833) 5 B. & Ald. at p. 340.

⁴⁾ See *Laing v. Barclay Curle & Co. Ltd.* [1908] A. C. at p. 45.

⁵⁾ S. 62, sub-s. 4.

⁶⁾ *Laing v. Barclay Curle & Co. Ltd.* [1908] A. C. 35.

Rule 4. When goods are delivered to the buyer "on sale or return" or other similar terms the property therein passes to the buyer:

- a) When he signifies his approval or acceptance to the seller, or does any act adopting the transaction;
- b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact."

Under this section it has been decided, where W. delivered goods to H. on the terms of a memorandum headed "On approbation. On sale for cash only or return. Goods had on approbation or on sale or return remain the property of W., until such goods are settled for or charged", that the goods were not delivered "on sale or return" or other similar terms within the meaning of the section, and that the memorandum showed that the intention was that the property should not pass to H. until he had paid for them or was debited by W. with the price¹). But if A. delivers goods to B. "on sale or return", and B. delivers the goods to C. "on sale or return", then B. has done an act adopting the sale by A., and is bound to pay for the goods²).

Rule 5. 1. "Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

2. Where in pursuance of the contract, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract".

These rules have been laid down to determine the point at which the property passes in cases where the parties have not formed any intention or have failed to express their intention on the point. Formerly there was a tendency to regard shipbuilding contracts in a different light from other contracts³), but it has now been clearly established that no such distinction obtains and that shipbuilding contracts will be construed by the rules laid down in the Sale of Goods Act⁴).

Reservation of the right of disposal. Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled⁵).

Goods shipped under a bill of lading. The most common instance of a seller reserving the right of disposal of the goods is where they are shipped on board a vessel to be delivered to a buyer at another port and the seller instructs his agent not to indorse the bill of lading to the buyer unless the buyer also accepts a bill of exchange for the price. In such a case the property does not pass to the buyer until he has accepted the bill of exchange. The law relating to goods shipped is the subject of special provisions laid down in subsections 2 and 3 of s. 20 as follows:

"Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal."

"Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him".

¹) *Weiner v. Gill* [1906] 2 K. B. 574.

²) *Genn v. Winkel* (1912) 17 Com. Cas. 103.

³) *Woods v. Russell* (1822) 5 B. & Ald 942; *Exp. Lambton* (1875) L. R. 10 Ch. at p. 414.

⁴) *Laing v. Barclay Curle & Co.* [1908] A. C. 35; *Seath v. Moore* (1886) 11 App. Cas. 370.

⁵) Sale of Goods Act, s. 20, sub-s. 1.

These two sub-sections summarise the law existing when the Sale of Goods Act was passed, which is somewhat more fully stated in the following passage from a judgment of Bowen, L.J. "A cargo at sea while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognized as its symbol, and the indorsement and delivery operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods¹⁾".

With this passage should be read the judgment of Cotton L.J. in *Mirabita v. Imperial Ottoman Bank* (1878) 3 Ex. D. at p. 172, where he says: "Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent, or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser".

Where the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from even asserting any right of property therein. If the vendor deals with, or claims to retain the bill of lading, in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance or payment or tender, the property in the goods does not pass to the purchaser. From this we see that the expression "appropriation to the contract", as pointed out by Parke, B., in *Wait v. Baker* (1848) 2 Ex. at p. 8, is used in two senses in English law:

- i) As a "conditional appropriation", i.e. with the meaning that the goods are so far appropriated that the goods, although the property in them remains *pro tem.* in the seller, must be delivered on fulfilment of the condition subject to which the appropriation has been made; and
- ii) That the goods have been finally appropriated to the contract so as to pass the property in them to the buyer.

The latter is the usual meaning in English law.

Risk. It is important to know at whose risk the goods are, i.e. on whom the loss is to fall if they are destroyed after the contract has been made but before performance has been completed. It may happen that although the goods have been delivered to the buyer the risk is still with the seller, or that although the goods have not been delivered the risk is with the buyer. The ordinary rule of law is that, in the absence of special agreement, the risk passes with the property. "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk, whether delivery has been made or not. Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault²⁾". Nothing, however, contained in this section is to affect the duties or liabilities of the seller or buyer as a bailee of the goods of the other party³⁾. That is to say that if one party has the possession of the goods, under such circumstances that he is the bailee of the other, he will be liable for any loss or damage to them which is caused by a breach of his duty as such bailee, notwithstanding that the property

¹⁾ *Sanders v. Maclean* (1883) 11 Q. B. D. at p. 341.

²⁾ Sale of Goods Act, s. 20.

³⁾ *Ib.*

in the goods is in the other party. And if the loss or damage is caused by wrongful conduct amounting to a tort, the person guilty of such conduct is liable in damages for such tort whether or not a cause of action for breach of the contract of bailment can be framed against him.

Whoever has the risk has also the benefit of any increase due to accretion to the goods. "Where a bargain and sale is completed with respect to goods, and everything to be done on the part of the vendor before the property should pass has been performed, then the property vests in the purchaser, although the vendor still retains his lien¹⁾, the price of the goods not having been paid; and any accident happening to the goods subsequently, unless it is caused by default of the vendor — any calamity befalling them after sale is completed — must be borne by the purchaser, and, by parity of reasoning, any benefit to them is his benefit, and not that of the vendor²⁾".

VI. Transfer of Title.

Sale by a person other than the real owner. Where the sale is made by the owner himself, the buyer acquires a good title when the property passes. The law governing transfer of property has already been explained. But when some person who is not the owner sells, difficulties as to the title acquired by the purchaser begin to arise. The most frequent cases are sales of goods that have been stolen and sales of goods by agents in breach of their actual authority or in fraud of the real owner.

Sale by an agent. The general rule of law is that if the sale is by an agent who has authority to make such a sale, the purchaser acquires as good a title as though the owner himself had sold; but if the goods are sold by a person who is not the owner and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title than the seller himself has³⁾. For the protection, however, of innocent persons who have *bona fide* given value for goods, which the seller had no title to sell or dispose of, there are certain exceptions to this rule. Where, for example, a purchaser buys goods from a mercantile agent, who with the consent of the owner is in possession of the goods, or the documents of title to the goods, but deals with them adversely to the real interest of the owner and in breach of the authority given to him in respect of the goods by the owner, the case comes within the provisions of the Factors Act, 1889, which lays down that in certain cases such a purchaser shall acquire a good title. For further information as to those cases the reader is referred to the title "Agency". The Factors Act, it should be remembered, only deals with sales or dispositions made by a "mercantile agent" against the will of the owner, and that a "mercantile agent" is an agent who by the customary course of business has authority to sell or dispose of or buy goods, or raise money on the security of goods⁴⁾. Sales by any other kind of agent are governed by the provisions of the Sale of Goods Act.

Purchaser obtaining better title than the seller. In the following cases a purchaser of goods obtains a good title, and therefore a better title than the seller himself has if the seller's title be defective or bad.

1. Owner estopped from denying seller's authority. Where the owner of the goods is by his conduct precluded from denying the seller's authority to sell, the buyer is said to obtain a good title by estoppel⁵⁾.

For example, M. mortgaged machinery to P., who *bona fide* made an advance on the security thereof. Some months afterwards the machinery, which had been left in possession of M., was taken in execution under a judgment against M. at the suit of N. Evidence was given that after the seizure P. frequently conversed with H.'s attorney, sometimes in M.'s presence, referring to the seizure, and consulted with him as to the best way of disposing of the property, never making any claim to the machinery. With P.'s knowledge the defendants purchased from the sheriff. Held that the defendants had acquired a good title⁶⁾.

¹⁾ See *post* p. 362.

²⁾ Per Blackburn J. in *Sweeting v. Turner* (1872) L. R. 7 Q. B. at p. 313.

³⁾ Sale of Goods Act, s. 21. 1.

⁴⁾ See Factors Act 1889, s. 1; *Oppenheimer v. Attenborough* [1908] 1 K. B. 221; *Weiner v. Harris* [1910] 1 K. B. at p. 29.

⁵⁾ Sale of Goods Act, s. 21, (1).

⁶⁾ *Pickard v. Sears* (1837) 6. A. & E. 469.

2. Sale by a mercantile agent. Where the sale is made by a mercantile agent under such circumstances that the buyer acquires a good title in virtue of the provisions of the Factors Act, 1889, such title is indefeasible¹).

3. Where seller has a power of sale. Where the sale is made in the exercise of a special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Such a sale in order to be good must be made strictly in accordance with the terms of the power. Instances of a power of sale within the meaning of this section are the common law power of a sheriff to sell goods seized under a writ of *fi. fa.*; his statutory power conferred by 2 Wm. & Mary, sess. 1, c. 5, s. 3, to sell goods taken under a distress; the statutory power of the bailiff of a County Court under s. 156 of the County Courts Act, 1888, to sell goods taken in execution²); and that of the High Court to order a sale under Order L, rule 2 of the Rules of the Supreme Court, which provides: "It shall be lawful for the Court or a Judge, on the application of any party, to make any order for the sale, by any person or persons named in such order, and in such manner, and on such terms as the Court or Judge may think desirable, of any goods, wares, or merchandise which may be of a perishable nature or likely to injure from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once."

Where goods are taken in execution they are bound in the hands of the judgment debtor as from the time when the writ is delivered to the sheriff to be executed. If the execution be levied under a judgment of a County Court and the registrar is also the high bailiff, goods on which execution is levied are bound in the hands of the judgment debtor as from the time when the application for the writ of execution is made to the registrar³). When goods are once bound by a writ of *fieri facias* a person who buys them, otherwise than on a sale by the officer of the Court, acquires no title unless he acquires them in good faith and for valuable consideration and without notice that any writ for the seizure or attachment of the goods had been delivered to and remained unexecuted in the hands of the sheriff or high bailiff⁴).

4. Goods sold in market overt. Where goods are sold in market overt according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller, subject to the exceptions as regards sales of horses mentioned below⁵). The sale to be a sale in market overt must be in a public and legally constituted market⁶). All open shops in the City of London which are usual places for the sale of goods of the same kind as those as to which the dispute has arisen, are market overt⁷), but a wharf is not⁸), neither is a show-room⁹), nor an auctioneer's sale-room¹⁰). Outside the City of London a market with the custom of market overt may exist either by grant or by prescription, but not otherwise, and so the custom does not obtain where the market has been established by a local Act of Parliament¹¹). A purchaser does not acquire a good title in virtue of sale in market overt unless the whole transaction, and not merely the formation of the contract, takes place in market overt. Therefore a sale by sample is not protected¹²).

Where goods have been stolen and are subsequently sold in market overt so that the property passes to the buyer, he can give a good title to any purchaser who buys from him. But if the thief is prosecuted to conviction, the property in the stolen goods reverts in the original owner from whom they were stolen, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise¹³). Intermediate purchasers incur no liability.

¹) The provisions of the Factors Act which relate to this part of the law of sale of goods are discussed at pp. 356, 357 (*post*).

²) As to which see *Goodlock v. Cousins* [1897] 1 Q. B. 558.

³) *Murgatroyd v. Wright* [1907] 2 K. B. 333.

⁴) Sale of Goods Act, s. 26.

⁵) Sale of Goods Act, s. 22, sub-s. 1 and 2.

⁶) *Lee v. Bayes* (1856) 18 C. B. 599; *Marnier v. Banks* (1867) 17 L. T. 147.

⁷) *The Case of Market Overt*, 5. Co. Rep. 836.

⁸) *Wilkinson v. King* (1809) 2 Camp. 335.

⁹) *Hargreave v. Spink* [1892] 1 Q. B. 25.

¹⁰) *Clayton v. Le Roy* [1911] 2 K. B. 1031.

¹¹) See *Moyce v. Newington* (1878) 4 Q. B. D. at p. 34.

¹²) *Crane v. London Dock Co.* (1864) 33 L. J. Q. B. 224.

¹³) Sale of Goods Act, s. 24, sub-s. 1.

The remedy of a person who has bought such goods is an action against the person who sold to him for damages for breach of the implied warranty of the right to sell and for quiet enjoyment.

Sales of horses. A person who buys a horse in market overt without notice of any defect in the title does not acquire a good title as he would were the horse some other chattel, as the above provision in the Sale of Goods Act does not affect the law relating to the sale of horses¹). The sale of horses is subject to special provisions of law contained in two Statutes, 2 & 3 Ph. & M. c. 7 and 31 Eliz. c. 12. The first of these statutes prescribes that at any horse fair or market an officer, called the tollor, shall be appointed to keep a record of all horses sold, who shall enter in a book in the presence of the parties particulars of any bargain or contract relating to a horse in accordance with certain formalities prescribed by the Act, and that if the provisions of the statute are not complied with, the owner of any horse "thievishly stolen or taken away" may by force retake the horse, or have an action for detinue or replevin in respect of it. The second of these statutes requires that further particulars be entered in the book and a note in writing given to the buyer, and provides that every sale of a horse not in accordance with the provisions of the Act shall be void. This second statute applies to horses that have not been stolen as well as to those that have²).

Summary of law when seller's title is void or voidable. The law on void or voidable title, apart from the provisions of the Factors Act³), may be summed up as follows: Where a seller has no title to goods, as for example where he has found them or stolen them, a purchaser gets no title at all as against the real owner unless the goods (not being horses) have been sold in market overt to a purchaser who has bought them in good faith and without any notice of the want of title in the seller. But where the seller has a title which is not void but only voidable (for example where he has obtained them fraudulently but under such circumstances that he has a right to retain them unless and until the person from whom he has so obtained them avoids the contract under which the seller acquired them), and the title has not been avoided at the time of the sale, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of the seller's defect of title⁴). If the contract under which the owner has parted with the goods has been induced by fraud amounting to larceny by a trick, a person who buys them, otherwise than in market overt, acquires no title⁵).

Where goods are claimed on the ground that the person in possession has bought them from a seller who had no title or a voidable title, the *onus* of showing this state of things and the want of *bona fides* necessary to support the claim, is on the claimant⁶). No order of the Court is necessary, but the property reverts in the original owner by operation of law⁷). If, however, the goods have been obtained by fraud not amounting to larceny, and such fraud amounts to some criminal offence, e.g. obtaining goods by false pretences, the property in the goods will not revert in the original owner of the goods, or his personal representative, by reason only of the conviction of the offender⁸). Hence the original owner of goods which have been obtained from him by false pretences and sold in market overt can by process of law recover them back only when they are in the possession of a person who has acquired them in bad faith or with knowledge that his transferor had a defective title. In all other cases, apart from prosecuting the guilty party, the only remedy of the original owner is to claim damages against the person guilty of the false pretences.

Goods sold twice over. Where a person who has sold goods continues or is in possession of the goods, or of the documents of title to them, and he, or a mercantile agent acting for him, delivers or transfers the goods or the documents of title to them under any contract of sale, pledge, or other disposition, to any person who receives such goods or documents of title in good faith and without notice of the previous

¹) Sale of Goods Act, s. 22, sub-s. 2.

²) *Moran v. Pitt* (1873) 42 L. J. Q. B. 47.

³) See below, "Good sold twice" etc.

⁴) Sale of Goods Act s. 23; *Cundy v. Lindsay* (1878) 3 App. Cas. 459.

⁵) Cf. *Oppenheimer v. Frazer & Wyatt* [1907] 2 K. B. 50.

⁶) *Whitehorn v. Davison* [1911] 1 K. B. 463.

⁷) *Vilmont v. Bentley* (1886) 18 Q. B. D. 322.

⁸) Sale of Goods Act, s. 24, sub-s. 2.

sale, such delivery or transfer has the same effect as it would have had if it had been made with the express authority of the owner of the goods¹).

Sale by a buyer of goods for which he has not paid. Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title thereto, under any sale, pledge, or other disposition thereof, to any person who receives such goods or documents of title in good faith and without notice of the previous sale, has the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner²).

The following case illustrates this rule. S. agreed to sell to P., a merchant at Altona, ten tons of copper, to be delivered at Rotterdam and paid for by a bill of exchange at 30 days from the bill of lading. Subsequently the plaintiff purchased from P. ten tons of copper. Three days later S. forwarded to P. a bill of lading for 10 tons of copper with a bill of exchange for his acceptance, in accordance with the terms of the contract between S. and P. P. handed the bill of lading to his banker, with whom his account was overdrawn, and the banker handed it to the plaintiff, who took the bill of lading in good faith and without notice that P. had not complied with his contract with S., and paid the price in cash to the banker. P. never accepted the bill of exchange. Held that the plaintiff had acquired a good title, and that S. on the bankruptcy of P. could not stop the copper in transit³).

In this case it was laid down that however fraudulent the conduct of the mercantile agent in actual custody of the goods may be (assuming him to be such a person as comes within the provision mentioned above), and however grossly he may abuse the confidence reposed in him or violate the mandate under which he has obtained possession of the goods or the documents of title, still he can, unless his conduct amounts to larceny by a trick, by his disposition give a good title to a *bona fide* purchaser who takes without notice.

VII. Performance of the Contract.

Delivery and payment of price. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract of sale. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods⁴).

The parties to a contract of sale may agree to any terms they please as to the time or mode of payment, or as to the time or mode of delivery. If goods are sold on credit and no stipulation is made as to the time of delivery, the property at once vests in the buyer. He is entitled to immediate possession and is not liable to pay the price until the period of credit has expired; but the right to possession is not absolute, and if he becomes insolvent before he has obtained possession the seller may stop *in transitu*. Where the goods are shipped to the customer under a *c.i.f.* contract and the only stipulation as to payment is that the terms are "net cash", delivery of the bill of lading, even when the goods are still at sea, is to be regarded as delivery of the goods themselves, and the buyer must pay cash when the bill of lading is tendered to him even though he has had no opportunity of inspecting the goods. In the absence of any agreement as to the time for delivery, the seller must deliver or tender the bill of lading within a reasonable time⁵). A person who sells goods *c.i.f.*, which have to be carried from one port to another, must ship under a through bill of lading. If he ships to an intermediate port not under a through bill of lading, and then re-ships from the intermediate port under a bill of lading to the port of destination, tender of this last bill of lading is not a good tender under the contract⁶). Payment by the buyer may be made either to the seller or to any person who is

1) Sale of Goods Act, s. 25, sub-s. 1; Factors Act, 1889, s. 8.

2) Sale of Goods Act, s. 25, sub-s. 2; Factors Act, 1889, s. 9.

3) *Cahn v. Pockett's Bristol Channel Steam Packet Company* [1899] 1 Q. B. 643.

4) Sale of Goods Act, 1893, ss. 27 and 28.

5) *E. Clemens Horst & Company v. Biddle Bros.* [1912] A. C. 18.

6) *Landauer v. Craven* [1912] 2 K. B. 95.

the seller's agent to receive payment, and if the seller has by his conduct led the buyer to believe that the agent has authority to receive payment in more than one way, whereas in fact his actual authority is to receive payment only in a particular way, the buyer will be discharged if he makes payment in any way that he has been led to believe is in accordance with the agent's authority¹).

Rules as to delivery. The question often arises, after a contract of sale has been concluded, whether the seller has to deliver the goods to the buyer or whether he may wait until the buyer comes and fetches them. In order that a seller may sue for damages for non-acceptance, or a buyer for non-delivery, he has to show that he was always ready and willing to carry out his part of the contract, and it is sufficient evidence of such readiness if the seller calls on the buyer to take delivery or the buyer calls on the seller to make delivery. It is therefore important to know where and when under the contract the law will hold that delivery should take place. For the solution of questions of this kind the following rules have been laid down by the Sale of Goods Act, s. 29.

Rule 1. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence. But if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

Rule 2. Where under the contract of sale it is agreed that the seller is to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

Rule 3. Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this rule shall affect the operation of the issue or transfer of any document of title to goods.

Rule 4. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

Rule 5. Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

The seller must afford reasonable facilities to the buyer to take delivery at the place which, under the above rules, is the place of delivery. As regards the time for delivery, where delivery has to be made within a reasonable time, a buyer to whom or a seller by whom delivery has not been made, cannot be treated as having repudiated the contract simply because a reasonable time has expired. The other party must call on him to fulfil his obligations, and if he then either expressly or by his conduct refuses to do so, the contract may be treated as repudiated and the other party is thereby discharged. Similarly where "delivery is to be as required", there is no repudiation until a demand for performance has been made. "No doubt, where a contract is silent as to time, the law implies that it is to be performed within a reasonable time; but there is another maxim of law, viz., that every reasonable condition is also implied, and it seems reasonable that the party who seeks to put an end to a contract, because the other party has not, within a reasonable time, required him to deliver the goods, should in the first instance inquire of the latter whether he means to have them²).

As regards goods at sea transfer of the bill of lading was and is regarded as a delivery of the goods, because they could not otherwise be dealt with³).

Delivery to a carrier. When the buyer requires the goods at a different place from that in which they are at the time when the contract of sale is concluded, the carriage of the goods may enter into the question of delivery. Where in such case some person other than the seller or buyer undertakes to carry the goods, the time when delivery to the buyer of the goods bought takes place varies according to the circumstances of the case. The governing consideration is, whose agent is the carrier?

¹) *International Sponge Importers Limited v. Andrew Watt and Sons* [1911] A. C. 279.

²) *Per Pollock C. B. in Jones v. Gibbons* (1853) 8 Ex. at p. 922.

³) For this branch of law see notes to *Lickbarrow v. Mason*, Smith's Leading Cases, and *Biddle v. Olemens Horst* [1911] 1 K. B. at p. 956; [1912] A. C. 18, and title "Maritime Law", *infra*.

If the carrier is the agent of the seller, delivery does not take place until the goods are handed over by the carrier to the buyer; but if the carrier is the agent of the buyer there is delivery to the buyer as soon as the goods are handed to the carrier. Where the carrier is the agent of the buyer to receive the goods, it does not follow that he is therefore the agent of the buyer to accept them, and the buyer does not lose his right to reject them if on examination, after the carrier has handed them to him, they turn out to be defective. Where goods are consigned by the seller to a carrier on the terms "carriage forward" that is strong evidence that the carrier is the agent of the buyer, as he has to look to the buyer for his remuneration¹). The law on the position of carriers in connection with the delivery of goods under a contract of sale is thus laid down in the Sale of Goods Act, s. 32:

Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is *prima facie* deemed to be delivery of goods to the buyer²). Thus, where goods are bought on *c.i.f.* terms, i.e. at a price to cover cost of insurance and carriage, delivery to the carrier and transfer of the documents is a fulfilment of the contract³).

Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omits to do so, and the goods are damaged or lost in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages⁴).

Insurance of goods carried by sea. Unless otherwise agreed, where goods are sent by the seller to buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods will be deemed to be at his risk during such sea transit⁵). Frequently the parties make special stipulations as to goods to be carried by sea, in which case such stipulations will be strictly enforced. For example, cattle were bought at Buenos Ayres *c.i.f.* (that is to say at a price to cover cost of insurance and carriage), and by the contract of sale the seller was to insure against all risks. The seller took out an "all risks" policy at Lloyd's, which in accordance with the usual practice among underwriters and brokers contained a warranty against "capture, seizure and detention and the consequences thereof". Disease broke out among the cattle, which were therefore prohibited from being landed at the port of destination and had to be slaughtered. The underwriters refused to pay on the ground that the policy did not cover such a risk. Held, that the purchaser was entitled to recover damages against the seller for not having insured so as to cover this risk⁶).

Deterioration in transit. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit⁷). But unless the deterioration is of this kind the buyer may reject on arrival. Thus, where a consignment of rabbits arrived in an unsaleable condition in Brighton owing to decay, and it was shown that they were in good condition when sent off from London, it was held that the buyer could reject them⁸). Goods of this kind must at the date of dispatch be in such a condition that they will keep sound for a reasonable time; otherwise they do not satisfy the implied condition that they are merchantable.

Delivery of wrong quantity. The rights of the parties when the quantity of the goods delivered is not the quantity bargained for are determined by s. 30 of the Sale of Goods Act. These rights may be governed by the terms of some special agreement, or the course of dealing between the parties, or some usage of trade (sub-section 4), but unless so governed they are determined as follows:

¹) *Cork Distilleries Co. v. G. S. & W. Railway* (1874) L. R. 7 H. L. at. p. 277.

²) Sale of Goods Act, s. 32, sub-section 1.

³) *Parker v. Schuller* (1901) 17 T. L. R. 299; *Clemens v. Biddle* [1912] A. C. 18.

⁴) S. 32, sub-s. 2.

⁵) S. 32, sub-section 3.

⁶) *Yuill & Co. v. Robson* [1908] 1 K. B. 270.

⁷) Sale of Goods Act, s. 33.

⁸) *Beer v. Coalker* (1877) 46 L. J. C. P. 677.

Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate¹).

Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest or he may reject the whole. But where the excess quantity delivered was very small, and the seller did not claim for the price of the excess, it was held there was a good tender and the buyer was liable in damages for not accepting²). If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate³).

Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole⁴). Even if the portion of the goods which is not in accordance with the contract is small and such that the defects may be remedied at a small cost, still if the defects are such as to make the defective goods unmerchantable the buyer may reject the whole of the goods⁵).

Delivery by Instalments. Unless it is agreed that delivery is to be by instalments, the whole of the goods sold must be delivered at one and the same time, and the seller cannot claim to deliver nor the buyer to accept the goods in any other manner.

Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach in failing to make or accept delivery is a repudiation of the whole contract, which discharges the other party from any further performance, or whether it is merely a severable breach which gives rise to a right to damages arising from that breach but not to a right to treat the whole contract as repudiated⁶). The question in each case is whether the failure to comply with the contract as regards one instalment, or as regards some number less than the whole number of instalments, shows in all the circumstances in the party so failing an intention to repudiate the contract and treat it as not binding on him. If such intention is proved, the other party may elect to act on such repudiation and determine the contract, in which case he is entitled to recover the damage flowing from such repudiation, or he may still hold the person who has failed to perform, to his contract, and claim only the damages resulting from the particular breach. If the repudiation is by a buyer of goods not in existence, the seller need not make or tender the goods in order to be able to sue for repudiation⁷).

The general principle was thus expressed by Lord Selborne L.C.: "You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part⁸)".

The fact that an instalment is defective in quality, or otherwise such that the buyer would be entitled to reject it, is no answer to a claim for damages for repudiation, if the buyer, before the time when he could so reject has arrived, and in ignorance that he will have such right, has already refused to be bound by the contract⁹). Acceptance of a prior instalment, where the terms of the contract are "delivery as required" does not destroy the right to reject a subsequent instalment¹⁰). Where

¹) Sale of Goods Act, s. 30, sub-section 1.

²) *Shipton v. Weil* (1912) 28 T. L. R. 269.

³) S. 30, sub-section 2.

⁴) S. 30, sub-section 3.

⁵) *Jackson v. Rotax Motor and Cycle Company* [1910] 2 K. B. 837.

⁶) S. 31.

⁷) *Cort v. Ambergate Railway Company* (1851) 17 Q. B. 127.

⁸) *Mersey Steel and Iron Co. v. Naylor* (1884) 9 App. Cas. 434.

⁹) *Braithwaite v. Foreign Hardwood Co.* [1905] 2 K. B. 543.

¹⁰) *Jackson v. Rotax Motor Co.* [1910] 2 K. B. 937.

the price is to be paid by instalments, the seller may sue for an overdue instalment of the price as a debt and the contract is not regarded in law as repudiated¹⁾.

Acceptance by the buyer. A buyer who has not seen the goods he buys is entitled to have after delivery a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract before he is bound to keep them. Unless otherwise agreed, when the seller tenders delivery of the goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of inspecting the goods for the purpose of such examination²⁾. But if the buyer has bought on *c.i.f.* terms, delivery to the carrier is conditional delivery to the buyer, and the buyer on presentation of the bill of lading must at once pay the price, whether he has had an opportunity of examining the goods or not³⁾.

The question of acceptance arises in two cases. The first is where the goods are of the value of £10 or upwards and the party desiring to enforce the contract seeks, in the absence of a memorandum in writing, to prove delivery and acceptance of a portion of the goods. For this purpose it is sufficient to prove any act by the buyer which recognizes a pre-existing contract of sale⁴⁾. The second is where the question of the right to reject arises, and the seller seeks to show that such right has been waived by an acceptance of the goods which leaves to the buyer only the remedy (if any) in damages for breach of warranty. For this purpose the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them; or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them⁵⁾. Re-sale by the buyer is strong evidence of acceptance, but not necessarily conclusive. By special arrangement goods may be accepted conditionally and in such case the acceptance may be withdrawn if the condition is not fulfilled. For example, where the seller had ordered shoes to fulfil an army contract and it was arranged that if any were thrown on his hands by the army authorities he might reject them, it was held that by receiving them and sending them on to the army authorities he had not lost his right to reject⁶⁾. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right to do so, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them⁷⁾.

When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect to take delivery and also for a reasonable charge for the care and custody of the goods⁸⁾. But this provision does not affect the rights of the seller where such neglect or refusal amounts to a repudiation of the contract⁹⁾.

VIII. Unpaid Seller and his Rights against the Goods.

The seller of goods is deemed to be an "unpaid seller" for the purposes of the Sale of Goods Act:

- a) When the whole of the price has not been paid or tendered;
 - b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise;
- and any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid or is directly responsible for the price, has, if unpaid, the rights of an "unpaid seller"¹⁰⁾.

1) *Workman v. Lloyd* [1908] 1 K. B. 968.

2) Sale of Goods Act, s. 34.

3) *Clemens Horst v. Biddle* [1912] A. C. 18.

4) Sale of Goods Act, s. 4 (3). And see *ante*, p. 343.

5) Section 35.

6) *Heilbutt v. Hickson* (1872) L. R. 7 C. P. 438.

7) Sale of Goods Act, s. 36.

8) Section 37.

9) *Ib.*

10) Section 38.

The rights of an unpaid seller against the goods are:

1. Lien.
2. Stoppage *in transitu*.
3. Re-sale.

These rights are not affected by the fact that the property may have passed, but exist independently of whether the property is in the seller or buyer. If the property has not passed the seller has an additional right, namely, a right of withholding delivery, similar to and co-extensive with his rights of lien and stoppage *in transitu* as regards goods the property in which has passed to the buyer. All these rights arise by implication of law¹).

1. An unpaid seller's lien is a lien for the price, which gives him the right while he keeps possession of the goods (even though he does so as agent of or bailee for the buyer) to retain them until the price is paid or tendered. The unpaid seller's lien arises in the following cases:

- a) Where the goods have been sold without any stipulation as to credit;
- b) Where the goods have been sold on credit, but the term of credit has expired;
- c) Where the buyer becomes insolvent²).

Where an unpaid seller has made part delivery of the goods he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention³).

An unpaid seller loses his lien, or right of retention:

- a) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
- b) Where the buyer or his agent lawfully obtains possession of the goods;
- c) By waiver.

An unpaid seller having a lien, or right of retention, does not lose such lien or right of retention by reason only that he has obtained judgment for the price of the goods⁴). Waiver of a lien can only be by reason of an agreement, express or implied, founded on good consideration. For example, if the seller assents to a sub-sale there is an implied waiver of his lien⁵). If he takes a bill for the price the lien is excluded during the currency of the bill, but revives on dishonour of the bill⁶). If he expressly reserves a lien, he thereby excludes the lien implied in law⁷).

2. Stoppage *in transitu*. The right to stop *in transitu* is a right in the seller after he has parted with the goods, but before they have come into the possession of the buyer, to stop them as against an insolvent buyer during the transit, and to resume possession and retain them until payment or tender of the price. The right arises only when the buyer becomes insolvent, and cannot be exercised after the transit has been completed and the goods have come into the possession of the buyer⁸). Strictly speaking, the right to stop *in transitu* applies only to goods the property in which has passed to the buyer. If the property has not so passed there is no need to rely on this right; the seller stops his own goods and relies on his lien or right of retention.

Goods may be *in transitu* although they have left the hands of the person to whom they were intrusted for carriage. It does not matter how many intermediate carriers may have handled the goods. If they have not been handed to the buyer they can be stopped. Goods are deemed to be *in transitu* while they remain in the possession of the carrier, whether by water or land, and although such carrier has been named and appointed by the consignee, and also when they are in any place of deposit connected with the transmission and delivery of them, provided they have not reached the buyer or his agent or a person who has attorned to the buyer⁹). The duration of the transit is defined as follows by s. 45 of the Sale of Goods Act:

Goods are deemed to be in transit from the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer,

¹) Section 39.

²) Section 40, 41.

³) Section 42.

⁴) Section 43.

⁵) *Knights v. Wiffen* (1870) L. R. 5 Q. B. 660.

⁶) *Valpy v. Oakeley* (1851) 16 Q. B. 941; *Griffiths v. Perry* (1859) 28 L. J. Q. B. at p. 207.

⁷) *Re Leith's Estate* (1886) L. R. 1 C. P. at p. 305; *Angus v. Mc Lachlan* (1883) 23 Ch. D. 330.

⁸) Section 44.

⁹) *Kendall v. Marshall* (1883) 11 Q. B. D. 356.

until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee¹⁾.

If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end²⁾.

If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer, or his agent, that he holds the goods on his behalf, and continues in possession of them as bailee for the buyer or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer³⁾.

If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back⁴⁾.

When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer⁵⁾.

Where the carrier or the bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end⁶⁾.

Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods⁷⁾.

The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods, or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer⁸⁾.

When notice of stoppage *in transitu* is given by the seller to the carrier or other bailee in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller⁹⁾.

3. Re-sale by buyer or seller. The unpaid seller's right of lien, or retention, or stoppage *in transitu*, is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto; provided that if such sale be by a mercantile agent or a person who has possession of the goods or the documents of title thereto, under such circumstances that he gives a good title under the Factors Act to the buyer as hereinbefore explained¹⁰⁾, the unpaid seller cannot exercise his right of lien or retention or stoppage *in transitu*¹¹⁾.

In order that the sale may be "assented to" by the unpaid seller within the meaning of this section, the seller must assent in such a way as in the circumstances shows that the unpaid seller intends to renounce his rights against the goods. It is not enough to show that he has received notice that the purchaser has entered into a sub-contract in relation to the goods, and that the unpaid seller has assented to it merely in the sense of acknowledging the receipt of the information. Such an assent would imply no intention of making delivery to a sub-purchaser before he himself had been paid under the original contract¹²⁾.

Where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes it in good faith for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage

1) Sale of Goods Act, s. 45, subsection 1.

2) Sub-section 2.

3) Sub-section 3.

4) Sub-section 4.

5) Sub-section 5.

6) Sub-section 6.

7) Sub-section 7.

8) Section 46, sub-s. 1.

9) Section 46, sub-s. 2.

10) See ante p. 356.

11) Section 47.

12) *Mordaunt Brothers v. British Oil and Cake Mills Ltd.* [1910] 2 K. B. 502.

in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right can only be exercised subject to the right of the transferee¹).

The effect of this section is to put all documents of title (which are enumerated in s. 1 of the Factors Act) on the same footing as bills of lading. The law with regard to bills of lading will be found treated in further detail in the title "Maritime Law", *infra*.

It is important to observe the distinctions between unpaid seller's lien and the right of stoppage *in transitu*. The unpaid seller's lien attaches when the buyer makes default in paying the price, whether the buyer is solvent or insolvent. The unpaid seller's right to stop *in transitu* only arises when the buyer is insolvent. The Courts look with great favour on the right of stoppage *in transitu*, owing to its intrinsic justice. If the contract is a contract for delivery by instalments and the buyer becomes insolvent, the seller, notwithstanding that he may have agreed to allow credit for the goods, is not bound to deliver any further instalment until he has received payment therefor and for all instalments previously delivered²).

Subject to the provisions of law stated below, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*. The buyer cannot therefore treat the exercise of such a right as a repudiation of the contract which entitles him to determine it³). Similarly, mere non-payment of the price cannot be treated by the seller as a repudiation by the buyer⁴). But where the goods are of a perishable nature, or where the unpaid seller gives notice of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract⁵). And where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract is thereby rescinded, but the seller may sue for any damages he has sustained through the contract being thus determined⁶).

Where an unpaid seller, who has exercised his right of lien, or retention, or stoppage *in transitu*, re-sells the goods, the purchaser acquires a good title thereto as against the original buyer⁷).

IX. Seller's Right of Action for Breach of the Contract.

The general rule is that a debtor who wishes to avoid being sued must seek out his creditor and tender payment of his debt without waiting for any demand. This rule applies to a sale of goods when the price is due from the buyer. Where under a contract of sale the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action for the price⁸).

Price payable on a day certain. Where the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price although the property in the goods has not passed, and the goods have not been appropriated to the contract⁹). So, where payment is agreed to be paid by instalments, each instalment may be sued for on the happening of the events on which it is to become due¹⁰).

Payment of price by Bill of Exchange. When a bill is given in payment of the price it is regarded as conditional payment. If the bill is dishonoured the seller may sue on the bill, provided he is still the holder¹¹), or he may sue in debt for the price; but until the bill reaches maturity and is dishonoured, he cannot sue at all. If it has been agreed that the price shall be paid by a bill, and the buyer does not give

¹) Sale of Goods Act, s. 47.

²) *Exp. Chalmers* (1873) L. R. 8 Ch. 289.

³) Sec. 48 (1).

⁴) *Exp. Chalmers* (1873) L. R. 8 Ch. 289.

⁵) Sec. 48, sub-s. 3.

⁶) Sec. 48, sub-s. 4.

⁷) Sec. 48, sub-s. 2.

⁸) Sec. 49, sub-s. 1.

⁹) Sec. 49, sub-s. 2.

¹⁰) *Workman Clark and Co. Ltd. v. Lloyd Brasileiro* [1908] 1 K. B. 968.

¹¹) *Davis v. Reilly* [1898] 1 Q. B. 1.

the bill, the seller cannot sue for the price until the term has expired for which the bill was to be given, but he can sue in damages for any damage sustained owing to the buyer's breach of contract in not giving the bill as agreed¹); and if the failure to give the bill amounts to a repudiation the seller can determine the contract and sue in damages for wrongful repudiation²).

Action for non-acceptance. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. If the contract is for delivery by instalments, failure to accept a single instalment may amount to a repudiation that entitles the seller to determine the whole contract³), but in each case it is a question of fact to be determined with reference to all the circumstances whether there has been a repudiation⁴). The seller when suing for damages for repudiation is not bound to prove a tender of the goods⁵). Failure by the seller to perform a condition precedent, of which failure the buyer does not know when he refuses to accept, affords no defence to an action for non-acceptance⁶).

Damages for non-acceptance. The measure of damages for any breach of contract is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of contract⁷). This principle applies to breach of a contract of sale of goods, and the particular application of it to contracts of this kind has led to the laying down of certain rules.

Where the buyer refuses to accept the goods and there is an available market for such goods, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept⁸). If it turns out that the goods were such as might have been rejected for inferiority, still if the repudiation was made in ignorance of such inferiority, the buyer will have to pay damages assessed on the basis that the goods complied with the contract requirements⁹).

X. Remedies of the Buyer.

Damages for non-delivery. Just as the seller has an action in damages for non-acceptance if the buyer refuses to accept or take delivery of the goods, so the buyer has an action in damages for non-delivery if the seller wrongfully, that is to say, contrary to the terms of his contract, neglects or refuses to deliver the goods the subject of the contract. The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the failure of the seller to deliver in accordance with the terms of his contract. Here again, where there is an available market for goods of the kind agreed to be supplied, the measure of damages is *prima facie* to be ascertained by the difference between the market or current price and the contract price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver¹⁰). If there is a market, that is, an available market where goods of the kind stipulated for in the contract may be bought either by a party himself, or through someone else, for example, a broker, the market price is ascertained by reference to the price there prevailing. If there is no such market, then the measure of damages is the difference between the contract price and the price at which the goods have to be bought by the purchaser acting reasonably in all the circumstances of the case. It should be remembered that the general intention of the law in giving damages for breach of any kind of contract, including a contract of sale of goods, is that the person claiming should be placed in the same position as he would have been in if the contract had been performed. So, where goods are delivered on a date later than the date stipulated for, *prima facie* the measure of damage is the fall in price that has taken place

1) *Paul v. Dod* (1846) 2 C. B. 800.

2) *Bartholomew v. Marknick* (1863) 33 L. J. C. P. 145.

3) *Honck v. Muller* (1881) 7 Q. B. D. 92.

4) *Mersey Steel and Iron Co. v. Naylor* (1884) 9 App. Cas. 434.

5) *Cort v. Ambergate Railway Co.* (1851) 17 Q. B. 127.

6) *Braithwait v. Foreign Hardwood Co.* [1905] 2 K. B. 543.

7) *Hadley v. Baxendale* (1854) 9 Ex. 35.

8) Sale of Goods Act, s. 50, sub-ss. 2 and 3.

9) *Braithwait v. Foreign Hardwood Co.* [1905] 2 K. B. at p. 552.

10) Section 51.

since the date agreed for delivery. If, however, in the meantime the purchaser has entered into a contract to sell them at a higher price than the price on the day of actual delivery, he can only recover the difference between the contract price and that price at which he has contracted to sell¹).

Where the parties have in the contract agreed a fixed sum to be payable as a penalty in the event of non-delivery of the goods, such sum will be treated by the Court as liquidated damages and be awarded to the purchaser on his proving the non-delivery in respect of which such sum is made payable in the contract²).

Specific performance. Where the breach of contract complained of is non-delivery of the goods purchased, the buyer may claim specific performance of the contract and delivery of goods of the kind agreed to be delivered, and the Court may, if the goods are specific or ascertained goods, direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods and paying damages. A judgment or decree for specific performance may be unconditional, or conditional upon terms as to damages, payment of the price, and otherwise as the Court may think just, and the application for specific performance may be made at any time before judgment³).

This power of the Court is illustrated by the following case. The plaintiffs entered into a contract with the defendant for the purchase of certain timber growing on his property. By the contract they were to have the right to enter upon the property, erect sawmills, cut the timber, saw it up and then remove it. The defendant was to give free exit for all such timber and free sites for sawmills. The plaintiffs erected a sawmill and commenced to cut and saw timber and remove it. The defendant subsequently repudiated the contract and drove the plaintiffs and their men from his property. The plaintiffs commenced an action for damages and for an injunction to restrain the defendant from preventing the plaintiffs from doing the acts they were entitled to do under the contract. Held, that as the Court could grant specific performance of such a contract it could also grant the injunction asked for and this was a proper case for the granting of such relief⁴).

Damages for breach of warranty. The most frequent cause of action arising out of a contract of sale of goods is breach of warranty. Even where the stipulation broken is a condition, on breach of which the seller is entitled to return the goods⁵), still the remedy for such breach is very frequently, owing to the fact that it is no longer open to the purchaser to reject the goods and return them, or because he does not wish to return them, a claim in damages for breach of warranty⁶). And where the stipulation is such that a breach of it does not entitle the seller to reject the goods⁷), the only remedy of the buyer is an action for damages for breach of warranty. The rules governing the remedies of the buyer in cases of this kind are thus laid down in section 53 of the Sale of Goods Act:

Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may:

- a) Set up against the seller in diminution or extinction of the price, when sued for the price, the amount of damages to which he claims to be entitled by reason of the breach of warranty; or
- b) Pay the price and maintain an action in which he as buyer is plaintiff for damages for breach of warranty.

If in an action by the seller for the price, the buyer sets up in diminution or extinction of the price the damage he has suffered from the breach of warranty, he is not thereby precluded from claiming at a subsequent date any further damage he may have suffered from such breach, and he may, in order to recover such further damage, commence an action as plaintiff for that purpose⁸).

1) *Wertheim v. Chicoutimi Pulp Co.* [1911] A. C. 301.

2) *Diestal v. Stevenson* [1906] 2 K. B. 345.

3) Sale of Goods Act, s. 52.

4) *James Jones and Sons Ltd. v. Earl of Tankerville* [1909] 2 Ch. 440.

5) See p. 346, *ante*.

6) See p. 346, 347, *ante*.

7) See p. 347, *ante*.

8) Sec. 53, sub-s. 4.

The measure of damages for breach of warranty, as in actions for non-acceptance or non-delivery of goods, is the estimated loss directly and naturally resulting in the ordinary course of events from the breach of contract complained of, that is to say, from the breach of warranty. In the case of breach of warranty as to the quality of the goods, such loss is *prima facie* the difference between the value of the goods to the buyer at the time of delivery and the value they would have had if they had answered to the warranty¹).

Where the defendants contracted to sell to the plaintiffs sulphuric acid commercially free from arsenic, and the plaintiffs did not make known to the defendants either expressly or by implication the purpose for which the sulphuric acid was required, namely the manufacture of brewing sugar in the shape of invert and glucose to be used in the brewing of beer, it was held that the plaintiffs could not recover the damages payable to brewers who had been sued for the sale of poisonous beer made with the brewing sugar, or for any loss of goodwill in the plaintiffs' business, but only for the price of the sulphuric acid and the damage to other goods with which they had mixed the arsenic²). But where the goods sold are as a matter of common knowledge an article of food, it will be implied that the seller knows that they are to be used for human food and impliedly warrants them to be fit for such purpose. If this warranty is broken the buyer may recover for all damage naturally resulting from the defective quality of the food or from it being unfit to be consumed as human food. Thus, where the buyer's wife ate food and was poisoned and died, it was held that the husband could recover damages for loss of services such as she had previously rendered³). So where the plaintiff bought a hot-water bottle which burst when being used by his wife it was held he could recover the cost of medical treatment for his wife⁴). And again where the plaintiff bought milk of the defendants, and owing to its being infected with typhoid germs his wife got typhoid fever and died, it was held he could recover the expenses due to her illness and damages for loss of her services⁵).

Where the goods through no fault of the buyer have perished after delivery, and were such that the buyer was entitled to reject them for breach of condition, he may sue for damages for breach of warranty notwithstanding that it is impossible for him to return them⁶).

XI. Contract induced by misrepresentation.

If a representation made by the seller, which the buyer could treat as a condition or warranty, is made fraudulently, the buyer may either rescind the contract and return the goods and claim damages for fraudulent misrepresentation, or he may keep the goods and sue for damages for fraudulent misrepresentation and for breach of warranty. If the misrepresentation was made innocently, no action for misrepresentation will lie; nor will the Court rescind the contract after the goods have been delivered. The only remedy in such a case, if the buyer cannot himself rescind, is damages for breach of warranty if the representation amounts to a warranty; if the innocent misrepresentation does not amount to a warranty there is no remedy⁷).

If the seller is induced by fraud on the part of the buyer or his agent to enter into the contract, he may disaffirm the contract and take possession of the goods⁸), and this he may do even though the purchaser has become bankrupt and his trustee in bankruptcy claims the goods⁹). The seller may, of course, allow the purchaser to keep the goods and sue for damages for fraudulent misrepresentation.

XII. Recovery of Special Damage.

In sale of goods as in all other cases of contract the measure of general, that is to say ordinary, damage is the estimated loss directly and naturally resulting from

1) Section 53, sub-s. 3.

2) *Bostock v. Nicholson* [1904] 1 K. B. 725.

3) *Jackson v. Watson* [1909] 2 K. B. 183.

4) *Preist v. Last* [1903] 2 K. B. 148.

5) *Frost v. Aylesbury Dairy Co. Ltd.* [1905] 1 K. B. 608.

6) *Chapman v. Withers* (1888) 20 Q. B. D. 824.

7) *Seddon v. North Eastern Ry. Co.* [1905] 1 Ch. 326.

8) *Re Eastgate* [1905] 1 K. B. 465.

9) *Tilley v. Bowman Ltd.* [1910] 1 K. B. 745.

the breach¹). These are the damages which a reasonable man would contemplate as the likely result of the breach if he directed his mind to it. The rules mentioned above are merely designed to show what damage can reasonably be considered to have been in the contemplation of the parties. Sometimes in addition to such general damage as is described above he can recover special damage due to the peculiar circumstances of the particular breach²). In order to make the other party liable for special damage, the party suing must show that it is such as can reasonably be regarded as having been in the contemplation of the parties. In order to show this he must prove that the other party, at the time the contract was entered into, knew of the special circumstances that would give rise to special damage in the event of a breach of the contract, and had such knowledge that a reasonable man would contemplate the special damage as a natural result of a breach. Where, for example, there has been a sub-sale of the goods by the buyer to a customer, and owing to some defect which is a breach of warranty on the part of the original seller, the buyer is sued by his customer and is made liable in damages, the buyer can recover from the original seller any damages for which he is thus made liable and any costs reasonably incurred in defending the action brought by his customer³).

Interest on the price. Where the breach on the part of a buyer consists in failure to pay the price, interest on the money due is not recoverable by the seller unless there is a special stipulation that interest shall be charged, or unless the plaintiff sues in damages for non-payment of the price at an agreed time⁴). In the former case it is recoverable as being a debt agreed to be paid, and in the latter the jury may award it as part of the damages for non-payment at the agreed time, where there is an agreement in writing for payment at a given time, or when by demand in writing the creditor has notified the debtor that interest will be charged after the date of the demand⁵).

Expenses incurred to mitigate the damage. The party suing for a breach of contract may always prove that he has done what is reasonable to mitigate the damage, and is entitled to recover any expense to which he has been put in taking the necessary steps for this purpose, provided that this expense is less than the diminution in damage thus brought about. Thus, where the plaintiffs agreed to supply certain machines to the defendants and delivered machines that were defective and unsuitable for the purpose for which they were supplied, and the defendants, after notice to the plaintiffs reserving their right to damages, purchased from a third person other machines, to take the place of those supplied by the plaintiffs and to lessen the loss that would be caused by using them, the cost of obtaining the other machines was taken into account in assessing the damages payable to the plaintiffs by the defendants⁶).

¹) Sale of Goods Act, s. 50 (1), s. 51 (2), s. 53 (3).

²) Sale of Goods Act, s. 54.

³) *Hammond v. Bussey* (1888) 20 Q. B. D. at p. 100; *Wallis v. Pratt* [1910] 2 K. B. at p. 1011; [1911] A. C. 394.

⁴) Sale of Goods Act, s. 54.

⁵) 3 & 4 Will. IV, c. 42, s. 28.

⁶) *British Westinghouse Electric and Manufacturing Company v. Underground Electric Railway of London* [1912] A. C. 673.

Title X. Maritime Law.

By Arthur B. Langridge, B. A., Barrister-at-Law.

I. Introductory.

The law merchant and merchant shipping. In speaking of the law merchant as it applies to bills of exchange Lord Blackburn¹⁾ made some pertinent remarks which serve to illustrate the position of the general rules which regulate the relation of the law merchant and the ordinary municipal law in civilized countries: "There are in some cases differences and peculiarities which by the municipal law of each country are grafted upon it (the general law merchant) and which do not affect other countries; but the general rules of the law merchant are the same in all countries"....²⁾ Similarly, in the case of the usages of mariners, Cockburn, L.C.J. said, in speaking of the universality of the practice of deviating to save life at sea: "The uniform practice of the mariners of every nation — except such as are in the habit of making the unfortunate their prey — of succouring others who are in danger, is so universal and well known, that there is neither injustice nor hardship in treating both the merchant and the insurer as making their contracts with the shipowner subject to this exception to the general rule of not deviating from the appointed course. Goods-owners and insurers must be taken, at all events in the absence of any stipulation to the contrary, as acquiescing in the universal practice of the maritime world, prompted as it is by the inherent instinct of human nature, and founded on the common interest of all who are exposed to the perils of the seas"³⁾.

It is this feature of practical uniformity, subject to occasional differences and peculiarities, which distinguishes the law merchant from the local and municipal systems of law found in the countries sharing the common boon of systems of commercial law which have had a common origin and which tend continually to become more and more uniform. The general legal systems prevailing in England and Scotland, for example, differ so widely that the principles and even the phraseology of the law in the one are not infrequently wholly unfamiliar to the inhabitants of the other, yet the Englishman and the Scot who enter into commercial transactions with each other would rarely be able to obtain, in case of dispute, a different decision in the courts of one country from that which would be given in the courts of the other; and a British statute dealing with commercial matters can be made to apply to either realm merely by the substitution of the equivalent terms used in each system of jurisprudence⁴⁾. How in the case of English jurisprudence a system of mercantile law so much akin to the systems prevailing throughout the west of Europe and countries deriving their legal systems thence has arisen, involves an inquiry of some interest into the position of merchants and trade in the earlier days of English history.

Another feature of the law merchant is its capacity of development: "It is also to be remembered that the law merchant is not fixed and stereotyped; it has not yet been arrested in its growth by being moulded into a code; it is, to use the words of Cockburn, L.C.J., in *Goodwin v. Roberts*⁵⁾, capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce, the effect of which is that it approves and adopts from time to time those usages of merchants which are found necessary for the convenience of trade; our common law, of which the law merchant is but a branch, has in the hands of the judges the same facility for adapting itself to the changing needs of the general public; principles do not alter, but old rules of applying them change, and new rules spring into existence"⁶⁾.

The law merchant and common law. That the law merchant is in the twentieth century a part of the common law of the realm is a proposition which it would be

¹⁾ A judge of the Court of Queen's Bench, 1859—1876, a Lord of Appeal in Ordinary, 1876—1887; one of the great common lawyers of the reign.

²⁾ *M'Lean v. Clydesdale Banking Co.* (1883) 9 App. Cas. 105.

³⁾ *Scaramanga v. Stamp* (1880), 5 C. P. D. p. 305.

⁴⁾ Possibly one or two exceptions may be found in the Sale of Goods Act.

⁵⁾ (1875), L. R. 10 Ex. p. 346.

⁶⁾ Per Bigham, J. (now Lord Mersey of Toxteth) in *Edelstein v. Schuler* [1902] 2 K. B. pp. 154, 155.

idle to dispute; but the investigation of the slow process by which it became so, and of its position before the courts of common law began to supplant the special tribunals wherein the law merchant and the law maritime were formerly administered, forms an interesting study in the history of English institutions to which but a brief space can be allotted here. English courts have historically affected and maintained an atmosphere of insularity, denying the authority of foreign codes or precedents save in so far as an English court could be shown to have adopted or could be induced to adopt principles either similar or identical as representing English law. "The Roman law" said Tindal. L.C.J., "forms no rule binding in itself, upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries of Europe¹). So again of the law merchant Lord Blackburn wrote: "There is no part of the history of English law more obscure than that connected with the common maxim that the law merchant is part of the law of the land. In the earlier times it was not a part of the common law as it is now, but a concurrent and co-existent law enforced by the power of the realm, but administered by its own courts in the Staple or else in the Star Chamber." After citing the words of the Lord Chancellor²) in 1474 in a case in the Star Chamber touching the carriage of goods to a wrong destination and there converting them³), Lord Blackburn continues: "It is obvious that at that time the law merchant was a thing distinct from the common law. This accounts for the very remarkable fact that there is no mention whatever of bills of exchange, or other mercantile customs, in our early books; not that they did not exist, but that they were tried in the Staple, and therefore were not mentioned in the books of common law; just as the matters over which the Court of Admiralty or Ecclesiastical Courts have exclusive jurisdiction are at this day never treated as parts of the common law. But as the Courts of the Staple decayed away, and the foreign merchants ceased to live subject to a peculiar law, those parts of the law merchant which differed from the common law either fell into disuse or were adopted into the common law as the custom of merchants, and after a time began to appear in the books of common law. How this great change was brought about does not appear". He proceeds to comment on the earliest reported case on a bill of exchange being only in 1602⁴), and the first case of *rei vindicatio* or stoppage *in transitu* in 1690⁵) and continues: "It seems quite impossible that such matters should not have been the subject of litigation in some shape or other in England for centuries before those times⁶)."

So far as it is feasible to sever the law maritime from the law merchant with which it inevitably had so close a connexion, it will be found that a similar independence of the common law and of continental rules has been asserted; but that whereas such parts of the law maritime as relate to the use of ships have generally, like the law merchant, been absorbed into the common law, such parts as relate to ships themselves, as chattels, and their dangers and perils at sea, have developed into the law administered not at common law but by the Courts exercising jurisdiction in Admiralty. "The first point raised" said Lord Esher, M. R., "is, whence is the original or common law jurisdiction⁷) of the High Court of Admiralty of England to be ascertained? The answer is, from the continuous practice, and the

¹) *Acton v. Blundell* (1843), 12 M. & W. p. 353.

²) Probably Lawrence Booth, Bishop of Durham.

³) *Le Chaunceller*, Cest suit est pris per un marchaunt alien que est venus per safe conduit icy, et il nest tenu de suer solonques le ley del terre (i. e. the common law) a tarryer le trial de XII homes, et auters solempnites del ley del terre, mes doyt suer icy (i. e. in the Star Chamber) et serra determine solonque le ley de nature en le Chauncerie, et il doyt suer la de hower en houre et de jour pur le sped des Marchautes. . . Et coment que ils sount venus deyns le royaume pur ceo le Roy ad jurisdiction deux de mitter destoyer al droyt &c. mes ceo serra secundum legem nature que est appell' per ascuns ley Marchaunt que est ley universall' per tout le monde. . . Year Book, 13 Edward IV (Easter), 10a.

⁴) *Martin v. David Boure*, Easter, 44 Eliz.: reported Cro. Jac. 6 (a foreign bill).

⁵) *Wiseman v. Vandeputt* (1691), 2 Vern. 203.

⁶) Blackburn on Sale, 3rd Ed. pp. 345, 346.

⁷) I. e. the jurisdiction enjoyed by the Admiralty Court with which Courts of Common Law did not assume to interfere.

judgments of the great judges who have presided in the Admiralty Court, and from the judgments of the Courts at Westminster¹). This proposition was thus stated in *The Gaetano à Maria*²). "It is not the ordinary municipal law of the country, but it is the law which the English Court of Admiralty either by act of Parliament or by reiterated decisions and traditions and principles has adopted as the English maritime law." "Neither the laws of the Rhodians, nor of Oleron nor of the Hanse Towns, are of themselves any part of the Admiralty law of England. It was attempted by one of the counsel for the respondents to say that the laws of Oleron were to be considered as part of the law of England. To any one who reads some of their strange enactments (of which he cited as examples Arts. 23, 24, 26) it must be ridiculous to suggest that they are part of the English law. But they contain many valuable principles and statements of marine practice which, together with principles found in the Digest and in the French and other ordinances, were used by the judges of the English Court of Admiralty when they were moulding and reducing to form the principles and practice of their Court"³). In his judgment in the case of *Luke v. Lyde*⁴) Lord Mansfield cited or referred to the Rhodian laws, the Consolato del Mare, the Laws of Oleron, the laws of Wisby, the Ordinance of the Emperor Charles V., Roceius de Navibus et Naulo, and the Ordinances of Louis XIV.; but Lord Tenterden aptly remarks in the preface to his great work⁵) that neither treatises nor ordinances nor the civil law nor even the 'ordinance of Oleron (which being considered as the edict of an English prince has been received with peculiar attention in the Court of Admiralty)' have the binding force or authority of law in this country. The utility of foreign decisions and opinions has been and still is recognised, as in *Dakin v. Oxley*⁶) where Le Guidon, the French ordinances, Valin, Pothier, Chancellor Kent, Casaregis, the ordinances of Rotterdam, the French Commercial Code, Parsons on Maritime Law, the Consolato del Mare, Boulay-Paty, the Spanish Commercial Code, Gilbert's Code de commerce and Pardessus' 'Collection of Ancient Maritime Codes' were cited on a new point; but the value of such citations is rather by way of illustration than as binding authorities.

The process of unification of the law merchant and the common law, of which we see the result to-day, may be traced through three stages, wherein a gradual though imperceptible development occurred: the first stage may roughly be said to last from the thirteenth century to the end of the sixteenth, and its principal feature is the administration in special tribunals of the law formed by the usages of merchants⁷) to the practical exclusion of the superior courts of common law; the second stage may be said to cover the years from 1600 to the era of Lord Mansfield (*circa* 1756—1788), and in it the usages of merchants began to be regularly enforced, when proved, in a court of common law, while the special tribunals for mercantile causes were rapidly falling into desuetude, the special privileges and liabilities of merchants were being extended to other classes, and treatises both English and foreign on the law merchant were becoming familiar to the English lawyer and merchant, although at first they did little more than reproduce old ordinances and collections already hoary with age. The third stage, still in progress, begins with the crystallization of many usages of merchants into principles of the common law, under the influence of Lord Mansfield in his long career and of his successors; with the publication of works on commercial and maritime law by men whose subsequent authority as judges only added value to the books which they had produced in their earlier days; and with the formation of that great body of case law which is at once the pleasure and the terror of the student of our law.

In the earliest stage, when merchants in some degree formed a class apart from the rest of the community in respect of their transactions and their courts,

¹) I. e. the Courts of Common Law.

²) (1882), 7 P. D. 137.

³) *Gas Float Whitton*, No. 2 [1896] P. pp. 47, 48.

⁴) (1759), 2 Burrow, 882.

⁵) Abbott on Shipping, 1st ed. 1801, p. 308.

⁶) (1864), 15 C. B., N. S. 646 (on the alleged right of a charterer to abandon the goods to the shipowner for the freight).

⁷) The law merchant must be understood to have applied much more to transactions in foreign trade than to the smaller domestic dealings of persons to whom the county court of the sheriff or the local court of the borough or the King's courts were probably always available, even if justice was there dilatory.

and when much of the trade of the country was in the hands of alien traders, there were available in every fair and market courts known as courts of piepoudre¹), wherein speedy hearing was given in the case of disputes between merchants and traders, especially in the cases of traders who were strangers, of any of the various nationalities resorting to them; and before such a tribunal trying 'pleas of merchandise' with traders as litigants and traders as assessors or doomsmen, the only code that could give satisfaction would be one familiar to them in all the places where they traded²). Moreover for their debts merchant creditors were given speedy remedies against their debtors' persons, goods, and lands³). About this period began the institution of the Staple, whereby the monopoly (formerly enjoyed principally by the Hanse merchants) of the export of wools, woolfells, leather, tin, and lead was assigned to one or more towns to which such commodities had to be brought for sale or exportation; the towns so assigned were changed from time to time, but the characteristic feature of the Staple was its possession of a mayor and constables before whom debts could be acknowledged, with the effect that an even more expeditious remedy became available in cases of default than existed under the Statutes of Merchants. The prosperity of the Staples fluctuated; an endeavour was made to abolish them in 1328⁴), but in 1353 we find elaborate regulations for holding them in England⁵); that the king's justices (i. e. of the courts of common law when on assize) shall not have cognisance of things appertaining to the cognisance of the mayor and ministers of the staple; that all contracts and trespasses shall be dealt with by the law merchant and in no wise by the common law, unless the plaintiff elects to sue at common law; also that where both parties are 'strangers' the jury also shall be 'strangers', if one party only, then half the jury shall be strangers; that under the security known as a statute-staple there shall be no delay in execution for 3 months as under a statute-merchant; that aliens have time to depart if war breaks out; and that speedy justice be done 'de jour en jour et de heure en heure'. Here we have a wide gulf fixed between the courts of common law and their procedure and the courts of the Staple; but the fortunes of the Staple were doomed to decadence with the rise of English manufactures and greater consumption of commodities within the realm.

Although the courts of common law may never have entirely ignored mercantile affairs it should not be overlooked that their rules and procedure made it very difficult to enforce a mercantile obligation except before a tribunal specially cognisant thereof; at a time when the only formal written obligation was a deed sealed and delivered, a common law court is found refusing to act upon a deed made abroad⁶); assignment of rights could give no right against the debtor to the assignee, although bills of exchange were then known; the right of survivorship between owners in common prevailed at common law against the rule of the law merchant that *jus accrescendi inter mercatores non habet locum*; and it is therefore not surprising to find that mercantile causes during this epoch are not reported as being tried before the common law judges, but, as has been pointed out, rather before local tribunals or special tribunals such as the Courts of the Admirals or the court of the Constable⁷).

It has already been shown that the English courts have always regarded with jealousy any assertion that a foreign code or ordinance is of any authority *per se* in this country; but they have also always been able and willing to recognise local and municipal customs of this country. A trade custom need not be ancient, but must be general, i. e. must apply in all cases within the area in which it is alleged to exist, it must be reasonable, and within the law; if at any time that which was once a custom is proved to be universal it ceases to be a mere custom, and has become part of the common law of the land. There may thus be mercantile usages

¹) *Sci. 'pedis pulverosi'*.

²) Cf. Select Cases on the Law Merchant [Selden Society, vol. 23; 1908, ed. Charles Gross, Ph. D.].

³) Statutes of Merchants, 11 Edw. I (1283) at Acton Burnell and 13 Edw. I (1285): cf. 14 Edw. III (1340), c. XI.

⁴) 2 Edw. III, Stat. Northampton, c. IX.

⁵) 27 Edw. III, Stat. 2; *Ordinacio Stapularum*.

⁶) *Anon.* 2 Edw. II (1308): deed made at Berwick would not support an action of debt (see Selden Society, vol. 17 [1903], p. 110).

⁷) Cf. Pat. Rolls, 20 Ric. II (1397), 28 March, p. 102, *Cope v. Snoke*.

which have not yet acquired, and perhaps never will acquire, the character of common law rules, while as to others they have been proved so often that the courts require no proof of their existence and validity; in other words they are now common law rules applicable in every appropriate case: "tiel payment enter merchants est conus . . . et les Judges covient prender notice de ceo que est use enter Merchants pur le maintenance de traffick"¹⁾ and "the custome of Merchants is part of the common law of this Kingdom, of which the judges ought to take notice: and if any doubt arise to them about their customes they may send for the merchants to know their custome, as they may send for the Civillians to know their law"²⁾; and in 1689 the court was of opinion that it ought *ex officio* to take notice of the law of merchants and had in several cases done so³⁾. When a general usage has been judicially ascertained and established, it becomes a part of the law merchant, which courts of justice are bound to know and recognise⁴⁾. The law merchant "is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of Courts of law which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience . . . By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it"⁵⁾.

The gradual process of assimilation by the common law of the leading principles of commercial law was therefore, it is suggested, aided by several causes: the decadence of the local and special tribunals, the influence of the publication of treatises on law of a type which showed a considerable advance on the bald statements of rules less and less applicable to existing conditions as time went on, the increase of national commerce and population, the labours of some eminent jurists on the bench, and lastly the enactment of statutes which to some extent favoured trade⁶⁾. In 1622 Gerard Malynes, a London Merchant, published his "*Lex Mercatoria*", the first English work directly devoted to mercantile law⁷⁾. Charles Molloy published in 1676 his "*De Jure Maritimo et Navali* or a Treatise of Affairs Maritime and of Commerce"; Wyndham Beawes, an English consul, wrote his "*Lex Mercatoria*" early in the eighteenth century, and this was almost the last of those general treatises which were destined to be supplanted, so far as lawyers were concerned, by the more specialised works on particular subjects such as Park on Insurance and Abbott on Shipping. Of the judges of this era Sir John Holt, L. C. J., may well be singled out, as his memory will endure not only for his opinion in the Case of the Bankers⁸⁾ but still more for the famous decision in the case of bailments⁹⁾ which is still the *locus classicus* on the subject. It was Holt's strict adherence to the letter of the law that rendered necessary a statute¹⁰⁾ asserting the negotiability of a promissory note, but it has been said that the legal qualities of a bill of lading may largely be attributed to his opinions. In this period too may be found the beginning of the obliteration for many purposes of the special rights and liabilities of traders as distinguished from ordinary citizens, which only survive to-day in an obscure corner of the Bankruptcy Act, but then might prevent a non-trader from being liable on a bill of exchange or becoming bound by a Statute-merchant, while throughout this period and for many years later only a trader could be made a bankrupt.

The third and present stage of English commercial law began with the long judicial career of William Murray, Earl of Mansfield, to lawyers and merchants

1) *Pierson v. Pountneys* (1609), Yelverton, p. 136.

2) Hobart, C. J., in *Vanheath v. Turner* (1621), Winch, 24.

3) *Carter v. Dourish* (1689), Carthew, 83.

4) *Brandao v. Barnett* (1846), 12 Cl. & F. p. 805, per Lord Campbell.

5) *Goodwin v. Roberts* (1875) L. R. 10 Ex. p. 346, per Cockburn, L. C. J.

6) E. g. 43 Eliz. (1601) c. 12 (providing Commissioners to try disputes on Policies of marine Assurance, to prevent the delay of actions at law); 14 Car. II (1662) c. 23 (to improve the speedy procedure and process in Assurance cases); 9 Will. III (1697—98) c. 15 (to enable Merchants and Traders to have arbitration awards made Rules of Court); 9 Will. III c. 17 (process on Inland Bills of Exchange); 3 & 4 Ann (1704) c. 8 (to assimilate Promissory Notes to Bills of Exchange).

7) Reprinted in 1686 with various codes and ordinances of maritime law, such as Oleron, Wisby and the Hanse Towns.

8) 1700, State Trials, XIV, 1, 29, where he defeated a shameless attempt to repudiate public obligations of the Crown.

9) *Coggs v. Bernard* (1704), 1 Sm. L. C. (ed. 11) 173.

10) 3 & 4 Ann. (1704) c. 8.

alike "*clarum et venerabile nomen*". In the famous case of *Lickbarrow v. Mason*¹⁾; Buller, J., said: "Thus the matter (sci. as to the indorsement of bills of lading in blank or to a particular indorsee) stood till within these thirty years: since that time the commercial law of this country has taken a very different turn from what it did before . . . Before that period we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country." The inestimable services to the mercantile community which this great jurist rendered are piquantly illustrated by the savage attack made upon him [by the author of the *Letters of Junius*²⁾]: "In contempt or ignorance of the common law of England, you have made it your study to introduce into the court where you preside maxims of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinions of foreign civilians, are your perpetual theme; but who ever heard you mention *Magna Charta* or the Bill of Rights with approbation or respect." If we disregard the invective, this passage shows the attitude which Lord Mansfield took towards the law merchant; he appraised it at its true worth and recognised that it was something other than the common law of England. The offence charged against Lord Mansfield was in fact a benefit which he bestowed upon the community at large. Many of his luminous expositions of mercantile law were delivered when he was sitting at the Guildhall in the City of London, the most appropriate forum that can be conceived; he had there special jurors who were conversant with mercantile usages, and were constantly summoned to serve in his court, a service which in itself was deemed a high distinction. Of his decisions it was said by Lord Thurlow "Ninety-nine times out of a hundred he was right in his opinions and decisions; and where once in a hundred times he was wrong ninety-nine men out of a hundred would not discover it."

The development of commercial law in England since the days of Lord Mansfield has three principal features: the decisions and expositions of many eminent judges whom it is here impossible to enumerate, although the names of James Parke (Lord Wensleydale)³⁾, Sir James Shaw Willes⁴⁾, and Sir James Charles Mathew⁵⁾ could not be omitted from any retrospect; the second feature is found in the very numerous statutes which have been passed to regulate or codify various branches of the law merchant; and the third is the establishment of a system for the speedy and business-like dispatch of commercial causes.

The activity of Parliament in legislating for commercial needs is spasmodic, but statutes of two categories may serve to illustrate the tendencies of legislation; one class is that of enactments altering the existing law, such as the Merchant Shipping Acts of 1734, 1786, 1813, 1854 and 1894—1911, the Factors Acts of 1823—1889, the Bills of Lading Act, 1855, the Bankruptcy Acts, 1825—1890, and with such statutes may be classed Acts like the Companies Acts, 1862—1908, or the Patents Acts, and the Acts which indirectly affect commerce by affecting the tribunals which hear commercial matters, such as the Admiralty Court Acts of 1840 and 1861, and the Judicature Acts of 1873 and later. The other class of statutes represents the few attempts at codification which have been made; the Bills of Exchange Act, 1882, the Partnership Act, 1890, the Sale of Goods Act, 1893, the Marine Insurance Act, 1906, and in a different fashion the Copyright Act, 1911. This substantial body of legislation has naturally in many cases affected the law applicable to mer-

¹⁾ (1787), 2 T. R. p. 73.

²⁾ Letter XLI.

³⁾ 1782—1868, a judge of the King's Bench 1828—1834, a baron of the Court of Exchequer 1834—1855; created Baron Wensleydale, 1856.

⁴⁾ 1814—1872; a judge of the Court of Common Pleas, 1855—1872.

⁵⁾ 1831—1908; a judge of the Court of Queen's Bench, and of the Court of Appeal; in 1895 he was the first judge assigned to hear Commercial Causes.

chant vessels, whether the question arises in a Court of Admiralty or a Court of Common Law.

II. Legislation affecting Shipping and British Ships.

Registration. A British ship is a vessel registered under the Merchant Shipping Acts¹⁾ (unless exempted from registry²⁾) in the register of British ships³⁾ at some port of registry⁴⁾. A ship of a class⁵⁾ that needs to be registered loses⁶⁾ if unregistered the benefits enjoyed by British ships (such as limitation of liability, or immunity in case of fire or theft⁷⁾, but is not relieved from the liabilities of a registered ship (such as the payment of dues, fines, and forfeitures) and is also liable to detention. Registration confers the status of British nationality⁸⁾, with the incidental rights of flying the British flag (the red ensign for the merchant service, or the blue ensign for the Royal Naval Reserve⁹⁾) and of invoking the diplomatic assistance of British representatives.

When all requirements for registry¹⁰⁾ are completed a certificate of registry¹¹⁾, solely for use in the lawful navigation of the ship¹²⁾, is granted.

What is a ship? The terms "vessel" and "ship", besides the meanings which they bear when used in business, have necessarily been defined with greater precision for the purposes of various statutes; but there is no general statutory definition to be found. "Vessel" is usually a term of wider signification than "ship" but in some cases the widest possible meaning has been given to the term "ship". In the Merchant Shipping Acts "vessel" includes¹³⁾ "any ship or boat or any other description of vessel used in navigation", while "ship" includes every description of vessel used in navigation not propelled by oars: but in the Foreign Enlistment Act¹⁴⁾ "ship includes any description of boat, vessel, floating battery, or floating craft; also any description of boat, vessel, or other craft or battery, made to move either on the surface of or under water, or sometimes on the surface of and sometimes under water"; on the other hand in the Harbours, Docks and Piers Clauses Act¹⁵⁾ "vessel" includes "ship, boat, lighter and craft of every kind, and whether navigated by steam or otherwise": The Admiralty Court Act, 1840¹⁶⁾ deals with ships or vessels¹⁷⁾ and with ships or sea-going vessels¹⁸⁾ without any definition of the terms, and the Admiralty Court Act, 1861¹⁹⁾, provides that the term "ship" shall include any description of vessel used in navigation not propelled by oars: Wherever, therefore, a ship or vessel is affected by any statutory provision the terms of the statute must be considered in order to ascertain their applicability. The County Courts Admiralty Jurisdiction Act, 1868²⁰⁾, speaks only of "vessels" without any definition, while the similar act of 1869²¹⁾ speaks only of "ships" and evades any definition of the term, although it is to be read and interpreted as one Act with the Act of 1868.

Measurement, Tonnage, and Load-line. Every British ship before registration is measured²²⁾ to ascertain her register tonnage²³⁾ in the manner prescribed²⁴⁾. This

1) M. S. A. 1894—1907.

2) M. S. A. 1894, s. 3.

3) Ibid. ss. 4, 5; 1906, s. 51.

4) M. S. A. 1894, s. 4.

5) Ibid. ss. 2, 3; 1898, s. 1; 1906, s. 70.

6) Ibid. s. 72.

7) M. S. A. 1894, ss. 502, 503.

8) Ibid. s. 2.

9) M. S. A. 1894, s. 73; King's Regulations (Navy), 1911, Art. 127.

10) M. S. A. 1894, ss. 6—13.

11) Ibid. s. 14.

12) Ibid. s. 15.

13) Ibid. s. 742.

14) 1870, 33 & 34 Vict. c. 90, s. 30.

15) 1847, 10 & 11 Vict. c. 27, s. 3.

16) 3 & 4 Vict. c. 65.

17) Ibid. ss. 3, 4.

18) Ibid. s. 6.

19) 24 Vict. c. 10, s. 2.

20) 31 & 32 Vict. c. 71.

21) 32 & 33 Vict. c. 51.

22) M. S. A. 1894, ss. 77—87; 1906, ss. 54, 55.

23) M. S. A. 1894, s. 82.

24) Ibid., Schedule II.

tonnage appears in her certificate; for purposes of limitation of liability¹⁾ some of the deductions under these rules are restored to the register tonnage; and after 1913²⁾ no ship will be allowed a deduction for propelling-power exceeding 55% of the register tonnage remaining after other authorised deductions have been made³⁾.

Register tonnage is a hypothetical tonnage ascertained by dividing the capacity in cubic feet (after all authorised deductions have been made from the gross capacity) by 100. Gross tonnage is the cubical capacity in feet divided by 100⁴⁾. Deadweight carrying capacity (D. W. C.) means the actual lifting power for cargo (or cargo-carrying capacity in tons of 20 hundredweight). For commercial purposes this depends on the displacement of the vessel as limited by the load-line regulations⁵⁾ —

The load-line is a horizontal line 18 inches long, bisecting a circular disc 12 inches in diameter, painted amidships on each side of the vessel⁶⁾; different load-lines may be allowed for different seasons of the year⁷⁾; the position of the load-lines is fixed under Board of Trade Regulations⁸⁾. The load-line regulations apply to foreign ships while in a port in the United Kingdom⁹⁾, unless exempted under the principal Act¹⁰⁾. The existing load-line Regulations are.

1. As to British ships, Regulations of 12 Jan. 1899, and 24 April and 30 May 1907.
2. As to British Colonial Ships, Regulations for India (1899), South Australia (1900), Straits Settlements (1893); Victoria (1899); as to foreign ships, order of 23 Oct. 1908, to operate from 1 Oct. 1909, with exemptions for German ships (21 Nov. 1908), and French ships (22 Nov. 1909), the Netherlands (11 June, 1910), Sweden (13 Oct. 1910).

Ownership. No ship can be registered as a British ship unless she is wholly owned :

1. By natural-born British subjects, or
2. By persons duly naturalised or made denizens, or
3. By a body corporate (usually a limited liability company) established and having its principal place of business¹¹⁾ within the British Empire¹²⁾.

Where the beneficial interest is severed from the legal ownership (as in the case of trusts) both the legal and the beneficial owners must be duly qualified¹³⁾; but the shareholders in a qualified body corporate need not (since they do not individually own interests in the vessel herself) be qualified as individuals to own her.

Where an interest in a British ship passes by operation of law to an unqualified person, that person may procure a sale of the interest so passing¹⁴⁾ and receive the proceeds; but a false declaration¹⁵⁾ of qualification to own an interest in a British ship¹⁶⁾ (or any other attempted acquisition by mere act of the parties) of such an interest by an unqualified person renders the interest so acquired subject to forfeiture to the Crown¹⁷⁾.

For the purposes of registration there are in every British ship 64 shares or sixty-fourths; each share may be owned jointly by a number of qualified persons not exceeding 5¹⁸⁾, but such joint-owners cannot¹⁹⁾ deal severally with their respective joint-interests in a ship or share; it is thus impossible to acquire in severalty less than a sixty-fourth by act of the parties, but this only affects the legal ownership, not the beneficial interest.

¹⁾ *Ibid.*, s. 503; 1906, s. 69.

²⁾ M. S. A. 1907, s. 1.

³⁾ M. S. A. 1894, ss. 78—81.

⁴⁾ *Ibid.*, ss. 77, 78.

⁵⁾ *Ibid.*, s. 438.

⁶⁾ M. S. A., 1894, ss. 438—445; 1906, ss. 1, 6—8.

⁷⁾ Regulations, paras. 2—8.

⁸⁾ M. S. A. 1894, s. 438; Regulations of 12 Jan., 1899.

⁹⁾ M. S. A. 1906, s. 1.

¹⁰⁾ *Ibid.*, 1894, s. 445.

¹¹⁾ *Cf. De Beers v. Howe* [1906] A. C. 455; M. S. A. 1894, s. 9 (I).

¹²⁾ M. S. A. 1894, s. 1.

¹³⁾ *Ibid.* ss. 57, 71.

¹⁴⁾ *Ibid.* s. 28.

¹⁵⁾ *Ibid.* s. 67 (2).

¹⁶⁾ *Ibid.* ss. 1, 9 (V).

¹⁷⁾ *Ibid.* s. 71.

¹⁸⁾ *Ibid.* s. 5 (II).

¹⁹⁾ *Ibid.* s. 5 (IV).

A declaration of ownership¹⁾, including the qualification to own²⁾ and the interest owned³⁾, is required before registration of any owner or part-owner⁴⁾.

A registered owner of a ship or share therein has, subject to rights shown by the register to be vested in any other person, absolute power⁵⁾ to dispose thereof and to give effectual receipts for the proceeds⁶⁾.

Seaworthiness and Navigation. It is a misdemeanour to send or knowingly to take a British ship⁷⁾ to sea in such an unseaworthy state as to be likely to endanger the life of any person; the owner and the master are bound⁸⁾ to use all reasonable means to secure her seaworthiness for and during the voyage⁹⁾. A British ship in a port in the United Kingdom which by reason of the defective condition of her hull, equipment or machinery¹⁰⁾ or by reason of undermanning¹¹⁾ or overloading or improper loading¹²⁾ is unfit to proceed to sea without serious danger to human life may be detained as unsafe in order to be surveyed¹³⁾. Similar provisions¹⁴⁾ apply to foreign ships in ports in the United Kingdom, unless they have merely put in on an emergency, not being bound to a port in the United Kingdom.

Every British foreign-going ship¹⁵⁾ and every foreign steamship carrying passengers between places in the United Kingdom must carry¹⁶⁾ duly certificated¹⁷⁾ or qualified personnel, viz.

1. A duly certificated master¹⁸⁾.
2. If of 100 tons or more, a duly certificated mate¹⁹⁾, and, where more than one mate is carried at least two duly certificated mates²⁰⁾.
3. If a steamship, one or more duly certificated engineers²¹⁾.
4. If she has 100 or more persons on board, a duly qualified medical practitioner²²⁾.
5. If she is of 1000 or more tons gross tonnage, a duly certificated cook²³⁾.

The Board of Trade may²⁴⁾ make rules as to life-saving appliances²⁵⁾ to be carried by British ships²⁶⁾ and by foreign ships while in ports in the United Kingdom²⁷⁾.

British sea-going passenger steamships must have compasses properly adjusted²⁸⁾; and all British sea-going steamships must have a fire-hose²⁹⁾.

1) Ibid. s. 9.

2) Ibid. s. 1.

3) Ibid. s. 9 (IV).

4) Ibid. s. 9.

5) Ibid. s. 56.

6) *Barclay v. Poole* [1907] 2 Ch. 284. The bankruptcy doctrine of reputed ownership has, as a rule, no operation in regard to British ships.

7) M. S. A. 1894, s. 1.

8) Ibid. s. 457.

9) Cf. *Hedley v. Pinkney* [1894] A. C. 222.

10) M. S. A. 1894, s. 459.

11) Ibid. 1897, s. 1.

12) Ibid. 1894, s. 459.

13) Cf. Court of Survey Rules, 29 Sept. 1876, 11 Jan. 1877.

14) M. S. A. 1894, s. 462; 1897, s. 1 (2); 1906, ss. 2, 6.

15) M. S. A. 1894, s. 742.

16) Ibid. s. 92 (1).

17) Ibid. ss. 92 (3), 94, 99.

18) Ibid. s. 92 (1) (a).

19) Ibid. s. 92 (b); 1906, s. 56.

20) Ibid. s. 92 (c).

21) Ibid. ss. 92 (d) (e).

22) Ibid. s. 209.

23) Ibid. 1906, s. 27.

24) M. S. A. 1894, s. 427—431.

25) Ibid. s. 427 (1).

26) Ibid. s. 427 (1) (b).

27) Ibid. 1906, ss. 4, 6. The existing rules as to British ships were made on 10 Feb. 1902, 24 May 1909, 19 April 1910, and 14 June 1911; as to foreign ships, 23 October 1908, ships of France, the German Empire, Norway and Sweden being exempted by special Orders in Council under M. S. A. 1906, c. 48. s. 4 made in 1909—1910, and Denmark and the Netherlands by Orders of 22 April and 11 June 1910.

28) M. S. A. 1894, s. 432 (1).

29) Ibid. s. 432 (1).

A statutory scale of provisions for the crew is established¹⁾ for practically all British vessels²⁾, and foreign-going vessels must carry medicines and medical stores according to prescribed scales³⁾, and anti-scorbutics unless exempted⁴⁾.

The Regulations for the Prevention of Collisions at Sea⁵⁾ must be observed⁶⁾ by all owners and all masters of British ships⁷⁾, wheresoever they may be, and by foreign ships when within British jurisdiction⁸⁾ or when the foreign country has consented⁹⁾ that these Regulations shall apply to its ships when outside British jurisdiction¹⁰⁾.

No British ship may be laden¹¹⁾ or sent to sea¹²⁾ with a grain-cargo¹³⁾ unless all necessary and reasonable precautions have been taken to prevent shifting of the cargo; and in particular grain-cargoes laden in the Mediterranean or Black Seas, or on the coast of North America, must be so laden as to comply with the Act¹⁴⁾; both British¹⁵⁾ and foreign¹⁶⁾ vessels bringing grain-cargoes from these areas are bound to give certain notices as to the kind and quantity of grain carried¹⁷⁾, and also to permit inspection where an officer authorised by the Board of Trade demands it¹⁸⁾. It is also an offence for any foreign ship to be laden with a grain-cargo in the United Kingdom¹⁹⁾ or to arrive in the United Kingdom with a grain-cargo so loaded²⁰⁾ that it would be an offence in the case of a British ship²¹⁾.

Timber, i. e. wood-goods, either heavy²²⁾ or light²³⁾ may not be carried in any ship, British or foreign, to any port in the United Kingdom, which arrives between²⁴⁾ 31 October and 16 April, as deck-cargo, except under the conditions specified²⁵⁾.

Certain goods (such as vitriol, gunpowder and explosives) of a dangerous character must be distinctly marked before shipment, and notice must be given by the consignor to the ship²⁶⁾; in the absence of marking or notice the goods may be thrown overboard; the ship is not bound to receive any such package, save by express agreement, and may require a suspected package to be opened²⁷⁾.

Prohibitions and restrictions on importation in respect of certain goods. In some cases, chiefly for reasons of public policy based on moral or financial considerations, goods of specified kinds may not be imported at all or may only be imported under severe restrictions; such goods include reprints of copyright books²⁸⁾, counterfeit or degraded coin, many forms or preparations of tobacco or alcohol, hides or other portions of infected animals²⁹⁾, arms and ammunition³⁰⁾, goods liable to for-

1) M. S. A. 1906, s. 25.

2) Ibid. 1894, s. 113.

3) Ibid. s. 200; and Scales of March 11, 1903.

4) Ibid. s. 200 (3), and Orders of Oct. 30, 1899, March, 1903.

5) See Regulations of 13 Oct. 1910.

6) M. S. A. 1894, s. 418.

7) Ibid. s. 418 (1).

8) Ibid. s. 418 (2).

9) Ibid. s. 424.

10) Such consent has been given by the principal maritime nations; cf. Order in Council, 13 Oct. 1910, Schedule II.

11) M. S. A. 1894, ss. 452 (1), 456.

12) Ibid. s. 452 (1).

13) Ibid. s. 456.

14) Ibid. s. 453, and Schedule XVIII.

15) Ibid. s. 454 (1).

16) Ibid. 1906, s. 3 (4).

17) Ibid. 1894, s. 454.

18) Ibid. s. 455; 1906, s. 3 (3).

19) M. S. A. 1906, s. 3 (1).

20) Ibid. s. 3 (2).

21) Board of Trade Notices, I—IX, under this part of the Act are collected as a Stationery Office publication dated 1890.

22) M. S. A. 1906, s. 10 (5) (a).

23) Ibid. s. 10 (5) (b).

24) I. e. both dates excluded.

25) M. S. A. 1906, s. 10. See Board of Trade Minutes, 7 Febr. 1907 and 20 Aug. 1907.

26) M. S. A. 1894, ss. 446 sqq. and cf. Explosive Substances Act, 1883, s. 8.

27) Cf. as to the common law liability of the consignor, *Bamfield v. Goole Transport Co.* [1910] 2 K. B. 94.

28) Copyright Act, 1911, ss. 2 (2), 14.

29) Customs Law Consolidation Act, 1876, s. 42.

30) Ibid. s. 43.

feiture under the Merchandise Marks Acts and goods fraudulently marked there-under¹).

III. Co-ownership, and Management of Ships.

Most British ships are now owned by companies, owning all the 64 shares; but where not so owned, the owners of the 64 shares are co-owners of the ship.

Prima facie co-owners of a British ship are part-owners, not partners²), but circumstances may indicate that they are partners³). As part-owners they are tenants in common⁴), each with an equal right to the possession and use of the vessel. If they agree to employ the vessel for profit they are liable for the expenses incurred in respect of the adventure⁵) as if they were partners. Their liability, whether arising *ex delicto* or *ex contractu* is for the whole of the damages⁶) or debt⁷) claimed; but there is a right to contribution from the other co-owners⁸), legal or equitable.

Position and authority of managing owner or ship's husband. Owing to the inherent difficulties in management of a ship by co-owners, they usually agree in appointing a managing owner⁹), who becomes the agent of all the co-owners. His name and address must be registered¹⁰), but even without registration his acts bind the owners in any case within his express or ostensible authority. His express authority is usually defined in writing (often by the articles of association of a company owning a ship), while his ostensible authority results from his position¹¹). If there is no managing owner the name of a ship's husband¹²), who will have all the obligations and liabilities of a managing owner, must be registered. The ostensible authority¹³) of a managing owner or ship's husband extends to acts touching the employment of the ship, such as procuring a charter, making arrangements to fulfil the ship's part therein, or pledging the co-owners' credit for necessary repairs when he cannot within a reasonable time consult them. His express authority depends on the terms of the instrument recording it, if any.

Title and ownership. The Admiralty Court possessed some inherent jurisdiction (now much extended by statute¹⁴) over both British and foreign vessels in questions of title and ownership and the incidental rights to possess the vessel, to enjoy profits arising from her employment and to manage her. The court is however averse from exercising this jurisdiction in the case of foreign vessels unless either the parties¹⁵) or the diplomatic representative of the country to which the ship belongs consent¹⁶).

Disputes between co-owners. Where conflicting claims of title or ownership, or for possession or profits, or to management, are made, the principles involved belong to municipal rather than maritime law, but the Admiralty Division can alone exercise the beneficial procedure *in rem*: such claims may arise:

1. In an action directly affecting title or ownership.
2. Where the majority in interest of the co-owners seek to get possession of the vessel or the proceeds thereof, viz. in an action for possession.
3. Where a minority in interest of the co-owners seek to protect their interest, viz. by an action of restraint.
4. In disputes between co-owners as to accounts or as to apportionment of earnings.

¹) (1887), 50 & 51 Vict. c. 28, s. 16; 1911, c. 31, s. 1.

²) Cf. Lindley on Partnership; Story on Agency, § 417; Williams & Bruce, p. 30, n.

³) *Campbell v. Mullett* (1819), 2 Swanst. 551.

⁴) And therefore able to assign their interests freely.

⁵) *Chappell v. Bray* (1860) 6 H. & N. 145.

⁶) *Mitchell v. Tarbutt* (1794) 6 T. R. 649.

⁷) *Chappell v. Bray*, *supra*.

⁸) *von Freeden v. Hull* (1907) 96 L. T. 590.

⁹) M. S. A. 1894, s. 59; *Frazer v. Guthbertson* (1880) 6 Q. B. D. 93.

¹⁰) M. S. A. 1894, s. 59 (1).

¹¹) *The Huntsman* [1894] P. 214.

¹²) M. S. A. 1894, s. 59 (2).

¹³) Cf. Title "Agency".

¹⁴) Adm. Court Act, 1840, s. 4; Adm. Court Act, 1861, s. 8.

¹⁵) Cf. *The Martin of Norfolk* (1802) 4 C. Rob. 293, p. 297.

¹⁶) Cf. *The Agincourt* (1877) 2 P. D. 239. If the representative refuses the court will probably dismiss the suit: cf. *The Nina* (1867) L. R. 2 A. & E. 44.

Accounts between co-owners; order to sell ship. In the case of any ship registered in England or Wales¹⁾ the Court has power²⁾ to take accounts between co-owners either incidentally in an action or as the principal matter in the action³⁾; and in the case of any such ship to order, in case of any suit as to ownership, possession, employment or earnings, the sale of the ship or any share therein. Such an order may be made at the request of a minority in interest though against the will of the majority⁴⁾, but the court is loth to order a sale against the will of the majority, and must be satisfied that a sale is really beneficial. This power is in English law purely statutory⁵⁾.

Rights of a majority of co-owners. By a doctrine peculiar in English law to Admiralty law the owners of a majority in interest in any ship are deemed to be entitled to possession⁶⁾ even if a minority already in possession are willing to indemnify the majority⁷⁾; in enforcing this right of the majority the court must now consider equitable claims and defences as well as legal rights⁸⁾. This jurisdiction seems to extend to foreign ships⁹⁾, but the court would be reluctant to exercise it unless similar power is given by the law of the flag of the foreign ship¹⁰⁾, even at the suit of a British part-owner of the foreign vessel.

Rights of minority of co-owners. The right of the majority to possess, and so to direct the employment of the vessel, is correlative to the right of the minority (other than a minority of shareholders in a company) to be secured where the majority seek to employ the vessel against the wishes of the minority¹¹⁾. In such cases the minority by bringing an Action of Restraint can always compel the majority to give security, viz. a bond, with sureties, conditioned to pay the value of the applicants' interest if the vessel does not return as stipulated, i. e. to England or Wales or, in some bonds, to a named port therein¹²⁾. Where such security has been given, the effect is that the minority cease to be entitled to share in the profits of the adventure to which they have objected or to be liable for the expenses of earning any profits; they also will receive nothing for the use or wear and tear of the vessel on the adventure. The court would probably be reluctant to entertain an action of restraint touching a foreign ship, unless possibly in a case where the law of the ship's flag contains similar provisions¹³⁾.

One co-owner may bring an action of restraint although the adventure to which he demurs is proposed by a managing owner to whose appointment he has consented¹⁴⁾.

Where the vessel is registered in England or Wales a sale of the vessel may be ordered in any action of possession or restraint¹⁵⁾, but the Court prefers to procure a purchase by the majority of the interest of the minority at a valuation rather than to order a sale of the whole ship¹⁶⁾, for which it always requires a strong case to be made out.

IV. Mortgages of Ships.

General principles. A British ship or a share therein may, like other chattels, be the subject-matter of a mortgage. Such a mortgage may be either registered or unregistered. A registered mortgage¹⁷⁾ must be in one of the two forms prescribed¹⁸⁾ (viz. to secure principal and interest or to secure an account current), as nearly as

1) *The Robinsons* (1884) 5 Asp. 338.

2) Adm. Court Act, 1861, s. 8.

3) *Quaere* whether equitable owners are within s. 8: *The Bonnie Kate* (1887) 6 Asp. 149.

4) *The Hereward* [1895] P. 284.

5) Adm. Court Act, 1861, s. 8.

6) *The Elizabeth & Jane* (1841) 1 W. Rob. 278.

7) *The Kent* (1862) Lush. 495.

8) *The Valiant* (1839) 1 W. Rob. p. 66; see Judicature Act. 1873, ss. 24, 25.

9) Adm. Court, Act, 1840, s. 4.

10) *The Graff A. Bernstoff* (1854) 2 Spks. Adm. 30.

11) *The England* (1886) 12 P. D. 32.

12) *The Cawdor* [1900] P. 47.

13) *The Graff A. Bernstoff*, *supra*.

14) *The Talca* (1880) 5 P. D. 169.

15) Adm. Court Act, 1861, s. 8.

16) *The Marion* (1884) 10 P. D. 4.

17) M. S. A. 1894, ss. 31—38.

18) *Ibid.* Sched. I, Forms B (I), B (II).

circumstances permit¹⁾, and is transferable only in the manner prescribed²⁾. An unregistered mortgage may take any form applicable to making a chattel a security for a loan.

Under a mortgage of a ship there would pass:

1. The ship with her existing appurtenances or any appurtenances thereafter introduced in substitution therefor³⁾.
2. After the mortgagee has taken possession, a right to collect freight.
3. Any other property specifically included.

Registered mortgages. By registration the position of parties is materially altered. A registered mortgagee has (but only with the consent of prior registered mortgagees, if any) an absolute power⁴⁾ to dispose of the ship or share, so soon as any default has been made under the mortgage; he is not affected by the bankruptcy or insolvency of the mortgagor after registration⁵⁾; and the ship or share is not deemed to be in the "reputed ownership"⁶⁾ of the mortgagor⁷⁾. The registered mortgagee obtains, in the absence of fraud, priority over all mortgages not already registered, whatever the date of their making⁸⁾ and over all mortgages not in the prescribed form, and he is not liable to be prejudiced by any subsequent sale or transfer of the vessel by the mortgagor.

A mortgage which is not, as nearly as circumstances permit, in the prescribed form cannot be registered without special leave⁹⁾; and whatever the form of a mortgage, whether registered or unregistered, if it is made to secure future advances, a mortgagee making further advances with notice that a subsequent mortgagee has made advances after the first mortgage, cannot claim that his further advance shall have priority over such subsequent mortgagee¹⁰⁾.

Unregistered mortgages. A mortgage of a ship or share, whether in the statutory form or not, need not be registered; if not registered it is perfectly valid¹¹⁾, but the mortgagee's rights are less extensive¹²⁾ and his claims will be postponed to claims under any registered mortgage, even if the registered mortgage was made after the unregistered mortgage and with notice thereof¹³⁾.

No mortgage of a ship requires registration as a bill of sale¹⁴⁾; and an unregistered mortgagee of a ship or share has in any case the ordinary equitable remedies of a mortgagee, such as foreclosure, and if his mortgage is by deed he has the further rights given by statute to mortgagees by deed¹⁵⁾, including those of sale and of appointing a receiver in certain events.

Rights of mortgagor and mortgagee. Although a mortgage is legally a transfer of ownership, the mortgagee of a ship or share therein is not deemed to be owner except in so far as may be necessary for making the security effective¹⁶⁾, and the mortgagor is deemed to continue to be owner.

It follows that a mortgagee is not bound by the ship's contracts for necessaries¹⁷⁾, unless he has expressly authorised or ratified them, even though he has had the advantage of them¹⁸⁾. To protect his security he may prevent the vessel from sailing uninsured if the mortgagor has contracted to insure¹⁹⁾; he is not bound by unusual engagements made by the mortgagor²⁰⁾; and the vessel which is his security is not

1) Ibid. s. 31.

2) Ibid. Sched. I, Form C.

3) *Coltman v. Chamberlain* (1890) 25 Q. B. D. 328.

4) M. S. A. 1894, s. 35; cf. *Barclay v. Poole* [1907] 2 Ch. 284.

5) Ibid. s. 36.

6) Bankruptcy Act, 1883, s. 44 (III).

7) M. S. A. 1894, s. 36.

8) Ibid. s. 33.

9) Ibid. s. 65 (2).

10) *The Benwell Tower* (1895) 8 Asp. 13.

11) M. S. A. 1894, s. 57.

12) See preceding paragraph.

13) *Black v. Williams* [1895] 1 Ch. 408.

14) Bills of Sale Act, 1878, s. 4.

15) Conveyancing Act, 1881, ss. 19—24.

16) M. S. A. 1894, s. 34.

17) See p. 487.

18) Cf. *The Argentino* [1909] P. 236.

19) *Laming v. Seater* (1889) 16 Sc. Sess. Cas. 4th Ser. 828.

20) *The Manor* [1907] P. 339.

liable to seizure in execution by a subsequent judgment creditor of the mortgagor¹⁾. But he may not interfere with acts of the mortgagor which do not impair the security, or bring an action of restraint²⁾ where a beneficial charter is proposed, or object to a charter merely because it will take the vessel beyond the jurisdiction: the mortgagor, so far as his acts do not impair the security, is deemed still to be owner, and may make contracts for the use of the vessel, the supply of necessities, the assignment of freight yet to be collected, repairs, or other matters, such as a prudent owner would make³⁾.

The right to take possession is one of the ordinary rights of a first mortgagee, but in the case of a ship a mortgagee may only take possession if the mortgagor is impairing the security⁴⁾ or some default has been made under the mortgage. When he has taken possession he has a right to collect all freight or passage-money due or to become due; he may use, or may contract with others for the use of, the ship; and he is entitled to the benefit of outstanding contracts.

On the other hand, if he takes possession, he must account for his receipts and his defaults; he is liable under such outstanding contracts as do not impair his security; and he is liable for losses resulting from his dealings with the security.

A second or puisne mortgagee has no right as against a prior mortgagee to take possession, but any mortgagee may protect his interests by obtaining the appointment of a receiver.

Foreign mortgagee. Although by statute⁵⁾ only certain qualified persons or corporations may own a British ship or share therein, the effect of further provisions⁶⁾ of the same statute, by providing that a mortgagee shall not be deemed to be owner except so far as may be necessary to protect the security, seems to be that a non-qualified person (e. g. an alien or a foreign corporation) may be a registered or an unregistered mortgagee of a British ship: but that if it became advisable to protect the security it could only safely be done by assigning the mortgage to a qualified transferee⁷⁾ out and out and not by way of trust. The Merchant Shipping Act, therefore, seems to make a British ship an unsafe security for a foreign or other mortgagee⁸⁾ not qualified to own a British ship.

Priorities. Any claim under a mortgage of a ship or share is postponed to any claim under any maritime lien⁹⁾, and also to claims under any possessory lien¹⁰⁾ created by a mortgagor in possession, as well as to possessory liens created by a mortgagee in possession himself. But claims under mortgages are preferred to claims by material men¹¹⁾, unless the mortgagee has allowed himself to be made responsible for them.

V. The Master: his Powers and Duties.

The master, i. e. any person, other than a pilot, having command or charge of any ship, is the servant *prima facie* of those by whom he is appointed, the registered owners or managing owner; in cases of urgency a substituted master, with similar authority and duty, may be appointed by the High Court¹²⁾, by a British Consul, a part-owner, a cargo-owner, or a Naval Court¹³⁾. He may be removed by the owners¹⁴⁾ or managing owner, by the High Court¹⁵⁾, a Naval Court¹⁶⁾, or a Colonial Court of Admiralty or a Vice-Admiralty Court¹⁷⁾.

¹⁾ *Dickinson v. Kitchen* (1858) 8 E. & B. 789.

²⁾ See p. 380.

³⁾ Cf. *Collins v. Lamport* (1865) 34 L. J. Ch. 165. 498.

⁴⁾ *The Blanche* (1887) 58 L. T. 592.

⁵⁾ M. S. A. 1894, s. 1.

⁶⁾ *Ibid.* s. 34.

⁷⁾ Cf. *ibid.* ss. 58, 71.

⁸⁾ See ss. 1, 34, 58, 71.

⁹⁾ See p. 436.

¹⁰⁾ See p. 417.

¹¹⁾ See p. 490 and *El Argentino* [1909] P. 236.

¹²⁾ M. S. A. 1894, s. 472 (3).

¹³⁾ *Ibid.* s. 483 (1) (a).

¹⁴⁾ I. e. on proper notice if he is entitled to notice: *Green v. Wright* (1876) 1 C. P. D. 591.

¹⁵⁾ M. S. A. 1894, s. 472 (1).

¹⁶⁾ *Ibid.* s. 483 (1) (a).

¹⁷⁾ *Ibid.* s. 472 (1).

The master, as the person appointed by the owners, is their general agent to do all such acts as are within the ordinary authority of a master¹⁾, but modern facilities of communication have tended to circumscribe his authority when in port and able to communicate with his owners. He may, if in a foreign port or place where he cannot reasonably communicate with the owners, make, or employ a proper agent to make a charter containing usual terms, and may make such arrangements as are needful to fulfil the ship's part under such a charter or under a charter made by his owners.

The power of the master of a foreign ship to contract so as to bind his owners is regulated by the law of the ship's flag; he may however render the ship liable to an action *in rem* for necessities supplied²⁾, even if his owners cannot be made liable in England.

The position of the master of a British ship is also largely affected by statute. He is to maintain discipline on board³⁾ and may do such acts as are requisite to maintain it, e. g. punish or confine a seaman⁴⁾, or even a passenger if circumstances really require it⁵⁾. He must enter into the prescribed agreement with the crew⁶⁾, pay the seamen's wages in the prescribed manner⁷⁾, victual the crew according to scale⁸⁾, and is responsible for the legality of discharges of seamen in foreign countries⁹⁾ or elsewhere abroad¹⁰⁾.

VI. The Legal Position of Foreign Ships in British Waters.

The immunity from the jurisdiction of British courts of public vessels which are the property of the Crown¹¹⁾ or of a foreign sovereign State¹²⁾ while employed by the State¹³⁾ is now generally admitted. A foreign sovereign may be plaintiff in the courts of this country and thereby submit to their jurisdiction to a limited extent¹⁴⁾, and make himself liable to claims by the person sued or to give security where he is plaintiff in an action *in rem*¹⁵⁾. In this way the fiction of extritoriality of foreign public vessels is fully recognised, but no such principle is admitted in the case of foreign merchant vessels. A foreign merchant vessel, whether in port, dock, or harbour, or moored in waters adjacent to the coast, or passing through the territorial waters¹⁶⁾ of the country, has no right to immunity from any proceedings, civil or criminal, to which a British merchant vessel might be subjected¹⁷⁾. It is however of no advantage to a State to concern itself with the purely internal affairs of a vessel merely passing through its territorial waters, and it is unlikely that any State would seek to enforce its theoretical rights in this respect¹⁸⁾; but where the acts of a foreign vessel within territorial waters do affect those entitled to the protection of the local laws, there is every reason for holding that the foreign vessel is liable to those laws, if in fact process can be served on her or her owner, or she can be found in those waters and arrested¹⁹⁾. It is by no means necessary to deny that a vessel in the territorial waters of one State does remain subject to the laws of her own State, but she does not (and those on board her in any capacity whatsoever do not) for that reason escape from the local municipal law of the place where she in fact is. British courts however are so far careful to avoid unnecessary interference with the internal affairs

1) *Grant v. Norway* (1851) 10 C. B., p. 687; and see Title "Agency".

2) See p. 488.

3) M. S. A. 1894, ss. 220 *et seq.*

4) *The Lowther Castle* (1825) 1 Hagg. Adm. 384; M. S. A. 1894, s. 240 (3).

5) *Ibid.* s. 287; *Aldworth v. Stewart* (1866) 14 L. T., N. S. 862.

6) M. S. A. 1894, ss. 113—124.

7) *Ibid.* ss. 131—134.

8) M. S. A. 1906, s. 25 (1).

9) M. S. A. 1894, ss. 186—188.

10) *Ibid.* ss. 187, 188.

11) Cf. *The Scotia* [1903] A. C. 501.

12) *The Jassy* [1906] P. 270.

13) *The Parlement Belge* (1880) 5 P. D. 197.

14) *South African Republic v. Chemin de Fer du Nord* (1878) 5 P. D. 197.

15) *The Newbottle* (1885) 10 P. D. 33.

16) Cf. M. S. A. 1894, s. 685; and cf. *R. v. Keyn* (1876) 2 Ex. D. 63.

17) Cf. Hall, *International Law*, 5th ed. pp. 204—207.

18) The Territorial Waters Jurisdiction Act, 1878 (41 & 42 Vict. c. 73), draws no distinction between stationary and passing vessels in making provision as to indictable offences.

19) Cf. M. S. A. 1894, s. 688; Shipowners' Negligence (Remedies) Act, 1905.

of foreign vessels that they are loth to deal with questions of title, ownership, or possession¹⁾, without the consent either of the parties or of the consul of the foreign State, and in claims for wages against a foreign ship or for possession it is expressly provided that notice shall be given to the consul of the State to which the vessel belongs, if there be one in London²⁾. This rule, although it now has a statutory effect, was a rule of courtesy towards foreign States and is based on the old practice of the Court of Admiralty; but the court is not absolutely bound by a protest of the consul against the case being allowed to proceed³⁾. It may also be observed that even with regard to the internal affairs of foreign merchant vessels Parliament shows an increasing tendency to assimilate the provisions affecting foreign vessels to those affecting British vessels; as for instance in matters touching the carriage of dangerous cargoes, the calculation of tonnage for the purposes of limitation of liability, the sufficiency of crew-spaces and the availability of remedies *in rem*.

VII. Affreightment.

In general. Apart from express stipulations in any contract of carriage, rights and liabilities under any contract to carry goods by water are regulated by common law and by statute.

At common law a public or common carrier of goods for reward is bound to deliver them safely without loss or damage, or to answer for their value or for any damage; he is in effect an insurer of the goods. In this position would be a shipowner who offers his vessel as a general ship without requiring any special contract, either in home or foreign trade. Whether a vessel carrying the goods of one shipper only, or carrying a specified cargo, is in the absence of express stipulations a general ship or a ship having the same liabilities as a general ship⁴⁾ is an unsettled point, but such a question will not in practice arise with foreign-going ships. However, it seems that all shipowners hiring out their vessels to carry goods without express stipulations restricting liability are liable as insurers⁵⁾.

A carrier by water may, apart from express stipulations, excuse himself for non-delivery or for damage, by proof of certain common law or statutory defences.

At common law it is a defence that the loss or damage was due solely (and without any negligence of the shipowner or his agent) to:

1. The act of God, i. e. that the casualty was brought about by natural causes wholly outside human agency, and such that its occurrence could not be reasonably anticipated or its effects avoided by the exercise of any reasonable amount of foresight, pains or care; e. g. damage by lightning or by hurricane⁶⁾.
2. The king's enemies, i. e. the belligerent enemies of the State to which the vessel belongs; but probably this term does not include the enemies of the State to which the shipper belongs, or the acts of persons who belong to a State at peace with the shipowner's sovereign, or of pirates.
3. A justifiable sacrifice; such a sacrifice occurs where goods in course of carriage are voluntarily destroyed or damaged in the presence of a danger affecting all interests and under a real necessity, as where goods are properly jettisoned to relieve a vessel in distress; if the sacrifice results in the preservation of property endangered there is a case of general average⁷⁾.
4. A defect inherent in the goods themselves or in their packing; i. e. where loss or damage arises from such a defect operating without any default or error

¹⁾ *The Agincourt* (1877) 2 P. D. 239; cf. *Adm. C. A.* 1861, s. 8.

²⁾ *R. S. C.*, Order V, r. 16.

³⁾ Cf. *The Leon XIII* (1883) 8 P. D. 121. It would be out of place in an article on Maritime Law to adduce authorities at length on the extent to which local municipal law applies to all persons and vessels within the limits of the territorial jurisdiction of the State where the persons or property may be; but the wide application of local law and the exclusion of extritoriality which occur, as it is submitted, in the case of foreign private vessels, are illustrated by the fact that some countries (but not the United Kingdom) have found it convenient to enter into Conventions to exclude the local municipal law in specified circumstances; and similarly this country has found it advisable to provide by statute a means whereby mail-steamers may be protected against the operation of local law.

⁴⁾ *Liver Alkali Co. v. Johnson* (1874) L. R. 7 Ex. 338.

⁵⁾ *Nugent v. Smith* (1876) 1 C. P. D. 423.

⁶⁾ *Nugent v. Smith*, *ubi supra*.

⁷⁾ See p. 415.

of the carrier or his agents; such loss is commonly said to be due to "inherent vice" or "vice propre": the carrier, however, is bound to use such care as the goods require, so far as he knows their nature or can perceive their condition, and so far as he is aware of defective packing and is able to remedy it he ought to do so¹).

Such excuses are not allowed to a carrier who has in fact been negligent, by himself or his agent; such negligence may exist:

1. In the employment of an unseaworthy vessel.
2. In deviation from the proper course of carriage.
3. In failure to prosecute the voyage with reasonable dispatch, or
4. In the employment of incompetent agents; and in any case the carrier is bound to exercise reasonable care to avoid such perils, and to restrict their injurious consequences (if possible) when they do happen.

By statute the owner of a British sea-going ship is exempted from liability for loss or damage to goods on board by reason of fire²) on board; this exemption is not lost merely because the unseaworthiness of the vessel is the cause of the fire³), but the protection will be lost if the intention of the parties is to exclude the operation of the section⁴), whether that intention is clearly expressed or is necessarily to be implied from the terms of the agreement⁴). A shipowner is also exempted from liability for loss by fire or theft of gold or silver articles or precious stones, where the owner or shipper thereof has not on shipment declared the true nature and value of the goods, unless the fire or theft occurs with his actual fault or privity⁵).

By statute, also, the owner of a registered⁶) British ship or of a foreign ship is exempted from liability beyond a limited amount⁷) where, without his actual fault or privity⁸):

1. Loss of life or personal injury is caused to any person or damage or loss is caused to any goods on board his ship, or
2. By reason of improper navigation of his ship loss of life or personal injury is caused to any person being carried on another vessel or loss or damage is caused to goods on such other vessel, or
3. By reason of improper navigation or management of his vessel loss is caused in respect of vessels or things or rights of any kind on land or water⁹).

Contracts of Affreightment. A contract of affreightment is not required by law to be in any particular form or to be in writing at all¹⁰); but, except in the case of the employment of barges and lighters, goods are rarely carried by water without some express stipulations regulating the terms of carriage, usually contained in a charter party, bill of lading, or berth-note; in the absence of any such document the terms of carriage, or some of them, may at times be collected from shipping notices, advice notes, advertisements, or even from previous dealings between the parties.

Where a shipowner or charterer proposes to carry the goods of any shippers on a definite voyage the vessel is said to be a "general" ship, and the terms of carriage of goods are usually expressed in a bill of lading; where the use of the vessel is hired from the owner for a voyage or for a period of time the contract of hiring is usually contained in a charterparty, the hirer being called the "charterer".

Charterparties. A charterparty is an agreement in writing (now rarely, if ever, in England in the form of a deed) for the hiring of a vessel (or, in rare cases, of a part of a vessel) for specified purposes or for an ascertainable time.

A charterparty, whether for a voyage or for a time, may amount to a "demise" or lease, whereby the owner parts altogether with the possession and control of the

¹) Cf. *Notara v. Henderson* (1872) L. R. 7 Q. B. 225.

²) M. S. A. 1894, s. 502; *The Diamond* [1906] P. 282.

³) The owner not being to blame for the default.

⁴) *The Satanita* [1897] A. C. 59.

⁵) M. S. A. 1894, s. 502; *Asiatic etc. Co. v. Lennard* (1912) 18 Com. Cas. 23.

⁶) M. S. A. 1894, s. 508.

⁷) Ibid. s. 502 (1).

⁸) *The Yarmouth* [1909] P. 293.

⁹) M. S. A. 1894, s. 503; 1900, s. 1.

¹⁰) An agreement that by its terms cannot be performed within a year must be in writing if any action is to be brought upon it; see Leake on Contracts, 6th ed. 1911, pp. 71, 72, and *Hanau v. Ehrlich* [1911] 2 K. B. 1056; and see *Jenkins v. G. C. Rwy.* (1912) 17 Com. Cas. 32.

ship *pro tempore*, and the master and crew become *pro tempore* the servants of the charterer and have possession of the ship on his behalf. In such a case the rights and liabilities of ownership pass to the charterer, the owner only being concerned to receive his chartered hire¹). Such contracts are not commonly used, and the ordinary charterparty only entitles the hirer to the use of the vessel, not to the possession, to the benefit, but not the control, of the services of the master and crew, the shipowner thus becoming a carrying agent on the terms indicated in the charterparty or bills of lading.

A voyage charter provides for the hiring of a vessel for a specified voyage or series of voyages: a time charter provides for a hiring for a specified or ascertainable period. In either case the charterparty may contemplate that the charterer shall provide a cargo or that he shall procure the shipment of cargo by others. Where third persons ship goods on a chartered ship and receive a bill of lading from the ship a contract may arise between them (or their assignees) and the shipowner²).

A time charter usually provides for the hiring of a vessel for a specified period (usually so many calendar months, with a clause giving the charterer an option to extend the hiring for a further specified period). Charterparties may be found which combine the characteristics of voyage and time charters, e. g. to perform as many voyages as possible in 9 months.

A charterparty binding between the parties may be made by agreement between principals, or between a principal and an agent³), or between agents for both principals, or by ratification by a principal of an agreement professedly made on his behalf by a person assuming to act as his agent, or by a mortgagee who has taken possession, or by a receiver duly appointed.

The classes of agent usually taking part in fixing a charter are managing owners or ship's husbands⁴), masters of ships⁵) and chartering brokers⁶).

A chartering broker may be employed by a shipowner to find employment for his vessel on terms laid down by the owner; or by a merchant or shipper to find tonnage for his goods or for a particular adventure. Such brokers are usually paid by a commission stipulated in the charter (to which they are not parties), which they can recover under an implied agreement to pay commission.

A charterparty duly effected binds:

1. All co-owners, including mortgagees in possession, except those who have successfully brought an action of restraint⁷).
2. A mortgagee not in possession, unless the agreement impairs his security⁸).
3. Any assignee of an interest in the vessel taking his assignment after the contract of affreightment is complete⁹).

Bills of lading. A bill of lading is a document which:

1. Acknowledges the receipt of goods on board a vessel.
2. Is evidence of some, or all, of the terms on which the goods were received.
3. Is a symbol of the goods so that a transfer of property in them may be evidenced by indorsement; and
4. In the hands of a consignee or indorsee for value is, in the absence of fraud or express knowledge of non-shipment, conclusive evidence of shipment against the person who signed it.

A shipper is entitled to receive a bill of lading pursuant to his contract of shipment and may decline to accept a bill of lading which seeks to vary that contract by the introduction of new terms or the omission of agreed terms. The duty of the ship is to give to the person entitled a duly signed bill of lading; it is usually given in exchange for the mate's receipt (which is rarely more than a mere acknowledged-

¹) *Sir J. Jackson Ltd. v. Owners of S. S. Blanche* [1908] A. C. 126.

²) *Manchester Trust v. Furness* [1895] 2 Q. B. 539.

³) A person professing to contract as agent but having in fact no authority may be sued for damages for breach of the implied contract that he has such authority: *Starkey v. Bank of England* [1903] A. C. 114. And see Title "Agency".

⁴) See p. 379.

⁵) See p. 382.

⁶) For the general rules affecting the personal liability of principals and agents, see Title "Agency".

⁷) See p. 380.

⁸) See p. 382.

⁹) *The Vindobala* (1887) 13 P. D. 42.

ment of receipt on board and is not conclusive against the ship) or else to the actual shipper or his agent.

A bill of lading for any goods to be exported from the United Kingdom or to be carried coastwise must be stamped with a 6d. stamp before execution, under a penalty of £50¹⁾.

A through bill of lading is a document embodying a contract for the transport of goods over two or more stages by different carriers. Any such bill of lading must be looked at to ascertain its effect²⁾, but it is *prima facie* a contract with the person signing it, or with his principal, for the whole transit; in practice, for purposes of freight and liability, the transit is usually split up into different sections with exclusive liabilities, and frequently with a contractual lien for all freight due in respect of earlier stages.

For some purposes a through bill of lading beginning with a stage of land transit seems to be outside the Bills of Lading Act, at any rate when given before transit by water begins.

A bill of lading given to a shipper who is also the charterer, or to an agent of the charterer, or to a charterer acting as agent, operates *prima facie* only as a receipt for the goods, without varying the contract of carriage made in the charterparty, even if the terms of the bill of lading differ therefrom³⁾, but if the shipowner and charterer do in fact agree to vary their earlier contract they are competent to do so in the bill of lading⁴⁾. But where such a bill of lading is indorsed to a holder, to whom the property in the goods also passes, then the contract contained in or evidenced by the bill of lading becomes the operative contract, to the exclusion of the charterparty contract⁵⁾.

Indorsement of bill of lading. The effect of indorsement of a bill of lading which is expressed to make goods deliverable to X or his assigns (which is the common form) is regulated partly by mercantile usage and partly by statute, provided that the indorsement is made before delivery by the vessel of the goods to some person entitled to receive them.

By mercantile usage the indorsement is evidence of a contract to transfer such property in the goods as the parties intended to be transferred⁶⁾, it may be the whole property out and out, or subject to a right of stoppage *in transitu*, or conditionally, or it may be by way of mortgage or pledge or merely to enable an agent to deal with the goods.

Although such indorsement might suffice to transfer to the indorsee property in the goods, either legal or equitable, yet until the passing of the Bills of Lading Act, 1855⁷⁾, the indorsee could neither sue nor be sued directly on the bill of lading contract.

The Bills of Lading Act, 1855. The effect of the Bills of Lading Act, 1855, is that:

1. Everyone, being either (i) a consignee named in the bill or (ii) an indorsee to whom the property⁸⁾ in the goods has passed upon or by reason of such consignment or indorsement⁹⁾ (whether the indorsement is special or in blank) can enforce in his own name rights of suit then existing or thereafter accruing, and is also subject to all accruing and (probably) to all existing liabilities, as if the precise contract, no less and no more, expressed in the bill of lading had been made with himself. An assignee is not prejudiced by, nor can he claim the benefit of, rights *dehors* the bill of lading which either the shipper or the shipowner could enforce the one against the other; and if the assignee assigns the property by indorsement his existing rights and all future liabilities pass to his assignee¹⁰⁾. The shipper, however, remains liable for freight, and the shipowner's right to stop *in transitu* is protected¹¹⁾.

1) Stamp Act 1891, s. 40, and Schedule.

2) See *Crawford v. Allan* [1912] A. C. 130.

3) *Leduc v. Ward* (1888), 20 Q. B. D. 475.

4) *Gullischen v. Stewart* (1884) 13 Q. B. D. 317.

5) Bills of Lading Act, s. 1; *Leduc v. Ward*, *supra*.

6) *Sewell v. Burdick* (1884) 10 App. Cas. 74.

7) 18 & 19 Vict. c. 111.

8) *Sewell v. Burdick* (1884) 10 App. Cas. 74.

9) *Delaurier v. Wyllie* (1889) 17 R. 167.

10) Bills of Lading Act 1855, s. 1.

11) *Ibid.* s. 2

2. As against the person signing a bill of lading or in whose name it is signed by an agent, the bill of lading is conclusive evidence of the fact of shipment of the goods represented to have been shipped, unless either the holder of the bill of lading had, when he received it, actual notice of non-shipment, or a mis-statement as to shipment can be proved to be due wholly to the fraud of the shipper or the indorsee or some person through whom he claims¹).

Where a shipper has shipped goods and has taken a bill of lading from the ship, either without knowing of the existence of a charterparty or even with such knowledge but without actual notice that only the charterer was to be bound to him on the bill of lading, and also where a bill of lading is in the hands of a consignee or indorsee for value, there is a contract between the ship and the holder of the bill of lading for breach of which either party may sue²). The master has no actual authority to vary the charterparty contract, but where a bill of lading which does vary the terms set out in the charterparty is in the hands of such a holder, the owner is bound by the bill of lading if the variation was in respect of some matter which a master has ordinary authority to decide, but is not bound if the variation goes beyond a master's ordinary powers, e. g. by agreeing to carry goods freight-free, or admitting that goods are of a certain quality.

Incorporation of terms of charterparty in the bill of lading. Where, however, the bill of lading contains an incorporating clause, such as "all other conditions as per charterparty", the person taking such a bill or an assignee claiming through him has agreed to be bound by some term or terms of the charterparty. The terms of the charterparty contract which are thus introduced into the bill of lading contract are such terms only as:

1. Are consistent with the express terms of the bill of lading itself, and
2. Relate to matters proper to be performed by a person taking delivery under a bill of lading, such as the payment of freight, liability for demurrage or dead-freight, terms regulating the place of discharge and the like; but such an incorporating clause will not import into the bill of lading matters of any other kind, such as a cesser clause, a negligence clause, or an arbitration clause³). Moreover, such an incorporating clause does not fix the holder with notice of the actual terms of the charterparty; it is for the ship to prove that the holder actually knew them. A master may bind his owner by giving a bill of lading which, though not allowed by the charterparty, is within his ordinary authority as master, unless the shipper knew of the restriction of the master's power at the time of taking the bill of lading.

Bills of Lading to be signed "as presented". A charterparty frequently provides that a master shall sign bills of lading "as presented" by the charterers: under such a contract the shipowner is bound by the terms of the bills of lading which he has agreed that his master shall sign, but he is entitled to look to the charterer for indemnity against any burden greater than that imposed by the charterparty contract. The words commonly added "without prejudice to this charterparty" reserve still more clearly the shipowner's rights under the charterparty⁴). If by the action of the charterer under this liberty to present bills of lading the ship is insufficiently protected against claims under bills of lading, or is given inadequate rights against holders of bills of lading, the charterer may lose the benefit of any "cesser of liability" clause⁵) to the extent to which the shipowner has been deprived of immunity from adverse claims or of an effective lien for claims by himself.

Effect of written contract of affreightment. A charterparty and a bill of lading being documents in which the parties have expressed in writing that which is presumably their final agreement, the court in construing either document will regard it as containing the terms of the agreement and will not admit evidence to contradict or to vary the written agreement, provided that it is clear and unambiguous.

Where, however, it is alleged that the document does not express the real agreement made, evidence of the agreement alleged to have been made must necessarily be admitted if the document is to be rectified.

¹) Ibid. s. 3.

²) Cf. *Manchester Trust v. Furness* [1895] 2 Q. B. 539.

³) *Thomas v. Portsea S. S. Co., Ltd.* [1912] A. C. 1.

⁴) *Kruger v. Moel Tryvan* [1907] A. C. 272.

⁵) *Hansen v. Harrold* [1894] 1 Q. B.

Moreover, where it is alleged that there has been mistake, misrepresentation, or deceit, or that the alleged contract is illegal or that for any reason the contract as written is not binding (e. g. that any party was incapable of contracting, or that there has been a subsequent agreement to vary or rescind the contract), parol evidence is admissible to show that there is no contract or that the contract has been varied by agreement.

Further, where from the facts in evidence the court finds that the document is not intended to be a complete exposition of the agreement (e. g. that there was a condition precedent to its operation, or a collateral agreement consistent with the written agreement¹), or that the parties impliedly included mercantile usages or customs of the trade concerned, such usages or customs being consistent with the written document, parol evidence of such terms may be given.

Interpretation of written contracts. Where it is sought to annex to a written document an implied term imported from trade usage or custom²), the court must be satisfied:

1. That the custom is reasonable (unless it is expressly introduced)³).
2. That it is general, i. e. that it operates in all similar cases in the same trade at the same place, unless expressly excluded⁴).
3. That it is certain, i. e. that it is as precisely ascertained as the written contract⁵).
4. That the custom, where it is relied on against a person not engaged in the particular trade or place concerned, could have been easily ascertained by him⁶) at the place where the contract was made⁷).
5. That the custom is not repugnant to the written contract (since *ex hypothesi* the parties have made it part of their contract⁸).
6. That it is not repugnant to the general law⁹).

In this connexion a trade usage or custom means a settled and established practice of the trade or port¹⁰); it need not be proved to be ancient; and when proved may be used either to annex a new term to a contract or to explain a term already there¹¹). It becomes a settled and established practice when it is the practice in that trade in that port¹²).

The construction or interpretation of documents is for the Court. In construing mercantile documents, the endeavour will be to give effect to the intention of the parties as expressed, giving:

1. To ordinary words their ordinary meaning, unless the context shows that they have been used with a special meaning.
2. To technical words their technical meaning in the trade or business concerned, unless the context shows that they must have been used with some other special meaning.
3. To legal terms their proper legal effect, unless the context requires some special and less proper meaning to have been intended.

Where the Court is satisfied that a special meaning must be given to ordinary or technical or legal terms, such special meaning, if it is material, is a question of fact to be decided before the document is construed; and for this purpose the Court may admit parol evidence.

The Court will regard in the construction of a contract of affreightment the subject matter of the contract, the relation of the parties, and the adventure contemplated; it will not apply the very strict rules of construction which it applies to legal documents, to mercantile documents which are notoriously lax and indefinite.

1) *Cf. Hassan v. Runciman* (1904) 10 Com. Cas. 19.

2) *Wigglesworth v. Dallison*, (1779) 1 Sm. L. C. ed. 11, p. 545.

3) *Sea S. S. Co. v. Price* (1903) 8 Com. Cas. 292.

4) *Nelson v. Dahl* (1879) 12 Ch. Div., p. 576.

5) *Nelson v. Dahl*, *ubi supra*, p. 575.

6) *Robinson v. Mollett* (1875) L. R. 7 H. L. 802.

7) *Cf. Holman v. Peruvian Nitrate Co.* (1878), 5 R. 657.

8) *Robinson v. Mollett*, *ubi supra*; *Bennetts v. Brown* [1908] 1 K. B. 490.

9) *Crouch v. Crédit Foncier* (1873) L. R. 8 Q. B. 374.

10) *Postlethwaite v. Freeland* (1880) 5 App. Cas., p. 616.

11) *The Cordelia* [1908] P. 27.

12) *Temple v. Runnalls* (1902) 18 T. L. R. 822.

Where different parts of the same instrument are inconsistent or contradictory, the document must be looked at as a whole in order to ascertain the true meaning, and effect will be given, as far as is reasonably possible, to all parts.

Where a document is a printed form with written additions which are inconsistent with that which is in print, greater weight will be given to that which is written as being more certainly the expression of the intention of the parties; and where printed clauses or terms are left in which are inconsistent with the general effect of the document they may be disregarded, as left in by common error. If, as is usually the case, parts of a printed form are erased, the Court may look at the matter erased in order to discern the intention of the parties in the rest of the document¹).

Law applicable to written contracts. Mercantile contracts, like other contracts, are in English law to be interpreted according to that system of law which the parties by an actual expression of intention or by a fair inference as to their intention are found to have intended to operate; their rights and obligations under the contract will be ascertained in accordance with that law. Where there is an express provision as to the law to be applied it must almost inevitably follow that that law will be applied; where the contract is silent there are various presumptions as to the system of law which will govern the contract. In ordinary mercantile contracts the place where the contract is made, where the contract is to be performed, and where any remedies for breach of it are sought, may each be material to be considered; and in contracts of affreightment the primary consideration is the law of the country to which the vessel belongs, i. e. the law of the flag²). The law of the ship's flag does not necessarily govern the contract, but in the absence of other indications there is a strong presumption that it does so, and unless the contract has made special provision for circumstances arising during the voyage, there is specially a strong presumption that the acts of a master in relation to ship and cargo during the voyage are to be regulated by the law of the flag. Such other indications may be found in the actual terms of the contract, or in the purpose for which the contract was made, or in the circumstances of its making³). It is permissible for parties to agree that different parts of the contract shall be governed by different laws⁴), and in practice in contracts of affreightment the performance of local acts, such as the mode of loading or the mode of discharge, is generally regulated by the local law or a local custom. Whatever the intention of the parties may be, it must be gathered from the document itself, and parol evidence of their intention is not admissible⁵).

The classes of cases in which the system of law to be followed has most frequently become material are:

1. Cases in connexion with the acts of the master during the voyage, and
2. Cases where the rights or liabilities under the contract as a whole differ under divergent systems of law.

In the former category are found cases of bottomry, e. g. where the claim of the owner of hypothecated cargo to be indemnified by the shipowner was defeated by a surrender to him of the ship and freight under French law⁶), or where under Italian law a master effectually hypothecated cargo without communicating, as he might have done, with the cargo-owner⁷); or cases of freight, where the ship has put into a port of distress but not carried the goods to their destination, where if determined by German law full freight may be payable⁸), but if by English law no freight may be payable⁹); the right to dispose of cargo by sale at an intermediate port will also be found to be affected by the law applied¹⁰); the duty of a master to tranship differs under different laws¹¹); and similarly a right to freight *pro rata*

¹) *Rowland S. S. Co. v. Wilson* (1897) 2 Com. Cas. 198.

²) *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115. Perhaps 'the law of the ship' is a more accurate term than 'the law of the flag'.

³) *The Industrie* [1894] P. 58.

⁴) *Chamberlain v. Napier* (1880) 8 Q. B. D. 614.

⁵) *In re Missouri S.S. Co.* (1889) 42 Ch. D. 321.

⁶) *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115.

⁷) *The Gaetano e Maria* (1882) 7 P. D. 137.

⁸) *The August* [1891] P. 328.

⁹) *The Industrie* [1894] P. 58.

¹⁰) See *The August*, and *The Industrie*, *supra*.

¹¹) *The Express* (1872) L. R. 3 A. & E. 597

itineris peracti can in English law only exist by express stipulation¹). In the second category will be found cases where the liability of a party depends upon the validity of a stipulation in the contract, e. g. where an exception of negligence was valid by English law but invalid in the State of Massachusetts²); or where a condition of carriage limited the liability of the carrying company in English law but not according to the law of Mauritius (i. e. French law)³).

Although an English court will resort in interpreting a contract of affreightment to the law intended by the parties to apply, so as to ascertain the rights of parties, the enforcement of such rights is wholly regulated by the English law as to procedure, i. e. the *lex fori*⁴). If the right exists under a foreign law, a remedy may be sought in England, although the formalities of process required by the foreign law have not been or cannot be complied with. It may now probably be considered settled that the time within which proceedings must be taken is the time within which an action on a purely English contract must be brought, i. e. six years; the nature of the evidence that may or must be given is governed by the English rules as to admissibility, so that where a memorandum in writing is required, a purely oral foreign contract cannot be proved, or where corroboration is required, corroborative evidence must be given, or where a guarantee is required to be signed by the defendant signature by his agent will not suffice. The remedy that can be obtained is any such remedy as would be given on a similar English contract, and not the remedy that the foreign court might give; in mercantile contracts the remedy will usually be damages, or an injunction, and in contracts of affreightment it will never be specific performance. A contract, therefore, though valid by a foreign law, cannot be enforced if an English rule of procedure bars the way; and the consequence is the same if it is contrary to public interest or public policy, as interpreted in English law⁵).

Representations, Conditions and Warranties. Besides certain undertakings which are implied by law in every contract of affreightment from which they are not expressly excluded by agreement⁶), there may, in every charterparty or bill of lading or in the preliminary negotiations, be made various representations of fact which constitute the inducement to enter into the agreement.

Representations inducing the contract. Representations of fact which form part of the inducement to enter into a contract may be either:

1. Not introduced into the document as finally drawn up, or
2. Terms of the written contract.

A false representation of fact which induces the formation of a contract, but is not embodied in the written agreement, will have effect as follows:

- a) If, although false, it was made innocently, it gives no right to claim damages, but it entitles the party to whom it was made to treat the contract as voidable. A party, however, who is entitled to treat a contract as voidable, and so to rescind it, can only do so while it is possible to put the parties to the agreement into their original position or substantially so;
- b) If, being false, it was made fraudulently, that is, was knowingly false, or without belief in its truth, or recklessly without caring whether it was true or false, the party to whom it was made may not only treat the contract as void but may also claim damages for deceit.

Representations of fact forming terms of the written contract are of two classes, viz. conditions and warranties. Whether a particular term in a contract is a condition or a warranty is a question of construction in each case, after the facts and circumstances of the particular case have been ascertained⁷).

A condition, i. e. for the present purpose a condition precedent, is a representation that a certain fact is true, or a promise that a certain state of things shall exist, which is so material that the truth of the representation goes to the root of the contract, and the validity of the agreement depends on its truth. If the condi-

¹) *Osgood v. Groning* (1810) 2 Camp. 466.

²) *In re Missouri S. S. Co.*, (1889), 42 Ch. Div. 321.

³) *P. & O. Co. v. Shand* (1865) 3 Moo. P. C., N. S. 272.

⁴) See Dicey on Conflict of Laws, ch. XXXII.

⁵) On the whole subject of Conflict of Laws or Private International Law, see Dicey on Conflict of Laws, especially Rules 152—161.

⁶) See p. 392.

⁷) *Kidston v. Monceau* (1902) 7 Com. Cas. 92.

tion is not fulfilled, the party to whom the representation was made may treat the whole contract as at an end, unless it has become impossible to restore the parties to their original position¹).

Where, after breach of a condition precedent, the party aggrieved either does not repudiate the contract or takes some benefit for which in the event of repudiation the other party will get no return, the party entitled to repudiate is said to waive the breach of the condition; in other words he treats the condition as a warranty only and may claim damages as for breach of warranty, and can no longer repudiate.

The following representations in charterparties or bills of lading have been held in particular cases to amount to conditions precedent:

1. Nationality of the vessel, as in times of war this may affect neutrality, and in peace it may affect the law applicable²).
2. Classification, e. g. on Lloyd's Register³), but this condition is satisfied by its truth at the time of making the agreement.
3. Description of vessel, e. g. whether steam or sail⁴).
4. Capacity as regards cargo, where it is found to be material⁵).
5. The place where the ship is, or will be, on a given day⁶).
6. The time at which she will be ready to receive cargo, or to sail⁷); (in cases 5 and 6 it is no answer for the shipowner to allege prevention by excepted perils if the charterer seeks to repudiate).
7. The destination of the ship or the route to be followed⁸).
8. The naming (when required by the charterparty) of the port to which the ship shall proceed⁹).
9. Her fitness for the voyage ("being tight, staunch, strong and in every way fitted for the voyage"), but this express stipulation applies to the time of making the contract and perhaps to the time of proceeding to the port of loading¹⁰); (as to the implied undertaking of seaworthiness, see below).
10. In time charters, readiness substantially at the time contemplated¹¹).

A warranty in a charterparty or bill of lading is a promise that some term of the contract which does not go to the root of the whole agreement is true; a breach of warranty gives a right to claim damages, but no right to repudiate the whole agreement.

Implied undertakings of the shipowner. In every contract of affreightment there are implied by law certain undertakings¹²) by the shipowner, unless there is some express clear and unambiguous stipulation qualifying the implied undertaking¹³). These undertakings are that his vessel:

1. Is seaworthy.
2. Shall enter upon and carry out the adventure with reasonable dispatch; and
3. Shall not deviate from her voyage without justification.

Undertaking of seaworthiness. The undertaking of seaworthiness (which must be understood to include fitness for the cargo¹⁴) as well as for navigation) is an absolute undertaking that the vessel shall be fit for the adventure; not that she shall be fit to encounter extraordinary dangers, but that she shall have no defect which a prudent owner would not remedy before sending her on her contemplated employment if he were aware of the defect. This means that she will not be seaworthy if she is not fit to encounter the ordinary perils of a voyage to her proposed destination with her contemplated cargo¹⁵).

¹) Cf. *Pust v. Dowie* (1864) 5 B. & S. 20.

²) *Behn v. Burness* (1863) 32 L. J., Q. B. 204, at p. 207.

³) *French v. Newgass* (1878) 3 C. P. D. 163.

⁴) *Fraser v. Telegraph Construction Co.* (1872) L. R. 7 Q. B. 566.

⁵) *Barker v. Windle* (1856) 6 E. & B. 675.

⁶) *Bentsen v. Taylor* [1893] 2 Q. B. 274.

⁷) *Oliver v. Fielden* (1849) 18 L. J., Ex. 353.

⁸) Cf. *Leduc v. Ward* (1888) 20 Q. B. D. 475.

⁹) *Rae v. Hackett* (1844) 12 M. & W. 724.

¹⁰) *Scott v. Foley Aikman* (1899) 5 Com. Cas. 53.

¹¹) *Tully v. Howling* (1877) 2 Q. B. D. 182.

¹²) *Steel v. State Line* (1877) 3 App. Cas. 72.

¹³) *Nelson v. Nelson* [1908] A. C. 16.

¹⁴) *Stanton v. Richardson* (1875) 45 L. J., Q. B. 78 (in the House of Lords).

¹⁵) *Maori King S. S. v. Hughes* [1895] 2 Q. B. 550.

Whether a vessel is seaworthy or not is a question of fact to be decided on evidence¹⁾ and proved by the party alleging unseaworthiness. The various circumstances of the particular venture must be considered, such as the time of year, the route to be traversed, the cargo to be carried, the nature of the voyage, whether in stages or direct²⁾.

The undertaking extends both to fitness to receive cargo during loading³⁾ and to fitness to sail at the commencement of the voyage⁴⁾, unless there is some express contrary exception⁵⁾; and also to the proper stowage of the cargo for the voyage⁶⁾; in time charters it covers fitness for the adventure at the commencement of the time charter⁷⁾. It applies to defects which are latent⁸⁾, as well as those which are apparent, and to defects which cannot be repaired at sea although easily remediable in port⁹⁾, but not to defects which can be promptly remedied after the adventure has begun¹⁰⁾. Unusual appliances which might be safe in the charge of experts may constitute a breach of the undertaking if left to inexperienced management¹¹⁾.

Where a charterer or shipper discovers before the voyage has begun that the vessel is unseaworthy, and the defect cannot be remedied within a reasonable time, he may treat the contract as at an end¹²⁾.

A breach of the undertaking of seaworthiness entitles a charterer or shipper to recover damages for loss in fact due to unseaworthiness¹³⁾:

1. Where the shipowner is not protected by exceptions in the contract¹⁴⁾, at whatever stage of the adventure the loss occurs.
2. Where, although there are exceptions which would protect the shipowner, he has had an opportunity of remedying the defect and has failed to do so, since this will be either negligence of the shipowner¹⁵⁾ or, in the case of a voyage in stages, a direct breach of the undertaking¹⁶⁾.

The implied undertaking of seaworthiness may be limited or negated by express stipulations, e. g. by excepting latent defects, or all defects, or unseaworthiness; such exceptions are usually expressed to be "provided reasonable diligence has been used to make the vessel seaworthy"¹⁷⁾, but cases occur in which shippers have been required to admit in their contract that the vessel is seaworthy.

Where it is sought to make a shipowner liable in damages for breach of the warranty of seaworthiness, it is not sufficient to prove merely the facts of unseaworthiness and of damage; the breach of warranty and the damage must be connected as cause and effect¹⁸⁾.

The undertaking of reasonable diligence. In commercial contracts there is, in the absence of express terms, an implied term that the contract shall be carried out by the parties with reasonable diligence, i. e. within a time which is reasonable in the circumstances which exist at any particular period of the adventure. In a contract of affreightment a shipowner accordingly undertakes that his vessel shall enter on her employment, load her cargo, and therewith proceed on her voyage to her destination, in a time which is reasonable with reference to the commercial adventure of the charterer or shipper¹⁹⁾.

¹⁾ Cf. *Lindsay v. Klein* [1911] A. C. 194.

²⁾ *Dixon v. Sadler* (1839) 5 M. & W. 405; *The Vortigern* [1899] P. 140; *McIver v. Tate* [1903] 1 K. B. 352.

³⁾ *McFadden v. Blue Star Line* [1905] 1 K. B. 697.

⁴⁾ *Cohn v. Davidson* (1877) 2 Q. B. D. 455.

⁵⁾ *Rathbone v. MacIver* [1903] 2 K. B. 378.

⁶⁾ *Kopitoff v. Wilson* (1876) 1 Q. B. D. 377.

⁷⁾ Cf. *Giertsen v. Turnbull* [1908] S. C. 1101.

⁸⁾ *The Glenfruin* (1885) 10 P. D. 103.

⁹⁾ *Steel v. State Line* (1877) 3 App. Cas. 72.

¹⁰⁾ *Hedley v. Pinkney* [1894] A. C. 222.

¹¹⁾ *The Schwan* [1909] A. C. 450.

¹²⁾ *Stanton v. Richardson* (1875) 45 L. J., Q. B. 78 (in the House of Lords).

¹³⁾ Cf. *Scott v. Foley Aikman* (1899) 5 Com. Cas. 53.

¹⁴⁾ As he may be, by appropriate words.

¹⁵⁾ *Worms v. Storey* (1885) 11 Exch. 427.

¹⁶⁾ *The Vortigern* [1899] P. 140.

¹⁷⁾ Cf. *The Laertes* (1887) 12 P. D. 187.

¹⁸⁾ *The Europa* [1908] P. 84; *Kish v. Taylor* [1912] A. C. 604.

¹⁹⁾ *Jackson v. Union Marine Co.* (1874) L. R. 10 C. P. 125.

Where by excessive delay the commercial adventure will be frustrated, the charterer or shipper may treat the contract as at an end¹⁾ and require the redelivery of any goods entrusted to the ship²⁾; but where the adventure is not frustrated, unreasonable delay will only give a right to sue for damages³⁾.

Where the delay is caused by occurrences not foreseen by the parties when the contract was made, if the obstacle cannot be removed within a reasonable time any party, shipowner, charterer or shipper, may treat the contract as at an end⁴⁾; if the obstacle is caused by an excepted peril and the exception protects the party who is unable to perform his part, that party is not liable in damages, but if he is not so protected he will be liable.

Where the delay or the impossibility of performance arises from the destruction of something of which the parties contemplated the continued existence⁵⁾, or from the non-occurrence of a particular event⁶⁾, and the existence of the thing or the occurrence of the event was contemplated as the foundation of the contract⁷⁾, both parties are discharged from further performance⁸⁾, but no action can be brought to recover money payable and paid before the dissolution of the contract, and any rights which accrued before the dissolution can be enforced⁹⁾.

Deviation. The undertaking that the vessel shall not deviate without justification which, in the absence of express terms, is impliedly given by the shipowner means that the vessel shall prosecute her voyage in the manner in which such a voyage is usually performed¹⁰⁾, without departing therefrom unless there is some justification.

Deviation may be constituted by departure from the ordinary route¹¹⁾, or by unauthorised delay on the ordinary route¹²⁾; deviation of any kind and to any extent may be authorised by express terms, but in the absence of express terms the ship can only justify deviation:

1. Where it was necessary to save life¹³⁾, and not to save property only, or
2. Where it was prudent to deviate for the safety of ship and cargo, or either of them¹⁴⁾.

Such deviation may be justified on the ground of reasonable apprehension of capture by enemies or pirates¹⁴⁾, or reasonable fear of dangers of navigation, such as icebergs or alteration of soundings, or necessity to repair the ship or to condition the cargo¹⁵⁾; but such justification cannot be set up where the necessity to deviate arises from a default of the shipowner which in fact causes a loss¹⁶⁾.

The effect of unjustifiable deviation is:

1. To abrogate any special contract of affreightment, together with any provisions in favour of the carrying ship, so as to leave the shipowner in no better position than a common carrier and liable for any loss for which such a carrier would be liable¹⁷⁾, or possibly even in a worse position¹⁸⁾, at any rate as to losses occurring after the deviation, and
2. To entitle the charterer or shipper:
 - a) Where the deviation frustrates the commercial adventure, to demand the return of his goods at the place where the vessel is, without paying any freight, or
 - b) If the commercial adventure is not frustrated, to sue for damages.

¹⁾ *MacAndrew v. Chapple*, (1865) L. R. 1 C. P. 643.

²⁾ Cf. *Jackson v. Union Marine Co.*, (1874) L. R. 10 C. P. 125.

³⁾ Cf. *Kidston v. Monceau* (1902) 7 Com. Cas. 87.

⁴⁾ *Jackson v. Union Marine Co.*, *ubi supra*.

⁵⁾ *Nickoll v. Ashton* [1901] 2 K. B. 126.

⁶⁾ *Krell v. Henry* [1903] 2 K. B. 740.

⁷⁾ *Nickoll v. Ashton*, *supra*.

⁸⁾ *Chandler v. Webster* [1904] 1 K. B. 493.

⁹⁾ *Ibid*.

¹⁰⁾ *Leduc v. Ward* (1888) 20 Q. B. D. 475.

¹¹⁾ *The Dunbeth* [1897] P. 133.

¹²⁾ Cf. *Potter v. Burrell* [1897] 1 Q. B. 97.

¹³⁾ *Scaramanga v. Stamp* (1880) 5 C. P. D. 295.

¹⁴⁾ *The Teutonia* (1872) L. R. 4 P. C. 171.

¹⁵⁾ *Phelps v. Hill* [1891] 1 Q. B. 605.

¹⁶⁾ *Kish v. Taylor* [1912] A. C. 604.

¹⁷⁾ *Internationale Guano Werken v. MacAndrew* [1909] 2 K. B. 360.

¹⁸⁾ *Joseph Thorley v. Orchis Co.* [1907] 1 K. B. p. 669.

By express terms in the contract the effect of deviation may be wholly different and any deviation may be justifiable. It is usual to give liberty to deviate to save property or to tow vessels found in distress; where liberty is given to call at any ports the vessel may deviate to any ports near the ordinary route¹⁾ in their geographical order; where she may call at any ports in any order, she may call at any ports on the ordinary route and in any rotation²⁾; and if the liberty is wide enough, she may abandon the geographical route entirely³⁾.

VIII. Performance.

Proceeding to the place of loading. Obligations in the performance of a charter-party usually begin with the duty of the ship to proceed to her port of loading or, under a time charter, to the place where hire is to begin under the contract. She may be required to proceed:

1. By a named date, or
2. Forthwith, or in some similar terms, or
3. Where no express stipulation is made, within a reasonable time.

Where a definite date is agreed, on or before which a vessel is to proceed to her loading-port⁴⁾ or to reach her loading-port⁵⁾, the obligation must be strictly complied with, and on breach of the obligation the charterer may, if the term is a condition precedent, as it usually is, treat the agreement as at an end⁶⁾, or may sue the shipowner for damages⁷⁾, unless he is protected by the excepted perils⁸⁾. If, however, the charterer has already refused to load as agreed, the vessel is excused from proceeding to the loading-port at all⁹⁾.

Where the vessel is to proceed forthwith¹⁰⁾, or immediately¹¹⁾, or with all convenient speed¹²⁾, or some equivalent term is used, she is not bound to proceed at that very moment of time, and the obligation is very much the same as where the implied undertaking of due diligence is left to operate¹³⁾. If she proceeds to her loading-port without undue delay¹⁴⁾, the obligation is satisfied; if there is unreasonable delay, the charterer may repudiate the charterparty or may without repudiating the charterparty sue the shipowner for damages¹⁵⁾.

The fact that a definite date is fixed by which a vessel is to sail for or arrive at a particular place does not entitle the shipowner to delay her sailing or arrival until that date if she can reasonably proceed or arrive sooner¹⁶⁾, unless the express terms of the charterparty allow him to do so¹⁷⁾.

The fact that it has become or will be impossible for the vessel to sail or to arrive at the time required by the charterparty does not entitle the shipowner to refuse to allow the vessel to go to the agreed place, unless the delay has been caused by excepted perils and has been so great as to frustrate the commercial adventure¹⁸⁾.

Where neither a date is fixed nor an obligation to proceed forthwith is imposed, the shipowner's obligation of dispatch is based on his implied undertaking of due diligence¹⁹⁾, so that he is bound to bring her to her loading-place with all reasonable dispatch.

1) *Leduc v. Ward* (1888) 20 Q. B. D. 475.

2) *Glynn v. Margetson* [1893] A. C. 351.

3) *Evans v. Cunard Co.* (1902) 18 T. L. R. 374.

4) *Price v. Livingstone* (1882) 9 Q. B. D. 679.

5) *The Austin Friars* (1894) 7 Asp. 503.

6) *Oliver v. Fielden* (1849) 18 L. J., Ex. 353.

7) *Cf. Nickoll v. Ashton* [1901] 2 K. B. 126.

8) *Barker v. M'Andrew* (1865) 18 C. B. N. S. 759.

9) *Cf. Bradford v. Williams* (1872) L. R. 7 Ex. 259.

10) *Hudson v. Hill* (1874) 2 Asp. 278.

11) *Forest Oak S. S. Co. v. Richard* (1899) 5 Com. Cas. 100.

12) *MacAndrew v. Chapple* (1866) L. R. 1 C. P. 643.

13) See p. 393.

14) *Hudson v. Hill* (1874) 2 Asp. 278.

15) *Nelson v. Dundee S. S. Co.* [1907] S. C. 927.

16) *M'Andrew v. Adams* (1834) 1 Bing. N. C. 29.

17) *Hudson v. Hill* (1874) 2 Asp. 278.

18) *Shubrick v. Salmond* (1765) 3 Burr. 1637.

19) See p. 393.

Cancelling dates. In many charterparties a cancelling clause, giving the charterer power to refuse to load if a vessel does not arrive before a named date, or is not ready to load on a certain date, confers on the charterer an option which he may exercise for his own benefit; he cannot be called upon to exercise it before the arrival of the vessel, even if the cancelling date is passed or it is impossible for her to arrive before it has passed¹⁾. The shipowner by his contract is bound to send his vessel to perform his contract and cannot rely on her inability to arrive in time to save her cancelling date, but if she arrives after the cancelling date the charterer may refuse to load her²⁾, or may load her and claim damages for the delay, or may cancel the agreement and claim damages³⁾.

If the shipowner refuses to send the vessel, the charterer's remedy in an ordinary case is to sue for damages, and then if freights have fallen he may fail to prove any⁴⁾; no court would decree specific performance of a charter party⁵⁾, and breach of a contract of affreightment is eminently a case where damages are as efficient a remedy as an injunction⁶⁾, and the court may refuse to enjoin the shipowner from refusing to send his vessel as agreed if the charterer has not acted equitably⁷⁾.

The place to which the vessel must proceed⁸⁾. A charterparty may provide that a vessel shall proceed:

1. To a named port, dock, wharf, quay, or berth; or
2. To a port, or dock, and so forth, to be ordered or named by the charterer, and in either case the obligation may be modified by a proviso:
3. That she shall proceed thither "or so near thereunto as she may safely get".

Under a contract to go *simpliciter* to a named place the vessel is bound to go to that place; a shipowner is not excused for failure to send his vessel thither by any impossibility of so doing, unless both parties when contracting were aware of the impossibility, or performance has been made impossible by some change in the law applicable made after the contract, or some express provision in the contract exonerates him. On his failure the charterer may treat the contract as void or may claim damages.

Under a contract to go to a port, dock or berth, etc. to be named, or as ordered by the charterer, the charterer has the discretion of naming, within the time specified, or within a reasonable time if no time is specified, a port, dock or berth, etc., which either is at the time available and accessible or is likely to be so within a reasonable time⁹⁾; he must name a place to which it is possible for the ship to go and a place which complies with the terms of the charterparty, and among the matters to be considered, where obstacles to her reaching the place exist, may be included any obstacle caused by the acts or the other engagements of the charterer¹⁰⁾. He may name a place which can only be reached after a reasonable delay such as the parties must have contemplated¹¹⁾. If he fails to name such a place within due time the ship may be sent to such a place as a prudent charterer might have selected¹²⁾, or the shipowner may treat the charter as at an end¹²⁾, or he may sue for damages due to the charterer's failure or delay in naming a loading or discharging place¹³⁾.

The obligation to reach a definite place is often modified by a clause to the effect that the ship shall in some circumstances only be required to get so near thereunto as she safely can. The shipowner can rely upon this clause when he can show that the destination named or ordered was not a place to which his vessel could safely go or from which she could safely depart, i. e. that the port or place was not safe

1) *Moel Tryvan v. Weir* [1910] 2 K. B. 844.

2) *Smith v. Dart* (1884) 14 Q. B. D. 105.

3) *Nelson v. Dundee S. S. Co.* [1907] S. C. 927.

4) *Cf. Bucknall v. Tatem* (1900) 83 L. T. 121.

5) *Cf. Lumley v. Wagner* (1852) 1 De G. M. & G. 604.

6) *Cf. London & Blackwall Rly. Co. v. Cross* (1885) 31 Ch. D. p. 369.

7) *Bucknall v. Tatem* (1900) 83 L. T. 121.

8) Save that a vessel about to load has to give notice of her readiness to load before the charterer's duty to load begins, the principles applicable to the obligations of shipowner and charterer in loading and in discharging are so similar that it is convenient to deal with both loading and discharging in these paragraphs.

9) *Tharsis S. S. Co. v. Morel* [1891] 2 Q. B. 647.

10) *Cf. Bague Quilpué v. Brown* [1904] 2 K. B. 264.

11) *Carlton S.S. Co. v. Castle Line* [1898] A. C. 486.

12) *Sieveling v. Maas* (1856) 6 E. & B. 670.

13) *Stewart v. Rogerson* (1871) L. R. 6 C. P. 424.

for his ship as a laden vessel. The charterer cannot claim to divide the operations of loading or discharging so as to require a vessel to load partly in the named place and partly elsewhere¹⁾, or to discharge partly outside the named place so as to be able to reach the named place safely²⁾, there to discharge the residue of her cargo³⁾.

Whether a vessel is entitled to go to the nearest safe place so as there to become an arrived ship depends on the nature of the difficulty alleged to prevent her from reaching the place agreed. If she can reach the place by waiting for a reasonable time⁴⁾, as by waiting for the next spring-tides⁵⁾, or until the port is no longer blocked by ice⁶⁾, or until the place is no longer blocked by other vessels⁶⁾, or some similar cause, then she is bound to wait and go to the appointed place; but if she is prevented by a permanent obstacle or by an obstacle which, though temporary, will cause an unreasonable delay in a commercial sense, regard being had to the circumstances contemplated by the parties⁴⁾ she may resort instead to the nearest safe place: she will there become an arrived ship so that her lay days may begin to run or, in the case of discharge, the charterer or consignee must take delivery⁷⁾.

Express provision is sometimes made for the course to be adopted where the vessel cannot reach her destination; in such cases, if there would be unreasonable delay in waiting for the removal of the impediment, the express clause applies⁸⁾.

Where it is expressly agreed that the vessel shall reach a named place, she must get there unless there is a clause excusing her, and any expenses of so doing fall on the shipowner, but if the charterer is to name the place to which she is to go he must name a place in accordance with the contract to which she can get⁹⁾; if he does not the ship may refuse to go thither, or if she goes, any extra expenses will fall on the charterer: a place, however, may satisfy the contract although the vessel may have to wait for the periodical recurrence of conditions which bring it within the contract¹⁰⁾.

Wherever a vessel is entitled to proceed to the nearest safe port in lieu of the places named in the contract or ordered under the contract, she must be regarded as an arrived ship when she has reached the place which is allowed to be substituted for the place named or ordered.

A distinction must be drawn between the right of a charterer to name a port, dock or berth where the contract refers to a port, etc. "as ordered", in which case the vessel will be an "arrived" ship on reaching such port, etc.¹¹⁾, and the right of a charterer to order a vessel which has already arrived in a larger area to proceed to a particular berth to load or discharge¹²⁾. If under the contract the vessel has to reach a particular berth, whether named or to be named, her lay days cannot commence until she is there, but if she has only to reach a particular area her lay days will begin on her arrival there, before she reaches the particular berth selected by the charterer.

In a contract of affreightment the word "port" means the area which is called the port in a commercial and business sense, not necessarily an area coincident with some geographical, fiscal, or administrative area¹³⁾, but not, on the other hand, any particular portion of the business or commercial port unless a custom to that effect is proved. A custom may be proved (unless it is inconsistent with the charterparty¹⁴⁾, under which a vessel is not an "arrived ship" until she has also reached a particular part of the port¹⁵⁾ or a dock¹⁶⁾ or particular dock¹⁷⁾; or if she is to reach a dock named, a similar custom may require her to reach a berth within that dock¹⁸⁾.

1) *Shield v. Wilkins* (1850) 5 Exch. 304.

2) *The Alhambra* (1881) 6 P. D. 68.

3) *Reynolds v. Tomlinson* [1896] 1 Q. B. 586.

4) *Dahl v. Nelson* (1881) 6 App. Cas. 38.

5) *Parker v. Winlow* (1857) 7 E. & B. 942.

6) *Knutsford SS. Co. v. Tillmanns* [1908] A. C. 406.

7) *Erasmus Treglia v. Smith* (1896) 1 Com. Cas. 360.

8) *Knutsford SS. Co. v. Tillmanns* [1908] A. C. 406.

9) *The Alhambra* (1881) 6 P. D. 68.

10) *Carlton SS. Co. v. Castle SS. Co.* [1898] A. C. 486.

11) *Leonis v. Rank* [1908] 1 K. B. 499.

12) *The Felix* (1868) L. R. 2 A. & E. 273.

13) *Leonis SS. Co. v. Rank* [1908] 1 K. B. 499.

14) *Reynolds v. Tomlinson* [1896] 1 Q. B. 586.

15) *Thijs v. Byers* (1876) 1 Q. B. D. 244.

16) *Nelson v. Dahl* (1879) 12 Ch. D. p. 586.

17) *Nielsen v. Wait* (1885) 16 Q. B. D. 67.

18) *Norden SS. Co. v. Dempsey* (1876) 1 C. P. D. 654.

Safe Port. A safe port means a port into which the particular vessel can, apart from temporary obstacles¹⁾, safely navigate²⁾, or from which she can safely depart with her cargo without danger from natural³⁾ or political⁴⁾ causes. Where a charterer is to order a vessel to a safe port, he must select a port which is free from permanent danger to that vessel at the time of ordering⁵⁾; if he does not, the ship may refuse to proceed, and if the port named is not in fact safe when she is about to arrive he may be required to name some other safe port⁶⁾; if he fails to do so, the contract may be treated as fulfilled by the ship on arrival at the place already reached.

Readiness to load. A vessel is ready to load when all the spaces in the ship in which cargo is to be carried⁷⁾, whether usual cargo-spaces or spaces in which the charterer is by custom or express agreement entitled to ship cargo, are ready to receive the contemplated cargo, and she has also such official documents as may be required at the place of loading⁸⁾, and such ballast⁹⁾ and dunnage as may be required; she must also be equipped with such safeguards as may be required by law in the case of particular cargoes (such as grain in bulk or explosives).

Provision of ballast. Sufficient space for necessary ballast is not part of the cargo-space, and the shipowner, whose duty it is, apart from express stipulation, to provide ballast¹⁰⁾ must ship such ballast as is required¹¹⁾, and may ship goods on which he will receive freight, provided that he does not thereby prejudice the commercial adventure of the charterer¹²⁾.

Notice of readiness. A charterer is entitled to notice of the ship's readiness to load (but not of arrival or readiness at the port of the discharge), and is not liable for delay in beginning to load (unless by express stipulation) if he has had no notice¹³⁾, but where he has actual knowledge it may be that he will not be relieved from liability because he has not express notice.

Commencement of lay days. Subject to any express stipulations in the contract¹⁴⁾ a vessel's lay days for loading begin when she has lawfully¹⁵⁾ reached the place at which she becomes an arrived ship¹⁶⁾ and is ready to load¹⁷⁾ and has given notice of readiness to the charterer¹⁸⁾; the time at which she becomes an arrived ship may be the time at which the charterer becomes bound to load her, or the obligation to load may be postponed until her arrival at a particular loading-place¹⁹⁾.

Obligation to have cargo ready. The charterer, subject to any express stipulations in the contract, undertakes an unqualified obligation²⁰⁾ to provide a cargo for the vessel when she is in her loading-place ready to load and notice of such readiness has been given. He must load her either within the time fixed by the contract, if any, or within a reasonable time, if no definite time is fixed. The failure of producers or manufacturers or merchants to supply goods, or of carriers to forward or deliver them, or the prevention of the ordinary course of business by natural or human causes, such as ice²¹⁾ or strikes²²⁾ or official prohibitions²³⁾ affords no defence to a charterer who has failed to provide cargo at the loading-place, or to take delivery at the place

1) *Parker v. Winlo* (1857) 27 L. J., Q. B. 49.

2) Cf. *Carlton SS. Co. v. Castle SS. Co.* [1898] A. C. 486.

3) *Reynolds v. Tomlinson* [1896] 1 Q. B. 586.

4) *The Teutonia* (1872) L. R. 4 P. C. 171.

5) *The Alhambra* (1881) 6 P. D. 68.

6) *The Teutonia* (1872) L. R. 4 P. C. 171.

7) Cf. *Mitcheson v. Nicoll* (1852) 7 Exch. 929.

8) *The Austin Friars* (1894) 10 T. L. R. 633.

9) *Lyderhorn v. Duncan* [1909] 2 K. B. 929.

10) *Weir v. Union S. S. Co.* [1900] A. C. 525.

11) *Lyderhorn v. Duncan* [1909] 2 K. B. 929.

12) *Towse v. Henderson* (1850) 4 Exch. 890.

13) *Stanton v. Austin* (1872) L. R. 7 C. P. 651.

14) *Horsley v. Roechling* [1908] S. C. 866.

15) *Good v. Isaacs* [1892] 2 Q. B. 555.

16) See p. 396.

17) See *supra*.

18) See *supra*.

19) Cf. *Leonis S. S. Co. v. Rank* [1908] 1 K. B. pp. 515, 516.

20) *Ardan SS. Co. v. Weir* [1905] A. C. 501.

21) *Kay v. Field* (1883) 10 Q. B. D. 241.

22) *Stephens v. Harris* (1887) 57 L. J., Q. B. 203.

23) *Kirk v. Page* (1857) 26 L. J. Ex. 209.

of discharge, unless he is protected by express exceptions or the performance has become illegal by English law¹⁾.

The charterer is assumed to have the cargo ready to load at the place of loading when the ship is ready in all respects to receive it; if he is by any cause prevented from loading a cargo which he has there in readiness to load, he may be excused for his failure by exceptions in the charter party, but he will not be excused (save by express exceptions for failure to get the cargo to the loading-place) unless either the course of trade known to and contemplated by both parties is to have the cargo ready elsewhere²⁾, or both parties knew of and contemplated the prospect of a moderate period of delay when they entered into the contract³⁾.

Cargo-carrying spaces. The charterer is entitled (subject to any express reservations or additions) to have cargo stowed in all the usual cargo-carrying portions of the vessel, not in cabins⁴⁾ or on deck⁵⁾; he cannot claim to have passengers carried in the cabins⁶⁾. Goods may be carried on deck when the charterparty requires it, or there is an express agreement⁷⁾ or a valid custom⁸⁾ entitling the ship so to carry goods.

Deck cargo. If a ship carries goods on deck without an express agreement or a custom so to do, the shipowner as to such goods is not protected by any of the exceptions in the contract and will be liable as an insurer. If the charterer procures the shipment of goods on deck without having contracted for the use of it or being entitled to have goods carried there by custom, he must pay freight thereon at current (not necessarily chartered) rates⁹⁾.

"Alongside": duty to have cargo alongside. The charterer's duty is (in the absence of any variation by express stipulation or by local custom) to get his cargo alongside the ship so that it may be moved from the place where it lies into the ship by the ship's appliances¹⁰⁾; and his duty is, similarly, to take the cargo from alongside in discharging. By local custom¹¹⁾ or by express contract the obligation of the ship may be varied so that she may have a greater share in the loading or discharge¹²⁾. The respective duties of ship and merchant in loading and discharge are regulated by the terms of the contract, which is deemed to incorporate any local custom consistent with the express terms.

Stowage of cargo. The actual work of loading, stowage, and discharge, is (in the absence of express stipulations) the duty of the shipowner or his master, who is required to be competent as a stevedore¹³⁾ and to provide what is necessary for proper stowage, such as dunnage, battens, or shifting boards¹⁴⁾. The shipowner is liable to a shipper (unless protected by exceptions) for bad stowage, whether the ship has employed a stevedore or, when the shipper is not aware of the terms of the charterparty, the charterer has appointed a stevedore¹⁵⁾. As between shipowner and charterer, liability for defaults of a stevedore is determined by considering who employed the stevedore¹⁶⁾; this depends on the terms of the contract, but it requires clear phraseology to exonerate the ship and make the charterer liable. If the charterparty amounts to a demise, the charterer alone can be liable¹⁷⁾; in other cases the ship is liable to a consignee or an indorsee of a bill of lading given by the ship, and to a shipper who was not aware of the terms of the charterparty, unless the shipper knew the

1) *Esposito v. Bowden* (1857) 7 E. & B. 762.

2) Cf. *Stephens v. Harris* (1887) 57 L. J., Q. B. 203; and as to discharging, *The Alme Holme* [1893] P. 173; *Hudson v. Ede* (1868) L. R. 3 Q. B. 412.

3) *Harris v. Dreesman* (1854) 23 L. J., Ex. 210.

4) *Mitcheson v. Nicoll* (1852) 7 Exch. 929.

5) *Neill v. Ridley* (1854) 9 Exch. 677.

6) *Shaw Savill v. Aitken* (1883) 1 C. & E. 195.

7) *Burton v. English* (1883) 12 Q. B. D. 218.

8) *Royal Exchange Co. v. Dixon* (1886) 12 App. Cas. 11.

9) *Mitcheson v. Nicoll*, *supra*.

10) *Petersen v. Freebody* [1895] 2 Q. B. 294.

11) Cf. *Glasgow Navigation v. Howard* (1910) 15 Com. Cas. 88.

12) *Nottebohn v. Richter* (1887) 1 Q. B. D. 63; *Leach v. R. M. S. P. Co.* (1910) 16 Com. Cas.

143.

13) *Anglo-African Co. v. Lamzed* (1886) L. R. 1 C. P. 226.

14) Cf. p. 378.

15) *Sandeman v. Scurr* (1886) L. R. 2 Q. B. 86.

16) *Harris v. Best* (1892) 7 Asp. 272.

17) *Baumvöll v. Gilchrest* [1892] 1 Q. B. 253.

way in which his goods were to be stowed or were stowed and did not dissent¹); if under the contract the charterer is ultimately liable, the shipowner has recourse against him; and either the shipowner or the charterer will finally have a right to sue the stevedore if he has been negligent.

What is a cargo: full cargo. A cargo is presumably a full cargo, but the meaning is governed by the wording of the contract²). A full and complete cargo is so much cargo of the goods contemplated as the vessel can carry in her cargo-space when loaded according to the custom of the port of loading³); for a full and complete cargo the charterer must, apart from custom, fill the ship with goods of the kind contemplated and without broken stowage, if such a cargo can fill her, or with broken stowage if the nature of the cargo requires it⁴); but where the ship is responsible for stowage the charterer is not liable for broken stowage due to the default of the ship⁵). The charterer's obligation is satisfied if he ships a cargo of the goods contemplated under conditions permitted by the custom of the port⁶).

In the majority of charterparties the nature of the cargo to be shipped is specified with more or less precision: under a contract to ship "lawful merchandise" the shipper must provide goods such as are ordinarily shipped at the port concerned⁷); "produce" means such commodities as are ordinarily produced near the port of shipment. If the contract allows the shipment of goods of more than one kind the whole cargo may be of any one or more kinds to the exclusion of the rest⁸), even though this may impose extra expenses on the ship⁹) by requiring ballast or by causing a decrease of the total freight¹⁰).

Similarly the ship is bound, unless the contract provides otherwise, to take a full cargo, if provided, and for failure to do so the shipowner may be liable in damages; he may not put bunker-coals in cargo-space or diminish the cargo-space by taking more bunker-coal than is reasonably necessary for the chartered voyage¹¹).

The actual amount of cargo which a charterer must provide is determined by the wording of the contract, and in several cases various common clauses dealing with this subject have received a judicial interpretation:

1. Under a contract to load a full and complete cargo, the vessel being described as of 2600 tons deadweight, the charterer must load as much cargo as the vessel can carry safely, though it amounts to 2950 tons¹²).
2. Under a contract to load a cargo of say about 2800 tons, where the vessel could carry 2880 tons and 2840 tons were shipped, this was held to be a cargo, though not a full cargo¹³).
3. Under a contract to load a full and complete cargo, say about 1100 tons, where the vessel could carry 1210 tons, it was said that taking the contract as a whole the shipowner had indicated about 1100 tons as sufficient and that "about" would be satisfied by a 3% margin, so that 1133 tons would suffice¹⁴).
4. Under a contract to load a full and complete cargo, say about 2850 tons and not more than 3000, the charterer was held bound to load 3000 tons if there was room¹⁵).
5. Under a contract to provide a cargo of not less than 6500 tons but not exceeding 7000 tons, it was held that on the wording of the contract a cargo here meant a full cargo, and that the charterer must load a full cargo, viz. in fact 6590 tons¹⁶).

1) *Ohrloff v. Briscall* (1866) L. R. 1 P. C. 231.

2) Cf. *Caffin v. Aldridge* [1895] 2 Q. B. 648.

3) *Cuthbert v. Cumming* (1856) 11 Exch. 405.

4) *Cole v. Meek* (1864) 15 C. B., N. S. 795.

5) *Furness v. Tennant* (1892) 8 T. L. R. 336.

6) *Isis S. S. Co. v. Bahr Behrend* [1900] A. C. 340.

7) *Vanderspar v. Duncan* (1891) 8 T. L. R. 30.

8) *Moorson v. Page* (1814) 4 Camp. 103.

9) *Irving v. Olegg* (1834) 1 Bing. N. C. 53.

10) *Southampton Colliery Co. v. Clarke* (1870) L. R. 6 Ex. 53.

11) *Darling v. Raeburn* [1907] 1 K. B. 846.

12) *Heathfield S. S. Co. v. Rodenacker* (1896) 2 Com. Cas. 55.

13) *Miller v. Borner* [1900] 1 Q. B. 691.

14) *Morris v. Levison* (1876) 1 C. P. D. 155.

15) *Carlton S. S. Co. v. Castle S. S. Co.* (1897) 2 Com. Cas. 173.

16) *Jardine v. Clyde S. S. Co.* [1910] 1 K. B. 627.

6. Where the contract provides for the shipment of both weight and measurement goods, the charterer probably satisfies his obligation if he tenders sufficient cargo to fill the ship in the proportions of dead weight goods and measurement goods customary at the port, even if the ship could have carried a greater deadweight than she actually received.

Completion of loading. When the charterer has once fulfilled his obligation of tendering sufficient cargo and any other duty imposed on him by the contract, he is not liable for further delays, such as inability to leave the port owing to ice¹⁾, or to lack of necessary documents²⁾ which the charterer is not under a duty to furnish.

Effect of fire after loading cargo. If the cargo, or part of it, is destroyed by fire after shipment, the charterer need not replace the goods with other goods, nor can he claim a right to do so³⁾; but the shipowner may load goods in the space so left unoccupied and may himself receive the freight for them.

Mate's receipt. When goods have been delivered to the ship the shipper usually receives a "mate's receipt", the goods being then at the risk of the shipowner unless he is exonerated by express stipulations⁴⁾; this receipt is evidence against the ship of the facts therein stated⁵⁾, and *prima facie* entitles the holder to receive the shipowner's usual bill of lading in exchange for the receipt unless the ship has notice that some other person claims the goods; the ship, however, may give the bill of lading to a person named in the receipt as owner or to a person proved to be owner of goods on board if there is no notice of conflicting claims⁶⁾. The mate's receipt cannot be assigned so as to transfer the property in the goods without notice to the shipowner⁷⁾.

Clauses in Bills of Lading.

A bill of lading as a document of title has already been considered⁸⁾; the effect of various clauses commonly found therein is discussed here:

1. "Shipped in good order and condition" means that judged by external appearances the goods were in good order and condition when shipped; an unqualified statement to this effect makes a "clean bill of lading"⁹⁾; under such a bill of lading the ship will have no claim against the goods except the claim for freight on delivery, and if the goods are not in good order and condition when delivered the shipper or his assignee can recover damages on proof that they were internally in good order and condition when shipped, or that they were damaged *in transitu* by a cause for which the ship is liable. The shipowner cannot deny as against an indorsee for value that the goods were in fact shipped in good order and condition¹⁰⁾.
2. "Quantity unknown": descriptions of quantity or of the number of parcels bind the person signing the bill of lading¹¹⁾, but the shipowner is not liable for such descriptions where the goods have never in fact been shipped¹²⁾, if he can disprove the shipment.
3. "Quality unknown": descriptions of quality do not as a rule bind the shipowner, as the master has no ordinary authority to bind him in this respect¹³⁾.

Where, however, it is agreed that statements as to quantity or quality shall be conclusive, the shipowner is bound, in the absence of fraud by the shipper, to answer for any deficiency¹⁴⁾, unless he can prove a loss by excepted perils after actual shipment.

1) *Pringle v. Mollett* (1840) 6 M. & W. 80.

2) *Barret v. Dutton* (1815) 4 Camp. 333.

3) *Aitken v. Ernsthausen* [1894] 1 Q. B. 773.

4) *Nottebohm v. Richter* (1886) 18 Q. B. D. 63.

5) *Biddulph v. Bingham* (1874) 30 L. T. 30.

6) *Cowasjee v. Thompson* (1854) 5 Moo. P. C. 165.

7) *Hathesing v. Laing* (1875) L. R. 17 Eq. 92.

8) See p. 386.

9) *Restitution S. S. Co. v. Pirie* (1889) 61 L. T. 330.

10) *Martineaus v. R. M. S. P. Co.* (1912) 17 Com. Cas. 176.

11) See p. 388.

12) *Grant v. Norway* (1851) 10 C. B. 665.

13) *Cox v. Bruce* (1886) 18 Q. B. D. 147.

14) *Mediterranean Co. v. Mackay* [1903] 1 K. B. 297.

4. "Weight and contents unknown": this or any similar clause, such as "quantity and quality unknown", when found in a bill of lading which states that the goods were shipped in good order and condition, relieves the shipowner from the absolute obligation to deliver in good order and condition the goods so described, as it converts the contract into an agreement to carry the parcel, whatever it may be, instead of an agreement to carry specified goods¹).

Where bill of lading and charterparty differ. A charterparty frequently provides that bills of lading shall be signed "as presented" or "as required" or "at any rate of freight", and in such cases it usually stipulates that this shall be done "without prejudice to this charterparty". Whether under such provisions the charterer is bound to present for signature bills of lading that do not depart from the charterparty terms²), or may tender for signature bills of lading which do not follow the charterparty terms³), is not clearly settled; but in either case the charterer is bound to indemnify the shipowner for any loss consequent on a liability being imposed on the shipowner by the terms of the bill of lading which would not have been imposed on him by the terms of the charterparty⁴), and may be expressly bound to do so⁵). The bill of lading will represent the contract between the shipowner and the shipper, but as between the shipowner and the charterer the charterparty contract remains unaffected⁶); in any event such clauses do not give the charterer an absolute discretion as to the contents of the bill of lading, and he could not require the master to sign a bill of lading for goods never shipped, or deprive the shipowner of his lien for chartered freight by making freight payable to a stranger⁷), and to the extent to which the shipowner is damaged by the terms of the bill of lading the charterer may lose the protection of the cesser clause, if there is one⁸).

Where bills of lading are to be signed "at any rate of freight" the master is bound to sign a bill of lading, although the rate of freight specified is insufficient to satisfy the shipowner's claim for chartered freight; and where the charterparty provides that the master "shall sign" bills of lading the master must sign them⁹), but the charterer can only recover his actual damages where a penalty is imposed, if the master refuses to sign as agreed¹⁰).

Cesser clauses. It is a common practice for the parties to agree that when the charterer has procured the shipment of the agreed cargo for the chartered adventure his liability under the contract shall cease; in such cases it is intended that the shipowner shall look to a lien, specially created, for the satisfaction of claims such as for dead freight or demurrage, which he is to be able to enforce against shippers, goods-owners and assignees. Such a lien does not exist apart from special contract, and the court always inclines to treat the relief given to the charterer as no wider than, but co-extensive with, the special right given to the shipowner in consideration of which he has released the charterer¹¹); the actual extent, however, to which the charterer is released must always depend on the wording of the contract¹²); if the remedy given enables the shipowner to enforce a claim for a liability already accrued the charterer will be released, while if it only protects the shipowner in respect of claims yet to accrue, the charterer may remain liable for claims already accrued, such as dead-freight or damages for detention at the port of loading.

Such a clause is usually called a "cesser clause"; and the principal difficulty in construing it arises from a commercial looseness of phraseology in using the word demurrage sometimes to include and sometimes to exclude delay other than demurrage in its technical sense¹³).

¹) *Lebeau v. G. S. N. Co.* (1872) L. R. 8 C. P. 88.

²) *Kruger v. Moel Tryvan S. S. Co.* [1907] A. C. 272.

³) *Turner v. Haji Goolam* [1904] A. C. 826.

⁴) See the two cases last cited.

⁵) *Milburn v. Jamaica Fruit Co.* [1900] 2 K. B. 540.

⁶) *Shand v. Sanderson* (1859) 4 H. & N. 381.

⁷) Cf. *The Canada* (1897) 13 T. L. R. 238.

⁸) *Hansen v. Harrold* [1894] 1 Q. B. 612.

⁹) *Jones v. Hough* (1879) 5 Ex. D. 115.

¹⁰) *Rayner v. Akt-Condor* [1895] 2 Q. B. 289.

¹¹) *Hansen v. Harrold* [1894] 1 Q. B. 612.

¹²) *Milvain v. Perez* (1861) 3 E. & E. 495.

¹³) See p. 420.

When the remedy for delay covers all delay at all stages of the adventure the charterer is absolved¹⁾; if it only covers demurrage in the strict sense at the port of loading, the charterer will remain liable for damages for detention there²⁾ but not for demurrage³⁾. If the remedy only extends to demurrage at the port of discharge, the charterer remains liable for detention at the port of loading⁴⁾.

Wherever a lien for demurrage is given by the cesser clause the charterer will be under no liability for any delay at the port of discharge, as the intention of the parties is clear, unless the charterer is also a consignee taking delivery of the goods at the port of discharge under a bill of lading which incorporates the charterparty, as there then is a wholly new contract⁵⁾; and if a lien is given for demurrage, but the charterparty contains no provision for demurrage days either in loading or in discharging, then "demurrage" must be construed to mean "detention" and the charterer is accordingly absolved for delay at either port⁶⁾.

IX. The Voyage.

Sailing on the voyage. A vessel is considered to have sailed or to have "finally sailed" when to perform her voyage she has left the commercial or business limits of the port of departure⁷⁾, being ready for sea and properly documented. If it has been agreed that she shall sail by or on a named day she must by or at the agreed time have begun her voyage, being in all respects ready for the voyage and without intention of returning⁸⁾.

Master's authority on voyage. During the voyage the master is, as at other times, the servant of the shipowner, with a duty and authority to fulfil his employer's contract by carrying the goods with reasonable care, and providing necessaries for the voyage where the ship is bound to supply them; he is also bound to take such steps (his acts binding his employer) as may be necessary for the prosecution of the adventure, as by borrowing on bottomry, making agreements as to salvage or transshipment, where a necessity so to act exists and he cannot reasonably communicate with his employer.

He is likewise the agent of the charterer to procure such things as the charterer may have undertaken to provide for the voyage, e. g. coal when the charterer is to pay for coal⁹⁾; and is moreover the agent, in case of necessity, of the goods-owner, to do such acts in relation to the goods as are necessary for the benefit of the goods-owner, such as selling or pledging the goods or part of them, or incurring special expenses in preserving or forwarding them. The shipowner is responsible for any improper acts or omissions of his servant, the master, in dealing with cargo in such circumstances¹⁰⁾; the master's authority so to act arises when:

1. A prudent owner, if present, would consider the act commercially wise, and
2. The master cannot in a reasonable time communicate with the goods-owner¹¹⁾.

Excepted Perils. The duty of the shipowner to carry out the proposed adventure and his liabilities in so doing have been discussed already¹²⁾, so far as they are unmodified by express stipulations; but the terms of the contract of carriage almost invariably effect a profound change in the mutual rights and responsibilities of the parties.

A charterparty usually contains exceptions, more or less numerous, which operate to excuse either party in whose favour they have been introduced¹³⁾ for fail-

¹⁾ *Sanguinetti v. P. S. N. Co.* (1877) 2 Q. B. D. 238.

²⁾ *Gray v. Carr* (1871) L. R. 6 Q. B. 522.

³⁾ *Kish v. Cory* (1875) L. R. 10 Q. B. 553.

⁴⁾ *Clink v. Radford* [1891] 1 Q. B. 625.

⁵⁾ *Gullischen v. Stewart* (1884) 13 Q. B. D. 317.

⁶⁾ *Bannister v. Breslauer* (1867) L. R. 2 C. P. 497. It is to be observed that the cases on the cesser clause are not in a satisfactory state and are barely, if at all, consistent; see the discussion in *Scrutton on Charterparties*, 6th ed. pp. 143—150.

⁷⁾ *Price v. Livingstone* (1882) 9 Q. B. D. 679.

⁸⁾ *Hudson v. Bilton* (1856) 6 E. & B. 565.

⁹⁾ *McIver v. Tate* [1903] 1 K. B. 362.

¹⁰⁾ *Notara v. Henderson* (1872) L. R. 7 Q. B. 225.

¹¹⁾ *Acatos v. Burns* (1878) 3 Ex. D. 282.

¹²⁾ See p. 392.

¹³⁾ *Braemount S. S. Co. v. Weir* (1910) 15 Com. Cas. 101.

ure to perform his undertaking in the event of prevention by excepted perils which that party could not have avoided by reasonable diligence. A bill of lading in practice invariably contains exceptions, which operate to excuse the carrier by whom it has been given to a shipper for failure to deliver the goods as agreed, if the failure is due to an excepted peril which the carrier or his servants could not avoid by reasonable diligence. Thus between the shipowner and a charterer the charterparty exceptions are material, but to the shipper the bill of lading exceptions; where the charterer is also a consignee, *prima facie* the bill of lading exceptions are immaterial¹⁾, unless there is an agreement to vary the charterparty terms.

Such exceptions *prima facie* apply throughout the adventure, including the loading, voyage, and discharge, but where they are introduced in favour of one party only, a strict interpretation is put upon them against the party relying thereon²⁾. Moreover any exception affords a good excuse to a party relying on it, only if it can be shown that the failure which he attributes to the excepted peril is *immediately* due to that peril; *causa proxima non remota spectatur*³⁾; except that where the loss is due to negligence of the carrier⁴⁾ making it possible for the excepted peril to cause the loss⁵⁾, the carrier cannot avail himself of the exception⁶⁾.

Among the very numerous perils excepted by express agreement, some are more commonly found and are of greater importance; it is barely feasible to enumerate all, so illustrative cases are here dealt with:

1. "Arrests and restraints of rulers, princes and peoples"; this is wider than "the king's enemies"⁷⁾ and includes all interference by the established authority of a State, whether by belligerent, executive or administrative act, such as embargo, prohibition of transit or of import or export, or reasonable fear of such interference⁸⁾; it does not extend to tumultuous or riotous proceedings without established authority or to ordinary legal process, or to interference induced by the negligent act of the shipowner⁹⁾.
2. "Strikes and lock-outs" extend to interference with the normal course of business by labour disputes¹⁰⁾, so that either workmen refuse to work or employers refuse to employ workmen in consequence of a labour dispute, with the result that labour cannot be obtained by reasonable efforts¹¹⁾. This exception may extend to labour disputes which prevent the transit of cargo as well as the loading thereof¹²⁾.
A party, however, cannot rely on an exception of strikes where, being at liberty to avoid the area in which a strike prevails, he elects to send the vessel there and the vessel is in fact delayed by that strike¹³⁾.
3. In an exception of "pirates robbers and thieves" piracy covers depredation by sea by persons without authority given by a civilised State, for their private gain¹⁴⁾; robbery or theft must be the forcible act¹⁵⁾ of some person not acting in the service or employment of the ship¹⁶⁾.
4. "Barratry" means some wilful¹⁷⁾ misconduct of master or crew, such as robbery, damage or spoliation or exposure of the ship to destruction¹⁸⁾ or to confiscation¹⁹⁾ without the consent of the owner and in circumstances in which he could not reasonably prevent it; the act to be barratrous must not be the

¹⁾ See p. 387.

²⁾ *Norman v. Binnington* (1890) 25 Q. B. D. 475.

³⁾ Cf. *Hamilton v. Pandorf* (1887) 12 App. Cas. 518.

⁴⁾ *Nugent v. Smith* (1876) 1 C. P. D. 423.

⁵⁾ *Ibid.* p. 436.

⁶⁾ *Steel v. State Line Co.* (1877) 3 App. Cas. p. 88.

⁷⁾ See p. 384.

⁸⁾ *Nobel v. Jenkins* [1896] 2 Q. B. 326.

⁹⁾ *Dunn v. Currie* [1902] 2 K. B. 614.

¹⁰⁾ *In re Richardson* [1898] 1 Q. B. 261.

¹¹⁾ *Bulman v. Fenwick* [1894] 1 Q. B. 179, p. 185.

¹²⁾ *Leonis v. Rank* (1907) 13 Com. Cas. 161, 295.

¹³⁾ *Brown v. Turner* [1912] A. C. 12.

¹⁴⁾ *Republic of Bolivia v. Indemnity Co.* [1909] 1 K. B. 785.

¹⁵⁾ *Rothschild v. R. M. S. P. Co.* (1852) 7 Exch. 734.

¹⁶⁾ *Steinmann v. Angier Line* [1891] 1 Q. B. 619.

¹⁷⁾ *Briscoe v. Powell* (1905) 22 T. L. R. 128.

¹⁸⁾ *The Chasca* (1875) L. R. 4 A. & E. 446.

¹⁹⁾ *Earle v. Rowcroft* (1806) 8 East, 126.

result of mere incompetence or negligence or brought about by the personal negligence of the owner¹).

5. Leakage, breakage, sweating, rust, and similar exceptions refer to loss or damage to the goods so affected, but not to loss or damage caused by the leaking, sweating, etc., of other goods²), unless some such exception as "injurious effects of other goods" is introduced³). The shipowner is not by an exception of leakage, etc. protected from liability for damage which the shipper proves to be due to negligent stowage⁴).
6. The exception of "negligence of master, mariners or other servants" does not exempt the shipowner from liability for his personal negligence⁵) or for a breach of the undertaking of seaworthiness⁶), unless clearly expressed to do so; but it may extend to any negligent act or default of his servants⁷), whatever its nature. Difficult questions have arisen when this exception is expressed to cover "negligence in navigation"⁸) or "negligence in navigation or management"⁹).
7. The exception of perils of the seas extends to loss or damage by perils peculiar to the sea, such as collision of vessels, stranding when not in the ordinary course of navigation, damage by sea-water, or having special importance at sea, such as storms and hurricanes; they must be perils which cannot reasonably be foreseen and guarded against at sea, and must not be merely perils on the sea¹⁰), such as explosion of boilers or barratry. As with other exceptions the damage or loss must be the direct¹¹) consequence of the excepted peril and must not be the result of the negligence of the owner or his servants, such as failure to stow goods properly or to have the ship seaworthy. Perils "peculiar to the sea or to a ship on the sea"¹²) are infinitely various; they may arise from sea water obtaining entrance by reason of damage (e. g. by collision with another vessel or an iceberg) or accident, from the effects of tempestuous weather on a vessel carrying cargo, or from the acts of men, such as piracy or the mistake of a belligerent vessel¹³); but the term cannot be held to extend to occurrences that take place in the ordinary course of maritime affairs, although they happen to a ship and on the sea, such as damage by the negligence of the carrying ship or due to improper stowage, or by the mere depredations of vermin such as rats (unless they bring about a result which is a peril of the sea¹⁴).

Place of delivery. The place of delivery either is fixed by the charterparty or bill of lading or is left to be named before arrival. Where the charterer has the right to name the place of delivery and the vessel is to call for orders, orders must be given within the time limited for the purpose, or within a reasonable time if no time is so limited.

Arrival at place of discharge. The ship must arrive at the agreed place of discharge¹⁵), but there is no implied obligation to give notice of arrival or of readiness to discharge either to the charterer or to consignees¹⁶), and time begins to run on her arrival and readiness to deliver. When she has arrived and is ready, the receiver of cargo must, unless there is a custom of the port or an express stipulation to the contrary, be ready with sufficient equipment to take delivery of his cargo during the working hours of the port until the discharge is completed. If no time is fixed

¹) *Chartered &c. Bank v. Netherlands &c. Co.* (1883) 10 Q. B. D. p. 532.

²) *Barrow v. Williams* (1890) 7 T. L. R. 37.

³) *Thrift v. Youle* (1877) 2 C. P. D. 432.

⁴) *The Pearlmoor* [1904] P. 286.

⁵) *City of Lincoln v. Smith* [1904] A. C. 250.

⁶) See p. 392.

⁷) *Marriott v. Yeoward* [1909] 2 K. B. 987.

⁸) Cf. *Carmichael v. Liverpool Association* (1887) 19 Q. B. D. 242.

⁹) *The Glenochil* [1906] P. 10.

¹⁰) *The Xantho* (1887) 12 App. Cas. 503.

¹¹) *Pink v. Fleming* (1890) 25 Q. B. D. 396.

¹²) Scrutton on Charterparties, 6th ed., Art. 83.

¹³) Cf. *The Xantho* (1887) 12 App. Cas. p. 509.

¹⁴) *Hamilton v. Pandorf* (1887) 12 App. Cas. 518.

¹⁵) Cf. p. 396.

¹⁶) *Nelson v. Dahl* (1879) 12 Ch. D. p. 583.

by the contract he is entitled to a reasonable time for taking delivery¹); after the lapse of a reasonable time, or at any time allowed by statute²) or by a custom of the port or by the terms of the charterparty or bill of lading, the shipowner may land the cargo³) into a warehouse⁴) without losing any lien he may have.

The duty of the ship is *prima facie* to deliver the goods alongside, but the extent of the duty may be varied by the terms of the contract to carry, so that the burden on the ship may be diminished or may be increased⁵).

To whom delivery is to be made. The master is entitled to deliver the goods to the first person who produces⁶) a bill of lading duly signed (or any one bill of lading if there is a set of bills of lading): if, however, he has notice of conflicting claims or has reason to doubt the right of the claimant to have delivery, his duty is either to interplead or to deliver the goods to the person rightfully entitled to delivery⁷); he can only adopt the latter course at the risk of being liable for any mistake. If a person not rightfully entitled to delivery wrongfully obtains possession from the master, the delivery does not operate to give him a good title⁸).

Landing subject to a lien for freight. At common law the master may⁹), where no one is ready to take delivery and pay freight, land and warehouse the goods¹⁰), giving the consignee notice of his action. He will thus retain his lien for freight and will also be entitled to recover the charges of landing and warehousing, while the consignee can obtain the goods on producing the bill of lading and paying freight and charges.

Landing under the Merchant Shipping Act. Under the Merchant Shipping Act, 1894¹¹), where the owner of goods imported from foreign parts fails to enter them at the custom house, or having entered them, fails to take delivery either:

1. Before the expiration of the time limited for delivery by the contract of affreightment, or
 2. Within 72 hours of the report of the ship if no time is so limited,
- the shipowner may (provided that the failure to take delivery is not due to the default of the shipowner¹²) enter the goods and land them either:

1. At the wharf or warehouse specified by the contract of affreightment, or
2. If that cannot conveniently be done, at some wharf or warehouse usual for such goods (and approved by the Customs if the goods are dutiable).

Provision is also made¹³) for the case of "overside goods" where:

1. The goods have been landed for assortment and the goods-owner has entered them and wishes to take delivery for another wharf or warehouse, or
2. The goods-owner has entered the goods for a particular wharf or warehouse and before they are landed has offered to take delivery and has been then ready to take them, but has been unable to get delivery then or to get true information as to the time when the ship will be able to deliver¹⁴).

Where goods are landed from a ship into the custody of a wharfinger or warehouseman with a written notice that the shipowner has a lien on the goods for freight or other charges, the goods in the hands of the holder remain subject to the lien.

The lien may be discharged:

1. By production to the warehouseman of a receipt for the charges, and by further giving to him a copy thereof or a release by the shipowner, or
2. By the goods-owner depositing with the warehouseman the sum claimed.

Within 15 days of making such a deposit, the depositor may give notice in writing to the warehouseman to retain the whole thereof or any part which is not by

¹) *Fowler v. Knoop* (1878) 4 Q. B. D. 299.

²) See below.

³) Cf. *Bourne v. Gatliff* (1844) 11 Cl. & F. 45.

⁴) *Mors-le-Blanch v. Wilson* (1873) L. R. 8 C. P. 227.

⁵) *Leach v. R. M. S. P. Co.* (1911) 16 Com. Cas. 143.

⁶) *The Stettin* (1889) 14 P. D. 144.

⁷) *Glyn v. E. & W. India Docks* (1882) 7 App. Cas. 591.

⁸) *Barber v. Meyerstein* (1870) L. R. 4 H. L. 317.

⁹) *Mors-le-Blanch v. Wilson*, *supra*.

¹⁰) *Meyerstein v. Barber* (1866) L. R. 2 C. P. p. 54.

¹¹) Ss. 492—501.

¹²) *The Energie* (1875) L. R. 6 P. C. 306.

¹³) M. S. A. 1894, s. 493 (4) (5).

¹⁴) *The Clan Macdonald* (1883) 8 P. D. 178; *Marzetti v. Smith* (1884) 49 L. T. 580.

the notice admitted to be due to the shipowner; the warehouseman will give notice of the deposit to the shipowner and will pay over to him any sums admitted to be due, and will retain the balance (or the whole deposit, as the case may be) for 30 days from the notice to retain it. If the shipowner fails to take proceedings to declare his right to a lien on the cargo and on the sum deposited within the 30 days, and to give the warehouseman notice thereof, the warehouseman will repay any sum still held by him to the depositor; if the shipowner does institute proceedings the warehouseman will retain the sum held to abide the event of the proceedings. If the goods-owner is successful in the proceedings the shipowner may be ordered to pay him interest on the sum held as deposit¹).

If the lien is not discharged by payment or deposit the goods or any part thereof may be sold after 90 days from landing (or earlier, if perishable) by public auction after advertisement: after the proceeds have been applied as directed by the Act²) any surplus is to be paid over to the depositor³).

X. Lay days, Demurrage, and Damages for Detention.

Lay days, or the period of time allowed to a charterer for loading or discharge, may be specified in the contract, in which event, if the charterer without some excuse valid under the contract (such as the occurrence of an excepted peril applicable to such failure) fails to complete the loading or discharge within the specified period, he will become liable to pay damages for delay; or lay days may not be specified in the contract, in which event he will become liable to pay damages for delay beyond a reasonable period for loading or discharge.

If the contract specifies a certain number of lay days it may further provide either:

1. That for each day's delay thereafter the charterer shall pay a liquidated (i. e. ascertained) amount by way of compensation for delay, or
2. That such liquidated amount shall be paid as compensation for each day's delay up to a fixed number of days: in each of these cases the amount to be paid is "demurrage" in the strict sense of the term.

If the contract is wholly silent as to days on demurrage, or if it specifies a limited number of days on demurrage, in the former case all delay and in the latter case all delay after the days allowed on demurrage must be compensated by damages for detention: where a liquidated sum is stipulated for demurrage, *prima facie* that will be the measure of damages for each day's detention thereafter. Difficulties frequently arise from the commercial habit of using the term demurrage to include both that which is strictly demurrage and that which is damages for detention.

Lay days begin when the vessel is ready to load or discharge in accordance with her obligations under the contract; they run continuously from their commencement unless the contract or a custom of the port provides otherwise⁴). Demurrage or damages for detention begin to accrue when the lay days or the reasonable time allowed for loading or discharge terminate, and run continuously until the vessel is loaded or discharged, provided that the vessel is continuously ready to fulfil her obligations and no default is attributable to the shipowners⁵), unless the contract provides otherwise, e. g. by excepting Sundays and holidays.

Averaging loading and discharging periods. *Prima facie* time for loading and time for discharge are distinct and separate periods⁶), but provision is sometimes made for the averaging of the time for loading and discharge, i. e. for treating them as one period, so that delay in one operation may be set off against time saved in the other⁷); but where dispatch-money is receivable by the charterer in respect of time saved⁸), he cannot after claiming dispatch-money for time saved in loading also claim to average the lay days so as to escape demurrage at the port of discharge⁹).

¹) *Red R. S. S. Co. v. Allatini* (1909) 14 Com. Cas. 82.

²) *M. S. A. 1894*, s. 498.

³) *M. S. A. 1894*, ss. 494—498.

⁴) *Nielsen v. Wait* (1885) 16 Q. B. D. 67.

⁵) *Tyne & Blyth S. Co. v. Leech* [1900] 2 Q. B. 12.

⁶) *Avon S. S. Co. v. Leask*, (1890) 18 Sess. Cas. 280.

⁷) *Molière S. S. Co. v. Naylor* (1897) 2 Com. Cas. 92.

⁸) *In re R. M. S. P. Co.* [1910] 1 K. B. 600.

⁹) *Oakville S. S. Co. v. Holmes* (1899) 5 Com. Cas. 48.

Meaning of "day"; various kinds of "days". A day is *prima facie* the period of 24 hours from midnight to midnight¹⁾; a charterer is not bound to begin to load or discharge unless he has the whole 24 hours, so he need not use part of a broken day, but if he does use it, an agreement may be implied to treat the day as a whole day²⁾. In discharging, where the last day is only partly used, it is *prima facie* to be reckoned a whole day³⁾, unless demurrage is at a fixed rate per diem and *pro rata* for any part of a day⁴⁾, or in the case of weather-working days when only a fraction of the day is working-time⁵⁾. Where a specific amount of cargo is to be loaded or discharged per diem, if the last day is not fully required for the completion of the operation the charterer is entitled to a whole day; but if the operation is to be performed at an "average rate of x tons per diem" any period beyond the time actually required will count against the charterer⁶⁾.

Days are *prima facie* consecutive periods of 24 hours⁷⁾; by agreement days may run from any hour of one day to the corresponding hour on the next day⁸⁾; and periods may be excluded from computation, as by the words "Sundays and holidays excepted"⁹⁾, working-day¹⁰⁾, weather-working day¹¹⁾, surf-day¹²⁾, colliery-working day¹³⁾, or by custom¹⁴⁾.

A working day is a day on which work is customarily done in the particular port; it excludes Sundays and holidays; if the crew of the ship observe a holiday which is not a holiday ashore the day cannot count against the charterer. A working day of 24 hours¹⁵⁾ entitles the charterer to 24 working hours which may be on successive working days. A weather working day is a working day on which the state of the weather does not prevent work¹⁶⁾.

Meaning of "month". In commercial documents a "month" means a calendar month¹⁷⁾; a calendar month means the period from a given day in one month to the end of the day preceding the corresponding day in the next month¹⁸⁾ unless (as is usually the case in time charters) account is to be taken of fractions of a day: where there is no corresponding day (e.g. a month from 30 January) the last day of the ensuing month is the end of the contractual month¹⁹⁾.

Reasonable dispatch. Where no lay days are fixed by the charterparty, it is implied that each party will perform any duty which falls upon him with reasonable dispatch²⁰⁾. There is no practical difference²¹⁾ between this implied obligation and an express obligation to load or discharge forthwith²²⁾, immediately²³⁾, with customary dispatch²⁴⁾, or as fast as the vessel can deliver²⁵⁾; all such phrases mean that the actual conditions, facilities and customs²⁶⁾ of the port at the time when the vessel is there must be considered, and the time which is reasonable for the operation must be ascertained from those data. If the shipowner or the charterer by his own acts²⁷⁾

1) *Migotti v. Colville* (1879) 4 C. P. D. 233.

2) *The Katy* [1895] P. 56.

3) *Horsley v. Roehling* [1908] S. C. 866.

4) *Yeoman v. The King* [1904] 2 K. B. 429.

5) *Branchelow S. S. Co. v. Lamport* [1897] 1 Q. B. 570.

6) *Yeoman v. The King*, *supra*.

7) *Nielsen v. Wait* (1885) 16 Q. B. D. 67.

8) *Leonis S. S. Co. v. Rank* (1907) 13 Com. Cas. 161.

9) *Nelson v. Nelson* [1908] A. C. 108.

10) *Nielsen v. Wait*, *supra*.

11) *Branchelow S. S. Co. v. Lamport*, *supra*.

12) *British & Mexican Co. v. Lockett* [1911] 1 K. B. 264.

13) *Saxon S. Co. v. Union S. S. Co.* (1900) 5 Com. Cas. 381.

14) *Cochran v. Retberg* (1800) 3 Esp. 121; *British & Co. v. Lockett* [1911] 1 K. B. p. 282.

15) *Forest S. S. Co. v. Iberian Ore Co.* (1899) 5 Com. Cas. 83.

16) *Branchelow S. S. Co. v. Lamport* [1897] 1 Q. B. 570.

17) *Simpson v. Margitson* (1847) 11 Q. B. 23.

18) *Angier v. Stewart* (1884) 1 C. & E. 357.

19) *Migotti v. Colville* (1879) 4 C. P. D. p. 238.

20) *Hick v. Raymond* [1893] A. C. 22.

21) *Hulthen v. Stewart* [1903] A. C. 389, p. 394.

22) *Hudson v. Hill* (1874) 2 Asp. 278.

23) *Forest S. S. Co. v. Richard & Co.* (1899) 5 Com. Cas. 100.

24) *Postlethwaite v. Freeland* (1880) 5 App. Cas. 599.

25) *Good v. Isaacs* [1899] 2 Q. B. 555.

26) *Lyle S. Co. v. Cardiff* [1900] 2 Q. B. 638.

27) *Watson v. Borner* (1900) 5 Com. Cas. p. 319.

unreasonably¹⁾ creates impediments, he may be held to cause the time occupied to become unreasonable and may so become liable for detention or damages. In all such cases it is not permissible to claim that the customary dispatch, or the rate at which a vessel could load or discharge in other circumstances, enables either party to ascertain a fixed time within which the operation should be completed; such terms relate primarily to the mode in which the work is to be done, the time occupied being dependent also on the actual circumstances of each case.

Discharge by a local authority. Where either by law or by custom the operation of loading or discharging is not to be performed by the joint or several exertions of the parties, but by some body over which the parties or either of them have no control, such as a harbour authority or a dock company, the charterer cannot be held liable for delay due to the act or default of that body, as in such a case the authority or company is not his servant or agent, or at any rate is no more the agent of the charterer than of the shipowner²⁾; the charterer, however, must have made all reasonable efforts to get the work done and must not by his own act have brought about the circumstances causing the delay.

Loading or discharge "in regular turn". Where (as is frequently the case in coal charters) a vessel is to be loaded or discharged "in regular turn" the charterer will be liable for delay if the vessel does not get her regular turn although she was ready to take it; if she loses it by no default of the charterer, but because she is not ready to take it the charterer is not liable, it being no default in him, even though the shipowner also may not be in default. The meaning of "regular turn" depends upon the terms of the contract; it may mean in due order of arrival and readiness to load or discharge³⁾, or in regular turn of the colliery⁴⁾ though that differs from the order of arrival⁵⁾, or in regular turn according to the custom of the port⁶⁾.

Liability for demurrage. In ascertaining who is liable for demurrage or for damages for detention the cases of general and of chartered ships must be distinguished. Where the ship is a general ship, the liability to pay for delay can only arise under the express terms of a bill of lading or from failure to take delivery within a reasonable time where there are no express terms as to delay⁷⁾, and the claim must almost inevitably arise only as to delay at the place of discharge. The liability here is primarily a liability of the shipper⁸⁾, but it is probable that where the property in the goods has passed to a consignee named in the bill of lading or to an indorsee thereof, any claim for delay must be made against such consignee or indorsee⁹⁾. Where, also, a bill of lading is presented to the master and delivery of the goods concerned is demanded, the court may find as a fact that the person demanding delivery has offered to be bound by the terms of the bill of lading, so that if the goods are delivered to him he becomes bound to pay for any delay for which the ship has a claim under the bill of lading, whether by its express terms or under the implied agreement to take delivery within a reasonable time¹⁰⁾.

Where there is a charterparty the liability to pay for delay is imposed:

1. On the charterer, under any express stipulation for the payment of demurrage or under the implied duty to perform his obligations within a reasonable time, unless he is released from liability either by a cesser of liability clause¹¹⁾ or by an explicit variation of the charterparty by the bill of lading¹²⁾, in which case he may be liable as consignee although exonerated as charterer¹²⁾.
2. On the holder of a bill of lading which in clear terms embodies the charterparty contract as to delay. The extent of this liability depends upon the precise terms of the incorporating clause and has given rise to much liti-

1) *Barque Quilpué v. Brown* [1904] 2 K. B. 264.

2) *The Kingsland* [1911] P. 7.

3) *Lawson v. Burness* (1862) 1 H. & C. 396.

4) *Barque Quilpué v. Brown* [1904] 2 K. B. 264.

5) *King v. Hinde* (1883) 12 Ir. L. R., C. L. 113.

6) *The Cordelia* [1909] P. 27.

7) *Fowler v. Knoop* (1878) 4 Q. B. D. 299.

8) *Cawthron v. Trickett* (1864) 15 C. B. N. S. 754.

9) Bills of Lading Act, 1855, s. 1.

10) *Cf. S. S. County of Lancaster v. Sharp* (1889) 24 Q. B. D. 158.

11) See p. 420.

12) *Gullischen v. Stewart* (1884) 13 Q. B. D. 317; see p. 387.

gation. The incorporating clause is usually in some such form as "freight and all other conditions as per charterparty". Such a clause admittedly only introduces into a bill of lading such terms of a charterparty as are consistent with the nature and object of a bill of lading, and among such terms it will import into the bill of lading a clause as to delay at the port of discharge; it is not, if framed as above, sufficient to import a liability to pay demurrage incurred at the port of loading, and still less would such a clause suffice to make the holder liable for damages for detention at the port of loading¹); but by apt words any charterparty liability may be incorporated in the bill of lading²).

3. On a person who, though he may have no property in the goods, takes delivery under a bill of lading which incorporates charterparty terms as to delay, without protesting against any liability for delay³).

Where each of several bills of lading dealing with different parcels of goods creates a separate liability for demurrage of the ship, it seems that a claim for the full amount of demurrage is enforceable against each holder of a bill of lading who has not taken delivery before demurrage accrues⁴), unless the failure is due to some default of the ship⁵) or, perhaps, if the liability for demurrage is created not by the bill of lading itself but by reference to a charterparty which creates a liability for a specified sum for demurrage *per diem*⁶).

XI. Freight.

Meaning of Freight; when it becomes payable. The normal meaning of "freight" is the reward due to a shipowner for the performance of his obligations under his contract: performance here means readiness to deliver⁷) at the agreed place (or at a substituted place of delivery where the ship has become entitled to deliver at such a place⁸)) the goods carried, in merchantable condition, i. e. *in specie*⁹) even though damaged¹⁰). Where, moreover, the goods-owner has prevented the performance by the shipowner of his obligation, as by taking delivery at a place short of the proposed destination¹¹), or refusing to take delivery at the destination¹²), or by refusing to order the vessel to a safe port¹³), full freight is earned.

Prima facie the delivery of the goods and the payment of the freight are concurrent acts, the charterer being required to be ready to pay for each parcel contemporaneously with the delivery thereof by the ship¹⁴); but the precise place, time and method of payment are often regulated by express stipulations.

Apart from express agreement¹⁵), freight is payable in full for goods on delivery, but no freight is payable on goods which do not reach the destination owing to loss, abandonment, sacrifice, or discharge before the ship reaches her destination. If the goods reach their destination and the ship is ready to deliver them in merchantable condition the shipowner is entitled to full freight, though he may have necessarily transhipped them for transit in another bottom and may have made a profit by so doing¹⁶); it is payable in full on goods delivered *in specie* though damaged¹⁷); and it is payable in cash (i. e. presumably in good local tender at the place of payment) unless it is otherwise provided by agreement or custom.

¹) *Smith v. Sieveking* (1855) 4 E. & B. 945.

²) *Gray v. Carr* (1871) L. R. 6 Q. B. 522; and cf. *Serraino v. Campbell* [1891] 1 Q. B.

283.

³) *S. S. County of Lancaster v. Sharp* (1889) 24 Q. B. D. 158.

⁴) *Porteus v. Watney* (1878) 3 Q. B. D. 223, 534.

⁵) *Ibid.* p. 226.

⁶) See *Scrutton on Charterparties*, 6th ed., p. 293.

⁷) *Cargo ex Argos* (1873) L. R. 5 P. C. 134.

⁸) *Erasmus Treglia v. Smiths* (1896) 1 Com. Cas. 360.

⁹) *Asfar v. Blundell* [1896] 1 Q. B. 123.

¹⁰) *Dakin v. Oxley* (1864) 33 L. J., C. P. 113.

¹¹) *The Bahia* (1864) Br. & L. 292.

¹²) *Cargo ex Argos*, *supra*.

¹³) *The Teutonia* (1872) L. R. 4 P. C. 171.

¹⁴) *Vogeman v. Bisley* (1897) 2 Com. Cas. 81.

¹⁵) Cf. *Greeves v. W. I. Co.* (1870) 22 L. T. 615.

¹⁶) *Shipton v. Thornton* (1838) 9 A. & E. 314.

¹⁷) *Dakin v. Oxley*, *supra*.

Freight payable in full; conditional payment by bill. The person liable to pay freight cannot, save under express agreement¹), make any deduction therefrom in respect of any claim for breach of the contract of carriage²); where there is such a provision he can only deduct sums in respect of claims arising from the default of the ship and not of the goods themselves³), and then only in cases where the shipowner is not protected by the exceptions⁴).

Where payment is made by the acceptance of a bill of exchange, the bill is *prima facie* not taken in absolute discharge of the liability, but operates as a conditional discharge unless there is an intention that it shall be an absolute discharge⁵); the taking of the bill suspends any claim for payment otherwise than by the bill until the bill is either met or dishonoured. A master has authority to take a bill in lieu of cash⁶), and by taking for the ship's convenience a bill in lieu of cash from a consignee he will release the shipper from his liability to pay freight⁷).

Freight, when earned. Apart from express agreement freight is only earned by performance of the shipowner's obligations or on prevention of performance by default of the goods-owner; if the vessel is wholly abandoned⁸), or if the voyage is unjustifiably delayed by the shipowner or his servants⁹), or if the goods are sold by the master during the voyage, though the sale be justifiable (unless the owner of the goods having been consulted has consented to the sale¹⁰), or if the goods have after abandonment been brought by salvors to a place of safety short of their destination¹¹), even though the shipowner is ready and able to bring them forward to their destination, freight is not earned.

The goods-owner may agree to accept delivery of the goods at a substituted destination either:

1. As a performance of the whole obligation of the shipowner, in which case full freight is payable, or
2. On the express or implied terms that he shall pay freight *pro rata itineris peracti* and shall release the shipowner from further performance. Freight *pro rata itineris peracti* is never in English law payable unless there is an express or implied promise to pay it; such a promise will not be implied merely from the fact that the goods-owner takes the goods at a place short of their destination¹²); there must be some evidence that the goods-owner voluntarily and deliberately released the shipowner from carrying the goods on¹³). If the goods-owner refuses to accept the goods elsewhere than at their destination and the shipowner does not bring them thither (in which event he earns full freight), no freight at all is due: a shipowner may by an excepted peril be excused from sending the goods on, but he cannot recover anything for mere part-performance unless there is some new contract to pay¹⁴).

Lump sum freight. A lump sum freight, or lump freight, is a freight payable as one sum for the use of a vessel to carry cargo. To earn such a freight it is not necessary that the owner should deliver all the cargo that was shipped¹⁵) (and he may by excepted perils be excused from delivering anything); this will be so whether he is excused for the non-delivery by reason of the excepted perils or whether he is not so excused¹⁶). The test seems to be whether the charterer has had the use of the ship; if he has, then for failure to deliver all or any of the cargo he may have a remedy in damages, but not in withholding all or part of a lump sum freight.

1) *Garston S. S. Co. v. Hickie* (1886) 18 Q. B. D. 17.

2) *Meyer v. Dresser* (1864) 16 C. B. N. S. 646.

3) *The Barcore* [1896] P. 294.

4) *The Norway* (1865) 3 Moo. P. C., N. S. 245.

5) *Currie v. Misa* (1875) L. R. 10 Eq. p. 163.

6) *Anderson v. Hillies* (1852) 12 C. B. 499.

7) *Strong v. Hart* (1827) 6 B. & C. 160.

8) *The Arno* (1895) 8 Asp. 5.

9) Cf. also *Jackson v. Union Marine Co.* (1875) L. R. 10 C. P. 125.

10) *Hill v. Wilson* (1879) 4 C. P. D. 329.

11) *The Arno*, *supra*.

12) *Metcalfe v. Britannia Iron Works* (1877) 2 Q. B. D. 423.

13) *Mitchell v. Darthez* (1836) 2 Bing. N. C. 555.

14) *Appleby v. Myers* (1867) L. R. 2 C. P. 651.

15) *The Norway* (1865) 3 Moo. P. C., N. S. 245.

16) Cf. *Harrowing Steanship Co. v. Thomas* [1912] 3 K. B. 321.

Rate of freight. The sums payable as freight are usually defined by the contract of carriage, but in the absence of express terms a reasonable sum, i. e. probably freight at the rates locally current at the time of shipment, is payable¹).

Where a shipowner carries his own goods in his own ship he is under no real liability for freight, but if a bill of lading for such goods specifies a rate of freight, then any assignee of the bill of lading or any person taking delivery otherwise than on behalf of the shipowner must pay the freight so stipulated²).

Where freight is payable on parcels of goods, it is usually payable in respect of their weight or quantity or measurement; apart from express contract the shipowner has the right to elect whether goods shall be treated as weight or measurement goods. The weight, quantity, or measurement will, unless otherwise stipulated⁴), be calculated on the cargo delivered, but the mode of ascertaining the weight or measurement will be that customary at the port of loading³); if the goods are such as to vary in weight or bulk after shipment, *prima facie* the weight or measurement at the time of shipment is to be taken⁵); but where there is a custom to the contrary at the port of discharge the custom of that port may prevail⁶). Any expense of ascertaining the weight or measurement will fall on the party for whose benefit the work is done.

The amount of a lump sum freight may be fixed in the contract or may be ascertainable in a manner prescribed by the contract, such as a rate per ton or a rate on a guaranteed capacity; in such cases it is the shipowner's interest that as much cargo as possible shall be carried and the extent of the charterer's liability must be ascertained from the contract itself; if the cargo-capacity is guaranteed and the guarantee is not fulfilled by the shipowner he may have to submit to a proportionate reduction of the freight⁷); if the charterer does not fulfil his part he remains liable for the whole sum. Whether a contract at a rate per ton for the whole cargo is for a lump sum freight or for ordinary freight is a question of construction⁸).

Advance freight. Advance freight is the term used to denote a payment on account of freight made before freight in its ordinary sense is earned. Advance freight is frequently stipulated to be payable on shipment, or on signing bills of lading⁹), or on sailing, or at a date after sailing¹⁰). Whether such a payment is advance freight or a loan, e. g. to defray disbursements, depends on the intention of the parties¹¹); if it is freight it is at the risk of the shipper, and if he is to insure it is cogent evidence that it is freight; if it is a loan it is repayable, but if it is freight it is by English law irrecoverable, so that if the goods are lost the shipper loses the advance freight unless the shipowner has committed a breach of a condition precedent or the loss is not due to an excepted peril.

Where advance freight has become payable, the shipper is bound to pay it although the goods have been lost, by excepted perils, before he pays but he is not so bound if the shipowner is responsible for the loss¹²), or if the cargo or part thereof is destroyed by an excepted peril before advance freight is due¹³).

Where advance freight has been paid it is to be treated as an advance on account of the whole freight to accrue due on delivery, not as an advance rateably on each parcel of goods or each ton of cargo; if the freight accruing on delivery does not exceed the freight advanced, no further payment can be required, but in no case can the shipper recover any part of the freight advanced, even if it exceeds the freight earned¹⁴).

Time freight. Where freight takes the form of periodical payments for the hire and use of a vessel, it is earned *prima facie* at the end of each period stipulated, but

¹) Cf. *Ursula Bright S. S. Co. v. Ripley* (1903) 8 Com. Cas. 171.

²) *Keith v. Burrows* (1877) 2 App. Cas. 636.

³) Cf. *Coulthurst v. Sweet* (1866) L. R. 1 C. P. 649.

⁴) Cf. *Pust v. Dowie* (1865) 5 B. & S. 20.

⁵) *Dakin v. Oxley* (1864) 15 C. B., N. S. p. 665.

⁶) *Nielsen v. Neame* (1884) 1 C. & E. 288.

⁷) *Rotherfield S. S. Co. v. Tweedy* (1896) 2 Com. Cas. 84.

⁸) *London Transport Co. v. Trechmann* [1904] 1 K. B. 635.

⁹) *Oriental S. S. Co. v. Tylor* [1893] 2 Q. B. 518.

¹⁰) *Weir v. Girvin* [1900] 1 Q. B. 45.

¹¹) *Allison v. Bristol & Co.* (1876) 1 App. Cas. 209.

¹²) *Thompson v. Gillespy* (1855) 5 E. & B. 209.

¹³) *Weir v. Girvin*, *supra*.

¹⁴) *Allison v. Bristol & Co. Comp. supra*.

it may be made payable at any time agreed by the parties¹⁾. Unless otherwise provided the hire runs continuously²⁾, including time lost in repairing, or by blockade or bad weather or similar causes; the charterer may, however, be entitled to damages for loss of time due to a default of the shipowner, or may be exonerated by the contract. In most time charters provision is made that hire shall cease, in the event of loss of time³⁾ by breakdown or damage preventing working for more than a specified period, until the vessel is again in an efficient state to resume her service⁴⁾, and (not an infrequent provision) is at some definite place specified in the charterparty. Under such a clause hire probably ceases when the period of breakdown begins, and again becomes payable when the ship is efficient for the immediate purpose of the adventure, e. g. to discharge, though her engines may be broken down⁵⁾; if, however, she has had to deviate to repair, hire begins again when she proceeds after repair from the place of repairing⁶⁾ subject to any express agreement.

Hire under time charters is frequently made payable in advance; it is then payable at the beginning of each specified period, including the whole of the last period, although the adventure may clearly be such as will terminate before the end of that period⁷⁾, the shipowner having to account for any surplus.

If the shipowner has a right to withdraw the vessel in default of payment, he is not bound to demand payment before withdrawing her; but where he withdraws her he can only claim hire up to the actual date of withdrawal⁸⁾, and the right of withdrawal may be waived expressly or by implication⁹⁾.

Freight, to whom payable. The person entitled to receive freight is *prima facie* the person with whom the contract of carriage was made, and therefore is usually the shipowner (or a charterer by demise as *dominus pro tempore*): payment of freight, when due, to his agent, as to a loading-broker at the port of loading when freight is payable there, or to the master when it is payable on delivery, is equivalent to payment to the shipowner, unless the debtor has had notice from the shipowner not so to pay or there is a custom to pay otherwise.

When the whole property in a ship or the property in any share therein is assigned, the assignee becomes entitled to the freight accruing due after the assignment in proportion to the interest which he has acquired¹⁰⁾, and can give a good discharge for such freight: but where the assignment is to a mortgagee, he only becomes entitled to receive freight accruing due if he has taken possession¹¹⁾; he then acquires a right to all freight subsequently falling due, even though it may have been assigned to some other person by the mortgagor after the mortgage, but not to freight already due but unpaid¹²⁾ or to freight already due and paid in respect of the current adventure¹³⁾.

A mortgagee, however, is preferred to an assignee claiming under an earlier equitable assignment of which the mortgagee had no notice¹⁴⁾, and he can enforce in his own favour any lien for freight already due in respect of cargo on board when he takes possession¹⁵⁾; and a legal mortgagee taking possession before freight is earned is preferred to subsequent assignees of freight in respect of advances made before he has notice of subsequent assignments¹⁶⁾.

Assignment of freight. Where the freight alone has been assigned, the assignee can enforce his claim either:

1) *Havelock v. Geddes* (1809) 10 East, 555.

2) *Ibid.*; cf. *Inman v. Bischoff* (1882) 7 App. Cas. 670; *Brown v. Turner* [1912] A. C. 12.

3) Cf. *In re Traae* [1904] 2 K. B. 377.

4) *Hogarth v. Miller* [1891] A. C. 48.

5) *Hogarth v. Miller*, *supra*.

6) *Vogemann v. Zanzibar S. S. Co.* (1902) 7 Com. Cas. 254.

7) *Tonnelier v. Smith* (1897) 2 Com. Cas. 258.

8) *Wehner v. Dene* [1905] 2 K. B. 92.

9) *Nova Scotia Steel Co. v. Sutherland* (1899) 5 Com. Cas. 106.

10) *Lindsay v. Gibbs* (1856) 22 Beav. 522.

11) *Keith v. Burrows* (1877) 2 App. Cas. 636.

12) *Shillito v. Biggart* [1903] 1 K. B. 633.

13) *Willis v. Palmer* (1859) 7 C. B. N. S. 340.

14) *Wilson v. Wilson* (1872) L. R. 14 Eq. p. 43.

15) *Keith v. Burrows* (1876) 2 C. P. D. p. 165.

16) *Liverpool &c. Co. v. Wilson* (1872) L. R. 7 Ch. 507.

1. In his own name if the assignment is in writing and absolute¹⁾ and he has given notice of the assignment to the debtor in writing²⁾, or
2. In the case of any assignment if he has given consideration for the assignment and notice (which need not be in writing) to the debtor³⁾.

Of several assignees *prima facie* the earliest in date is preferred, but a puisne or later assignee may acquire priority by giving the earliest notice of his assignment to the debtor⁴⁾. The debtor may assert in diminution of the assignee's claim any claim arising out of the same transaction which he could have set up against the assignor⁵⁾.

Who may sue for freight. Not only the shipowner, but also alternatively the master, where he has made himself personally liable on the contract of carriage (as by signing a bill of lading without excluding personal liability), may sue for freight, and conversely in such cases either the shipowner or the master may be sued for breach of the same contract. The master also may sue for freight where it is found that the receiver of goods has impliedly promised to pay freight in consideration of the master consenting to deliver the goods to him. Where the master has only acted as agent he cannot sue⁶⁾.

Liability for chartered freight. The liability to pay chartered freight is primarily a liability of the charterer, even where there is or will be sufficient bill of lading freight to satisfy the shipowner's claim for chartered freight; the shipowner, even where he has delivered the goods without receiving freight under the bills of lading, can still look to the charterer for payment and is not bound to resort in the first instance to the holders of the bills of lading. The charterer, however, may be released from his liability by a cesser clause which gives the shipowner an effective lien for his chartered freight.

Liability for bill of lading freight. The liability to pay bill of lading freight is primarily a liability of the shipper, unless he expressly acted as agent only. This liability is implied from the act of shipment⁷⁾ and the shipper is not by indorsing away the bill of lading released by a term requiring the consignee to pay, such as the common form "he or they paying freight", if the goods are in fact delivered to the consignee without being made subject to the exercise of a lien for freight; such words only emphasize the shipowner's lien for freight. The shipper may be released by the express terms of a bill of lading, or by the fact of the master taking payment from the consignee otherwise than in cash for his own convenience⁸⁾, or otherwise giving credit to the consignee to the prejudice of the shipper.

Liability of a consignee to pay freight. The Bills of Lading Act, 1855⁹⁾, provides that a consignee named in a bill of lading to whom upon or by reason of the consignment the property has passed shall be liable to pay freight according to the terms of the bill of lading; even before the statute he was liable for freight if he was the owner of the goods, as being the person for whom they were shipped. A consignee may also become liable for freight if he has presented a bill of lading under which freight is payable and has taken delivery of the goods thereunder; it is then a question of fact whether he has not impliedly promised to pay¹⁰⁾. A consignee may also be liable for freight if a promise to pay freight can be inferred from a previous course of dealing with the shipowner¹¹⁾.

Liability of an indorsee for freight. An indorsee to whom the property in goods has passed upon or by reason of the indorsement to him of a bill of lading is liable, unless he has further transferred the property by indorsing away the bill of lading for value¹²⁾, as is also an indorsee who, though he may not upon or by reason of the indorsement have acquired the property in the goods, takes delivery under the bill

1) *Durham v. Robertson* [1898] 1 Q. B. 765.

2) Judicature Act, 1873, s. 25 (6).

3) *Brandt v. Dunlop* [1905] A. C. 454.

4) *Marchant v. Morton* [1901] 2 K. B. 829.

5) *Government of Newfoundland v. Newfoundland Rly. Co.* (1886) 13 App. Cas. 199.

6) *Repetto v. Millar's Ltd.* [1901] 2 K. B. 306.

7) *Domett v. Beckford* (1833) 5 B. & Ad. 521.

8) *Strong v. Hart* (1827) 6 B. & C. 160.

9) 18 & 19 Vict. c. 111, s. 1.

10) *White v. Furness* [1895] A. C. p. 43.

11) *Coleman v. Lambert* (1839) 5 M. & W. 502.

12) *Smurthwaite v. Wilkins* (1862) 11 C. B. N. S. 842.

of lading, for freight according to the terms of the bill of lading¹), as if the bill of lading contract had been made with such indorsee²).

Collection of bill of lading freight. Where a shipowner retains possession and control of a ship which has been chartered, or sub-chartered, and bills of lading in respect of goods shipped have been signed by the master (or by charterers as agents for the master³) and handed to a shipper who knows⁴) or does not know⁵) of the existence of a charterparty, a contract is made with the ship, unless the shipper also knows that the bill of lading is given on behalf of the charterer only⁶); the shipowner or master or the ship's agent, as the case may be, is then entitled to collect the bill of lading freight⁷), the shipowner ultimately having to account for any surplus after retaining any chartered freight payable to him, unless the contract provides otherwise.

XII. General Average.

In the course of the voyage the three interests at risk are the ship, the cargo, and the freight (if any remains still to be earned). If, by reason of any peril common to the whole adventure, either:

1. A sacrifice whether total or partial, or

2. Extraordinary expenditure on behalf of all interests,

is of necessity and voluntarily incurred to avert or minimise a danger threatening all the interests at risk, and the sacrifice or expenditure does benefit all such interests, there is said to be a general average loss or a general average expenditure; this loss or expenditure all the interests benefited must share by paying general average contributions rateably to cover the general average loss and its direct consequences⁸) or general average expenditure. There is no right to a general average contribution where the danger was not common to more interests than one, or where the sacrifice arises from some default for which the owner of the interest sacrificed is legally responsible⁹), or where that which was sacrificed was already valueless.

Lien for general average loss. Where a general average loss has occurred, the shipowner or master has a lien on the cargo for its contributions and is bound to exercise this lien for the benefit of any person entitled to a contribution from cargo¹⁰). This lien may be discharged by payment or by tender of the amount due; in practice a general average bond is given by cargo-owners to pay a reasonable amount when ascertained by average adjusters¹¹). It is the duty of the shipowner or master to take steps to have the amount of contributions settled, and to collect the amounts due upon the average adjustment, and to furnish all information necessary to enable contributories to protect their interests by either paying the amount demanded or tendering a proper amount. The liability to contribute is imposed:

1. On the shipowner in respect of the ship.

2. On the owner of the chartered freight in respect of that freight.

3. On the charterer in respect of the bill of lading freight (and also, if the charter amounts to a demise, in respect of the ship).

4. On a goods-owner in respect of cargo, and on a consignee if he holds a bill of lading requiring him to pay general average, or if he takes delivery after notice that a lien for general average is claimed.

General average losses. General average losses may occur:

1. By sacrifice of cargo.

2. By sacrifice of ship or machinery or tackle.

3. By sacrifice of freight at risk.

4. By extraordinary expenditure of money or extraordinary loss of time or employment of labour; or

¹) *Leduc v. Ward* (1888) 20 Q. B. D. p. 484.

²) *Sewell v. Burdick* (1884) 10 App. Cas. 74.

³) *Tillmanns v. S. S. Knutsford Co.* [1908] 1 K. B. p. 191.

⁴) *Manchester Trust v. Furness* [1895] 2 Q. B. 539.

⁵) *Sandeman v. Scurr* (1866) L. R. 2 Q. B. 86.

⁶) *Samuels v. West Hartlepool S. N. Co.* (1906) 11 Com. Cas. 115.

⁷) *Wehner v. Dene* [1905] 2 K. B. 92.

⁸) *Anglo-Argentine Co. v. Temperley* [1899] 2 Q. B. 403.

⁹) Cf. *Lindsay v. Klein* [1911] A. C. 194.

¹⁰) *Strang v. Scott* (1889) 14 App. Cas. 601.

¹¹) *Huth v. Lamport* (1886) 16 Q. B. D. 735.

5. By the incurring of expense in resorting to a port of refuge to repair a general average sacrifice.

A sacrifice of cargo may occur by jettison, or in consequence of fire, or by sale or other voluntary diminution in value for the common benefit.

Where goods stowed in usual cargo-spaces are properly thrown overboard for the benefit of all interests and are so lost or damaged, all the other interests must contribute; no such claim arises for deck cargo jettisoned, unless the cargo is so carried either by custom or with the consent of all other cargo owners. Where, however, goods are stowed on deck without the assent of their owner and without a custom justifying such stowage, the shipowner may be liable to indemnify the goods owner¹). Deck cargo nevertheless contributes to general average like other cargo.

Where cargo is damaged by the measures taken to extinguish a fire on board, as by the scuttling of a ship or by pumping water into the hold, a right to general average contribution arises²); where cargo is used as fuel for the ship's engines either a right to a general average contribution arises, i. e. where the vessel had originally been adequately supplied with fuel for the adventure³), or else a right of indemnity against the shipowner where the ship was not so supplied⁴), unless the shipowner is exonerated by suitable exceptions in the contract of carriage.

Where part of a cargo is sold to provide funds for the completion of the adventure, a right to a general average contribution will arise if there were no other means of sending forward the rest of the cargo and it was also a benefit to the other cargo-owners that their goods should go on; unless this is so, the only claim is against the shipowner.

A general average sacrifice causing loss or damage to ship, machinery or tackle and giving a right to a general average contribution occurs where the loss or damage is due to the sacrifice or is its direct consequence, as where engines are voluntarily worked, and damaged in working, to get off a stranded ship, or where an anchor is slipped to avoid danger, or a sound mast is cut away, or the vessel is voluntarily stranded; but there must be a sacrifice of something which is still of value⁵) and the loss must not arise from any original default of the shipowner⁶).

A general average sacrifice of freight (i. e., for purposes of general average, the bill of lading freight⁷)) may arise from jettison of cargo, or from sale at an intermediate port, or from a sacrifice of the ship so that the goods either are not carried forward to their destination or are transhipped thither at a greater expense to the shipowner: in such cases there may be a general average loss of the net freight, i. e. after deduction of the expenses of earning the gross freight. Freight paid in advance is part of the value of the goods carried; freight earned on goods saved and delivered contributes to general average separately from the goods on which it is paid.

Freight in respect of future engagements of the vessel may be a general average loss if by reason of the sacrifice it cannot be earned, or it may have to contribute if by reason of the sacrifice the shipowner is enabled to earn freight under the future engagement, provided that the future engagement is not such as would be made in the ordinary course of employment of a trading vessel of the kind.

An extraordinary expenditure of money may be a sacrifice equivalent to a sacrifice of property at risk⁸), if voluntarily incurred in the presence of a common danger and for the common safety of interests at risk. Such expenditure, however, must be distinguished from expenses which the shipowner is under an obligation to incur for the purposes of the adventure⁹).

Port of refuge expenses. A vessel may necessarily go to a port of refuge to repair damage or to avoid danger: if the necessity arises from initial unseaworthiness the expenses will, in the absence of any stipulation to the contrary, fall on the

¹) *Strang v. Scott* (1889) 14 App. Cas. 601.

²) *Whitecross Wire Co. v. Savill* (1882) 8 Q. B. D. 653.

³) *Walford v. Galindez* (1897) 2 Com. Cas. 37.

⁴) *Robinson v. Price* (1876) 2 Q. B. D. 91, 295.

⁵) *Shepherd v. Kottgen* (1877) 2 C. P. D. 585.

⁶) *Robinson v. Price* (1876) 2 Q. B. D. 91, 295.

⁷) *The Leitrim* [1902] P. 256.

⁸) *Ocean S. S. Co. v. Anderson* (1883) 13 Q. B. D. 651; 10 App. Cas. 107.

⁹) *Wilson v. Bank of Victoria* (1867) L. R. 2 Q. B. 203.

shipowner. If the necessity arises from a cause which was not in itself a general average sacrifice, such as tempest or the avoidance of capture, but which has rendered it necessary to seek a port of refuge for the common safety of all interests, the deviation becomes a general average sacrifice and the ship may claim a contribution to the expenses of going in, of discharging cargo, and of transshipping cargo, if such acts are necessary for the common safety¹⁾, but cannot claim any contribution towards the wages and provisions of the crew²⁾, or reloading the cargo or repairing the ship.

If, however, the necessity to deviate has arisen from a general average sacrifice (such as the sacrifice of a mast or voluntary damage to engines) the expenses, of repairs, of discharging, warehousing and reloading cargo, and of entering and leaving port, are a general average loss of the shipowner or cargo-owner, as the case may be³⁾.

Adjustment of contributions in general average. The contribution from each contributory interest will be adjusted according to the law of the place of delivery, unless by agreement some other law of adjustment is or has been substituted; the value of each interest is calculated as at the place of delivery, any property which has been sacrificed being for this purpose treated as having encountered the same incidents as the residue of the interest of which it originally formed a part⁴⁾.

Contributory values. The value of cargo is taken at its market value at the place of delivery; the value of contributory freight is the freight received less the cost of discharge and collection; the value of freight sacrificed is:

1. Where the ship has been sacrificed, the gross freight less the charges which would have been incurred in order to earn it, or
2. Where cargo has been sacrificed, the unpaid freight less the cost of discharge.

XIII. Liens.

A lien at common law⁵⁾ is a legal right to retain possession, which has originally been lawfully acquired, of a chattel which is the property of another, until a just claim by the person on whose behalf the lien is exercised, whether by himself or by a bailee, against the person in whom the property in the chattel is, is satisfied. A common law lien is either particular or general, and is always dependent on possession, so that it is known as possessory. A particular possessory lien exists where the legal right is to retain goods until a claim arising in respect of the particular goods retained is satisfied; such a lien is given by law to carriers and to persons who bestow their skill or labour on the goods of another at his express or implied request, as to a shipwright who has repaired a ship. A general possessory lien exists where the right is to retain possession of any goods belonging to the same owner until some claim by the holder of the goods against the owner is satisfied, whether the claim has arisen in respect of the particular goods held or any of them or not; such a lien, in mercantile matters, can only exist where it is given by express or implied agreement; it is frequently implied from the usages of particular trades, e. g. in favour of a wharfinger or warehouseman, over goods brought to his wharf or warehouse, for a general balance of account. By express agreement a particular or a general lien may be given in any case. Neither a particular nor a general lien carries (apart from express agreement) any right to sell or use the goods, or to do anything but retain them, but this rule is relaxed by statute in the case of goods landed under a lien for freight⁶⁾. Any possessory lien may be extinguished by waiver, as by taking a bill of exchange in payment of freight⁷⁾, or by conduct inconsistent with the assertion⁸⁾ or retention⁹⁾ of a lien, or by voluntarily parting with the possession, for, unless the goods are obtained from the holder

¹⁾ *Svensden v. Wallace* (1884) 13 Q. B. D. 69; 10 App. Cas. 414.

²⁾ *Powle v. Whitmore* (1815) 4 M. & S. 141; cf. York-Antwerp Rules, 1890, rr. X, XI.

³⁾ Cf. York-Antwerp Rules 1890, rr. X, XI.

⁴⁾ *Fletcher v. Alexander* (1868) L. R. 3 C. P. 375.

⁵⁾ Maritime liens are discussed elsewhere; see p. 436, and equitable liens have little place in contracts of affreightment.

⁶⁾ M. S. A. 1894, s. 497.

⁷⁾ *Tamvaco v. Simpson* (1866) L. R. 1 C. P. 363.

⁸⁾ *Morley v. Hay* (1828) 7 L. J. (O. S) K. B. 104.

⁹⁾ *Kerford v. Mondel* (1859) 28 L. J., Ex. 303.

by fraud or without his consent, any relinquishment of his possession, for however brief a period, destroys the lien altogether¹⁾, so that it will not re-attach if he re-gains possession; if, however, he is illegally deprived of possession, it may re-attach²⁾. He may retain possession either by retaining the goods himself or by entrusting them to a bailee on his own behalf, and thus a shipowner may discharge and warehouse goods subject to his lien; he may retain them on board so that if the ship is delayed by the failure of the goods-owner to take delivery, the goods-owner may become liable for damages for the delay, but if he does so, he must be acting reasonably with regard to the probable expenses of the alternative measures open to him³⁾. A lien which has attached remains effective against a trustee in bankruptcy on the insolvency of the owner of the goods, and cannot be prejudiced by the acts of the goods-owner after it has attached. A shipowner has a particular lien on goods:

1. For freight.
2. For general average contributions.
3. For expenses properly incurred for the preservation of the goods; and he may have other and more extensive liens by agreement.

Lien for freight. The shipowner's common law lien for freight is a lien solely for freight in the strictest sense of the word, i. e. for the price of the carriage and arrival of goods deliverable *in specie* and ready to be delivered, the freight being payable against delivery of the goods: there is no common law lien for freight of any other kind, whether it be payable before delivery (advance freight⁴⁾, or after delivery⁵⁾, or at any time other than the time of delivery of the goods, as the lien only exists where the right to receive the freight and the right to receive the goods are contemporaneous. As against a charterer or the agent of a charterer the lien is for freight at the charterparty rate⁶⁾; as against an indorsee for value of the bill of lading it is a lien for freight at the bill of lading rate⁷⁾, unless the bill of lading clearly imposes a liability to pay the charterparty freight, or freight at the charterparty rate⁸⁾. The lien is a particular lien only, and extends solely to goods carried on the same voyage and deliverable to the same recipient. A particular lien for any other claim which may be called freight, or for any other claim, or any general lien, can only be exercised under some contractual right given in express terms or implied from the course of business between the same parties⁹⁾.

Lien for general average contribution. The shipowner's lien for general average contributions is a particular lien on all goods on board at the time of the sacrifice, to secure payment by each goods-owner of his proportion of general average; the goods-owner can procure the release of his goods from the lien by paying the sum demanded as his contribution, or by giving such security as the shipowner may demand, or by tendering a reasonable sum¹⁰⁾. Each cargo-owner has a right to require the shipowner or master to exercise this lien for his protection (as the lien does not follow the goods when the ship parts with possession), and has a right of action if he neglects to exercise it, unless the ship is expressly exempted from the obligation to protect the goods-owners.

Lien on goods for expenses of preservation. In the case of expenses incurred for the preservation of goods, the shipowner or master has a duty to take such steps as are reasonably necessary for the safety and safe carriage of the goods during the voyage, but he has a further duty to take reasonable measures to avoid loss, destruction or deterioration by reason of accidents for the necessary effects of which he is under no original liability owing to the exceptions in the contract of carriage¹¹⁾; the course which it is his duty to adopt must depend on circumstances

¹⁾ *Dicas v. Stockley* (1836) 7 Car. & P. 587.

²⁾ Cf. *In re Taylor* [1891] 1 Ch. p. 897.

³⁾ *Lyle v. Cardiff Corporation* (1899) 5 Com. Cas. 87.

⁴⁾ *Tamvaco v. Simpson* (1866) L. R. 1 C. P. 363.

⁵⁾ *Foster v. Colby* (1858) 3 H. & N. 705.

⁶⁾ *McLean v. Fleming* (1871) L. R. 2 H. L., Sc. & D., 128, 133; but there may be a new contract between the parties varying this rate; *Gullischen v. Stewart* (1884) 13 Q. B. D. 317.

⁷⁾ *Fry v. Mercantile Bank* (1866) L. R. 1 C. P. 689.

⁸⁾ *Red R S. S. Co. v. Allatini* (1909) 14 Com. Cas. 82.

⁹⁾ Cf. *Moss S. S. Co. v. Whinney* (1911) 16 Com. Cas. 247.

¹⁰⁾ Cf. *Huth v. Lamport* (1886) 16 Q. B. D. 735.

¹¹⁾ *Notara v. Henderson* (1872) L. R. 7 Q. B. 225, p. 235.

and on the contract, but in any case he must act reasonably for the safety of the cargo; he may be entitled at a port of refuge to repair the vessel and to detain the cargo for a reasonable time for that purpose, or he may be entitled to send the goods forward in another bottom, or he may be justified in abandoning the adventure¹⁾; but where he has taken reasonable measures for the preservation of the cargo, he will have a possessory lien on the cargo in his possession for the expenses incurred²⁾.

Contractual liens. Any lien given to the ship other than the liens for freight, general average, and expenses, must be contractual; the contract may be express, e. g. the charterer may be bound by the express liens given by the charterparty, and the holder of a bill of lading by liens expressly given by the bill of lading either in its own terms or by incorporation of the terms of the charterparty: but it must be remembered that an ordinary incorporating clause in a bill of lading, such as "freight and all other conditions as per charterparty", only imports into the bill of lading such terms of the charterparty as are consistent with the character of a bill of lading³⁾, so that if a shipowner is to have a lien at the place of discharge for claims other than freight due on delivery, e. g. advance freight or demurrage at the port of loading, the terms of the incorporating clause must definitely include such wider obligation. The law is said to favour particular liens, but while it recognises common law liens, it cannot imply a contractual lien where it is not specifically given or proved to exist by the course of business between the parties. The effect of a contractual lien is normally the same as that of a common law lien, but it may by express terms be made more extensive⁴⁾ or to cover charges due to other persons⁵⁾. The principal instances of contractual liens between shipowner and goods-owner are in the cases of advance freight, dead freight, demurrage and damages for detention; liens for charterparty freight against a bill of lading holder, liens for "all charges whatsoever", and general liens, also occur.

Lien for advance freight. It is still to some extent an open question whether advance freight, i. e. freight stipulated to be paid before the arrival and readiness for delivery of the goods, is freight in the true sense of the word; but although a charterparty lien for advance freight will bind the charterer so long as he is the person to whom delivery is to be made, it is clear that where by the terms of a bill of lading delivery is to be made to some other person who is to pay freight on the terms of the bill of lading, there can be no lien against that other person for freight which ought to have been paid in advance but has not been paid, unless the terms of the bill of lading specifically⁶⁾ import that obligation; it is true that the Bills of Lading Act⁷⁾ makes a consignee or indorsee liable in respect of the goods 'as if the contract contained in the bill of lading had been made with himself', but this is not sufficient to displace the express terms of the bill of lading by bringing in from the charterparty an inconsistent term. Where a ship never commences to earn freight she cannot, although she has been loaded, recover advance freight for which a lien has been given, even if a lien for 'freight' would cover 'advance freight'⁸⁾. Where the express terms of a bill of lading held by an indorsee for value admitted the receipt of the advance freight stipulated to be paid, the master was not entitled, on the insolvency of the shipper (who had paid the advance freight by a bill due after the arrival of the ship at her port of discharge), to exercise a lien for the whole freight⁹⁾.

Lien for dead freight. "Dead freight" is a term signifying freight which has never come into existence and is used to describe the damages suffered by a shipowner whose profit depends on the amount of freight, where a charterer has shipped less cargo than he is required to provide under an agreement whereby the profit of the shipowner depends on the amount of cargo shipped. The damages may be liquidated,

¹⁾ *Hansen v. Dunn* (1906) 11 Com. Cas. 100.

²⁾ Cf. *Hingston v. Wendt* (1876) 1 Q. B. D. p. 373.

³⁾ Cf. *Gardner v. Trechmann* (1884) 15 Q. B. D. 154. Such words may import a liability for dead freight and for demurrage: *Porteus v. Watney* (1878) 3 Q. B. D. 534.

⁴⁾ E. g. by giving a right of sale.

⁵⁾ E. g. for land transit under a through bill of lading: *The Hibernian* [1907] P. 277.

⁶⁾ *Gardner v. Trechmann* (1884) 15 Q. B. D. 154.

⁷⁾ (1855) 18 & 19 Vict. c. 111, s. 1.

⁸⁾ *Ex p. Nyholm* (1873) 29 L. T. 634.

⁹⁾ *Tamvaco v. Simpson* (1866) L. R. 1 C. P. 363.

where the charterparty contains terms which make the amount ascertainable¹⁾, or unliquidated²⁾ where other evidence is necessary before the amount can be assessed; and it seems that in either case a lien may be given and may be enforced for dead freight. The lien may arise from express stipulation or from the course of business between the parties²⁾. It will be exercised on goods actually carried for the loss due to nonshipment of goods that might have been carried, and the sum for which it can be exercised is the amount of freight which would have been earned for carrying the goods not shipped, less the expense of earning that freight. The lien can in any case be exercised against a charterer who receives delivery by himself or an agent, but against any other person taking delivery it would be necessary to show that he was bound by the stipulation to pay dead freight. A liability to pay dead freight is imported into a bill of lading by a term "freight and all other conditions as for charterparty"²⁾).

Lien for demurrage or for damages for detention. A contractual lien is frequently given for demurrage or for damages for detention, or for both of them: it is very frequently accompanied by a clause providing for the cesser of the charterer's liability. Where there is no cesser clause the liability of the charterer for such claims remains, but many difficult questions have arisen as to the liability of other persons taking delivery of the goods. The principle is that persons taking delivery are subject to the lien given, if it is expressly given in the bill of lading or if it is incorporated in the bill of lading by apt terms of reference to the charterparty; the difficulties arise in the interpretation of the terms used, in order to ascertain the extent of the liability, if any, imposed on the person taking delivery. There are four kinds of delay possible, namely —

1. Demurrage at the port of loading.
2. Damages for detention at the port of loading.
3. Demurrage at the port of discharge.
4. Damages for detention at the place of discharge;

and in any given case the contract may be expressed to extend to any one or more of these at either or at both places, and the term demurrage may be used to mean either kind of delay³⁾. Demurrage may be made payable either:

1. For a stipulated number of days, or
2. For an indefinite number of days,

and damages for detention may be payable:

1. After the expiry of a period of demurrage, or
2. Without any provision for demurrage having been made at all.

It cannot be said that the authorities on the question of liens for demurrage or for damages for detention are in a satisfactory condition; but as the extent to which an effective lien is given to the shipowner and the extent to which a charterer is relieved by a cesser clause are complementary one to the other⁴⁾, the decisions seem to yield the following results; the charterer being freed from liability where an effective lien is given to the shipowner by the bill of lading in each case.

1. Where the charterparty contains provisions as to demurrage at the port of loading, the charterer is not liable for any demurrage, if the provision is for a fixed number of days on demurrage, or for any delay if the provision as to demurrage covers all delay there. Thus, where the charterparty gave 50 days for loading, 10 days on demurrage at £8 *per diem* and an absolute lien for demurrage with a cesser clause, and the bill of lading ran 'freight and all other conditions as per charterparty', and the ship was detained in loading for 18 days beyond the 10 days on demurrage, the charterer was not liable for the demurrage, but was liable for the additional delay, while the holder of the bill of lading was liable for the demurrage, but not for the further delay⁵⁾. Where the charterparty gave 35 days for loading, discharge to be according to the custom of the port, de-

¹⁾ *Gray v. Carr* (1871) L. R. 6 Q. B. 522.

²⁾ *McLean v. Fleming* (1871) 2 H. L., Sc. & D. 128; *Kish v. Taylor* [1912] A. C. 604.

³⁾ *Clunk v. Radford* [1891] 1 Q. B., p. 630.

⁴⁾ "The tendency of the decisions — we think it may now be treated as a general rule — is to treat the cesser in regard to extent as correlative and corresponding to the lien upon the cargo reserved in the particular charterparty": per the Court of Appeal in *Rederiactieselskabet "Superior" v. Dewar* [1909] 2 K. B. pp. 1006, 1007.

⁵⁾ *Gray v. Carr* (1871) L. R. 6 Q. B. 522.

murrage at 4d. a ton *per diem* for each day's detention beyond the said lay days, and a lien for demurrage with a cesser clause, and the bill of lading ran 'freight and all other conditions and exceptions as per charterparty', all delay at the port of loading was demurrage and therefore fell on the bill of lading holder¹). Where the charterer had 13 days to load with 10 days on demurrage, the ship to be discharged at 30 tons a day, and the ship was detained 5 days beyond the 13, there being a cesser clause and a lien for demurrage, the charterer was excused as to demurrage and some of the judges thought as to damages for detention, if any had occurred²); the *obiter dicta* as to such damages seem to conflict with the general trend of the cases.

2. Under a charterparty which contains provisions as to demurrage at the port of discharge but not at the port of loading the charterer remains liable for delay at the port of loading. Where a vessel was to load in the usual and customary manner, and to discharge at the average rate of 100 tons a day or pay 4d. a ton *per diem* demurrage, with a cesser clause and a lien for demurrage, it was held that the only demurrage provided for was at the port of discharge and that therefore the charterer remained liable for delay in loading³).
3. Where the charterparty contains provisions as to demurrage which are applicable to both ports and gives a lien for demurrage which applies to both ports, the charterer is excused as to demurrage at the port of loading but not as to damages for detention. Where a vessel was to load in 15 working days, and to be discharged at a rate of 35 tons a day, with 10 days on demurrage at £8 *per diem*, with a cesser clause and a lien for demurrage, and 10 days demurrage occurred in loading, the charterer was excused as to demurrage (but would not have been excused as to further delay at the port of loading⁴).
4. Where no provision for demurrage at either port is made, but a lien for demurrage is given, it has been held that in order to give effect to the lien at all, demurrage must be held to include damages for detention at the port of loading⁵).
5. Where there is no provision for demurrage at all and no lien is given, but there is a cesser clause, the court will regard it as so inequitable that the charterer should be relieved of the liabilities which accrue before shipment⁶), that they will only treat him as freed therefrom, so that the shipowner is left without a remedy, if it is the necessary interpretation of the contract made⁷).

To summarise the result of the cases, it seems that where a bill of lading gives to the shipowner an effective lien for demurrage, the bill of lading holder is liable for all demurrage and detention at the port of discharge, and may be liable for demurrage at the port of loading; and where there is a cesser clause, the charterer is excused for all delay at the port of discharge and may be excused for demurrage at the port of loading or even, if the terms of the contract require it, for all delay at the port of loading.

Liens for charges on goods. A lien may be given in respect of charges of any kind in connexion with the goods; a lien for 'freight, demurrage and all other charges whatsoever', while it will give a lien for demurrage and may give a lien for damages for all delay will, as against an assignee of a bill of lading which incorporates the charterparty, only give a lien for such other charges as are specifically made payable by the charterparty, so that dead freight and money paid by the shipowner in connexion with the loading do not fall within the lien⁸).

General lien. A general lien on goods could be given by apt words in respect of charges in connexion with previous consignments of goods by other vessels, or

¹) *Rederiactieselskabet "Superior" v. Dewar* [1909] 2 K. B. 998.

²) *Kish v. Cory* (1875) L. R. 10 Q. B. 553.

³) *Clink v. Radford* [1891] 1 Q. B. 625; cf. *Dunlop v. Balfour* [1892] 1 Q. B. 507.

⁴) *Francesco v. Massey* (1873) L. R. 8 Ex. 101.

⁵) *Bannister v. Breslauer* (1867) L. R. 2 C. P. 497: see *Clink v. Radford* [1891] 1 Q. B. p. 631.

⁶) *Christoffersen v. Hansen* (1872) L. R. 7 Q. B. 509.

⁷) *Oglesby v. Yglesias* (1858) E. B. & E. 930.

⁸) *Rederiactieselskabet "Superior" v. Dewar* [1909] 2 K. B. 998.

on a previous voyage of the same vessel, made by the same shipper or to the same consignee, but it would have to be given in unmistakeable terms and the parties must be identical¹).

Exercise of lien. A lien given to the shipowner on freight receivable by the charterer must be exercised before the freight is paid over to the person who, apart from the lien, is entitled to receive it or to his agent²): and the right to exercise a lien only accrues when a sum in respect of which the lien is claimed has become payable³).

XIV. Remedies for Breach of Contract.

Subject always to the terms of the contract of affreightment, which may excuse any party from any liability whatsoever, or may in any manner vary the liabilities of parties, the normal remedy for an alleged breach of the contract is in damages for breach of contract; the other remedies lie in damages for tort (i. e. for the present purpose for wrongs independent of contract), injunction, declaration, and very rarely specific performance. Interpleader is a remedy to avoid a breach of contract.

Damages, the normal remedy, are in English law divided into two kinds; general damages, which are the damages attributable to any breach of a contract that is broken; e. g. failure to deliver goods sent for sale on arrival; or special damages, which accrue from a breach of contract inducing damages peculiar to that contract and known to do so by the parties when they contract.

General damages. General damages, which are the damages accruing from a breach of contract apart from any special circumstances, are measured by the pecuniary loss to the claimant, the loss to the claimant by the non-performance by the other party, not the expense to the other party of his performance of his part of the contract. Such damages must be attributable directly to the breach of contract, so that it can be said that the breach was *causa proxima*: it is always a question of law whether the breach of contract is *causa proxima* or *causa remota*, whether the damages flow from the breach directly, not merely derivatively as from a predisposing cause: general damages must flow from an immediate, not an ulterior, cause of the loss⁴). For instance, where a carrier fails to carry a passenger to his destination, damages are payable for the inconvenience of his walking thither or finding other means of transport, but not for his catching cold during his walk; but where the passenger suffers personal injury by reason of the negligence of the carrier in performing his contract, the general damages include compensation for pain and suffering, for actual pecuniary loss, and for probable pecuniary loss in his profession or business. The liability is based, not on what the parties knew or contemplated, but on the expectation as to the consequences of a breach of contract which an ordinary reasonable man would entertain, that is, on the normal effects of such a breach, the actual knowledge of the wrongdoer being immaterial.

Special damages. Special damages, on the other hand, are dependent on the common knowledge of the parties at the time of contracting, that particular results may follow as the consequence of a particular breach of contract; in order that they may be recovered the court must inquire:

1. Whether there were special circumstances.
2. What the special circumstances were.
3. Whether they were known to both parties at the time of contracting; and
4. If a party had considered the effect of a breach of contract in relation to such special circumstances, what damages should he reasonably have foreseen.

Special damages therefore are damages which a contracting party would reasonably expect as the probable result of a breach of contract, owing to the special knowledge with which both parties were equipped at the time of contract-

¹) Cf. *Moss S. S. Co. v. Whinney* (1911) 16 Com. Cas. 247.

²) *Tagart v. James Fisher* [1903] 1 K. B. 391.

³) *Wehner v. Dene* [1905] 2 K. B. 92; but the shipowner has a contractual right to retain possession of the goods during the voyage in order to earn his freight; his common law lien accrues when he has earned it.

⁴) *Agincourt S. S. Co. v. Eastern Extension Co.* [1907] 2 K. B. 305.

ing¹). There have been many cases with regard to the effect of notice to a carrier of special circumstances from which he might or ought to foresee special damages if he breaks his contract, and it is established that mere notice of such circumstances is insufficient to charge him with increased liability. This knowledge is material if he contracts on the basis of what he has learnt, and the effect of notice therefore varies with the actual circumstances of each case; the carrier may or may not be conducting a business in which he knows the materiality and effect of delay in relation to particular goods carried by him²); and then notice from the other party of special circumstances has effect or not according to the knowledge of the particular business or goods concerned which is known to both parties to be possessed by the carrier, or ought to be possessed by the carrier³), so that the other party has reason to believe that the carrier contracts subject to the special liability⁴).

The rules as to general and special damages may be summarised as follows (but it always essential to remember that any civil liability may be varied or excluded by the express terms of a contract, and that the parties may themselves fix the measure of any damages whatsoever):

1. General damages are the damages which a party to a contract knew or ought to have known would follow as a result of a breach of contract because they follow naturally (i. e. necessarily in the natural course of events) or probably (i. e. so uniformly that a reasonable person would expect them to follow in any given case) on such a breach.
2. Special damages are damages which the parties in fact contemplated (or would have contemplated if they had applied their minds to the consideration of the results of a particular breach), by reason of special circumstances, as the probable consequences of a breach of the contract, at the time when the contract was made, although they would not be the normal consequences of such a breach.

Damages liquidated or unliquidated. Damages for breach of contract are either liquidated or unliquidated; they are unliquidated where, in order to assess them, it is necessary to resort to evidence not provided by the contract itself, and the amount has to be estimated on that evidence rather than calculated on data provided by the contract; they are liquidated where the amount is expressly named or can be calculated from the provisions of the contract or from data provided in the contract, e. g. where a charterparty fixes a rate of demurrage or refers to a fixed scale of charges; but damages do not become liquidated because a contract fixes a maximum value for goods (e. g. where there is a partial loss under a valued policy of insurance) or a maximum liability of the shipowner (e. g. where there is damage to goods which are to be taken as of their invoice value); nor is an amount apparently liquidated necessarily liquidated damages, for it may be a penalty, and if it is a penalty, it may not be recoverable in full.

Liquidated damages or penalty. Whether a sum specified in a contract is liquidated damages and therefore recoverable in full in the event of a given breach of contract, or is a penalty, and therefore not recoverable beyond the extent of the damages actually suffered, is always a question of law on the construction of the contract and is therefore a question for the court; this is so by whichever name the parties have chosen to call it⁵), although some weight is to be given to the term actually used⁶), especially if the contract has been formulated under legal advice (but this is rarely the case with mercantile contracts). A specified sum is *prima facie* a penalty where it is to be paid on default of payment of a smaller debt or other liquidated sum (but not where on default in payment of a smaller sum in discharge of a larger original debt the original debt is again to become payable, or where in default of payment of an instalment the whole balance of a debt is to become payable). A specified sum is also *prima facie* a penalty where one fixed sum is expressed to be payable on default in performance of various stipulations in a contract, where a breach of one stipulation will result in liquidated

¹) *Bostock v. Nicholson* [1904] 1 K. B. 725.

²) *Simpson v. L. & N. W. Rly* (1876) 1 Q. B. D. 274.

³) *Schulze v. G. E. Rly* (1887) 19 Q. B. D. 30.

⁴) *British Columbia Saw Mills Co. v. Nettleship* (1868) L. R. 3 C. P. 499.

⁵) *Clydebank Engineering Co. v. Yzquierdo* [1905] A. C. p. 9.

⁶) *Diestal v. Stevenson* [1906] 2 K. B. p. 351.

damages while the breach of a different stipulation will not have a liquidated value¹), or again where a breach of any stipulation will result in liquidated damages but the liquidated damages are not of the same value in each case.

On the other hand, a specified sum is *prima facie* liquidated damages, and not a penalty, where it is fixed to be payable in the event of a particular breach of an uncertain value²); and wherever the intention of the parties was to prevent the matter of damages from being left at large, the sum will be liquidated damages, as if it were held to be a penalty (even though so called by them) the evil they wish to avoid would be perpetuated³); where the specified sum is to be payable for the breach of stipulations of varying importance, and none of the stipulations if broken would give rise *per se* to a claim for liquidated damages, the general rule is that the specified sum is to be deemed to be liquidated damages⁴), but if of the various possible breaches some may occasion serious damage, while others may occasion merely trifling damage, the presumption is that the parties intended the sum to be penal and therefore subject to modification by the court⁵). The specified sum will not necessarily be construed to be a penalty because the parties have chosen to assess the value of the breach at a sum in excess of the damage sustained⁶), or at a sum less than the actual damages⁷).

Damages in particular cases. The damages recoverable by a shipowner under a contract of affreightment, such as damages for detention, demurrage, dead freight, have mostly been considered elsewhere⁸): and the foregoing principles are here illustrated chiefly with regard to charterers, shippers, and consignees.

1. Where a shipowner fails to provide a ship as agreed, the damage to the charterer is the value of the ship to the charterer, i. e. the freight which he would have earned less the expense of earning it under that charterparty: if he prudently procures a substituted vessel, the damages will be the extra freight which he has to pay, but he must give credit for any net surplus profit which he may make, if he earns more freight than he would have earned under the original charterparty. If the effect is that the shipper has to find a fresh cargo at a higher price, he may be able to recover the difference in price⁹).

2. Where there is a binding contract to carry particular goods in a general ship (not a very common case), and the goods are shut out, the damages may include:

1. Any extra freight payable under a reasonable contract of carriage by a different vessel.
2. Damages for the delay, if any (probably represented by interest on the value of the goods).
3. Costs of warehousing (if incurred).
4. Additional delay in transit (if incurred).

3. Where there is delay in delivering goods, and the carrier is not excused either at law or by the contract, the receiver may incur loss by reason of the loss of the use of the goods themselves, or of the use of other goods in connexion with which the goods carried are indispensable, or loss of profit (e. g. on a resale), or loss of market by depreciation in market values or by depreciation of the goods themselves. Where the damage claimed is for loss of the use of the goods, or of the price which would have been received for the goods, the compensation is based on a calculation of interest¹⁰) on their value during the period of delay¹¹). Where the claim is for the loss of the use of other goods to which the goods delayed were essential, it is evidently a claim for special damages and such damages can only be recovered if within the principle stated¹²). Where the claim is for loss of profit, the natural uncertainty as to the duration of any particular voyage (apart from the

¹) Cf. *Kemble v. Farren* (1829) 6 Bing. 141.

²) *Sainter v. Ferguson* (1849) 7 C. B. 716.

³) *Diestal v. Stevenson* [1906] 2 K. B. 345.

⁴) *Wallis v. Smith* (1882) 21 Ch. Div. 243.

⁵) *Elphinstone v. Monkland* (1886) 11 App. Cas. p. 342.

⁶) *Astley v. Weldon* (1801) 2 B. & P. p. 351.

⁷) *Diestal v. Stevenson* [1906] 2 K. B. 345.

⁸) Cf. p. 420.

⁹) *Featherston v. Wilkinson* (1873) L. R. 8 Ex. 122.

¹⁰) Mercantile interest is reckoned at 5%.

¹¹) *British Columbia Saw Mill Co. v. Nettleship* (1868) L. R. 3 C. P. 499.

¹²) *British Columbia Saw Mill Co. v. Nettleship* (1868) L. R. 3 C. P. 499; *Hadley v. Baxendale* (1854) 9 Exch. 341.

probability that a shipowner has protected himself from any such claim by the terms of his contract) makes it almost impossible to recover such damages as general damages¹); but owing to the continuous improvement of sea-transport they may be recoverable as special damages if the date of arrival and the then existing state of the market²) or the prospective profit or obligations³) of the receiver were elements contemplated by the parties at the time of the contract⁴). Moreover, although the prospective profits on a resale can only be recovered *eo nomine* as special damages (if at all⁵)), the loss due to non-delivery may be measured by such profits if there is no market in which such goods can be procured, or if such or similar goods can only be procured at an enhanced price⁶), as the price to the sub-purchaser or the enhanced price of the substituted goods is evidence of the general damage sustained⁷): similarly the prospective obligations of a consignee may be a measure of the general damages sustained where there is no market in which he can replace the goods which he is bound to supply within a fixed time⁸). Although claims for loss of profits may be made against carriers they are in practice much more common against vendors.

4. Where the goods are lost, the general damages are measured by the value of the goods at the due time and place of arrival, after allowing for the expenses of getting them there (e. g. freight and charges); this will be the market value of such goods if there is a market in which they can be procured at that time or place; if there is no market and the goods were intended for trading purposes, the value may be taken at the value on shipment together with expenses incurred and a reasonable profit for the consignee or shipper⁹). If special damages are claimed, the same principles will apply as where special damages are claimed for delay in delivery.

5. Where the goods are delivered, but are delivered in a damaged condition, either as to the whole or as to part, the measure of damages is much the same as where the goods are lost: but in this case freight is payable on goods delivered *in specie*, instead of being merely one of the elements in calculating the arrived value; the net value of the goods as they have arrived is to be deducted from their net value as they ought to have arrived, and the difference will be the general damages recoverable. Special damages must be proved in accordance with the principle stated as to delay in delivery.

6. Where a charterer, or a shipper of goods who is under a binding contract to ship them, fails to ship goods at all, or to ship sufficient cargo¹⁰), or to ship the kind of cargo agreed¹¹), the question of the amount of damage really resolves itself into the question of the difference between the freight which the shipowner would have earned if the agreement had been properly carried out and the freight which he has earned under the substituted agreement (or probably, the freight which he might have earned if after a definite breach of the agreement he had acted reasonably with regard to the use of his ship¹²); there must be deducted the expenses which the shipowner would have incurred in earning the agreed freight, and there must be added the reasonable expenses of earning the substituted freight, and also any charges incurred under the original agreement (such as demurrage) before the breach of contract¹³).

A party to a contract, where the other party is in default, may take such measures as are reasonable to repair the breach, and if he has done so may recover, as part of his damages, the expense of doing so¹⁴).

¹) *Dunn v. Bucknall* [1902] 2 K. B. pp. 622, 623.

²) *The Parana* (1877) 2 P. D. 118.

³) *Elbinger &c. v. Armstrong* (1874) L. R. 9 Q. B. 473.

⁴) *Horne v. Midland Rly.* (1873) L. R. 8 C. P. 131.

⁵) *Grébert-Borgnis v. Nugent* (1885) 15 Q. B. D. 85.

⁶) *Hinde v. Liddell* (1875) L. R. 10 Q. B. 265.

⁷) *Cf. France v. Gaudet* (1871) L. R. 6 Q. B. 199.

⁸) *Elbinger &c. v. Armstrong* (1874) L. R. 9 Q. B. 473.

⁹) *O'Hanlon v. G. W. Rly.* (1865) 6 B. & S. 484.

¹⁰) *Cf. Aitken v. Ernsthausen* [1894] 1 Q. B. 773.

¹¹) *Young v. Canning Jarrah Co.* (1899) 4 Com. Cas. 98.

¹²) *Cf. Staniforth v. Lyall* (1830) 7 Bing. 169, where the substituted freight, after all charges and expenses had been paid, left a profit to the shipowner.

¹³) *Saxon S. Co. v. Union S. S. Co.* (1898) 4 Com. Cas. 29.

¹⁴) *Le Blanche v. L. & N. W. Rly.* (1876) 1 C. P. D. pp. 302, 303.

Mitigation of damages. It is also the general duty of one party to a contract to take reasonable measures to mitigate the damages consequent on a breach of the contract by the other party. Where, for example, charterers were unable to load a cargo according to the terms of the charterparty, but offered through their agents other remunerative employment for the vessel, yet the master refused to accept such employment and insisted on waiting until the end of the lay days, with the result that his vessel was ultimately delayed for five months and then only obtained a much smaller freight, it was held that he ought to have acted reasonably, and that the charterers could rely on his neglect to do so in reduction of damages¹). There is still some doubt whether the master is bound to consider proposals in mitigation of damages before his lay days expire²), but at any rate where the proposals are made by the charterers it would be practically safe and would be reasonable for him to do so, and the court would view his actions favourably; but until there is some act which the master is entitled to treat as a repudiation of the contract he is not bound to seek to mitigate damages³) before his lay days have expired. He is entitled to treat a repudiation as final, but if he does not do so he takes the risk of supervening circumstances⁴). The net profit of any substituted adventure must be set off against the damages, which are *prima facie* the net profit of the contemplated adventure⁵); but profits accruing to the claimant indirectly or independently of the contract are to be ignored⁶). So, too, a shipper who has had his goods shut out is expected to take reasonable steps to get them carried forward, if this course will reduce the damages, and he cannot, if reasonable means are available, recover the full damages that would be payable if the whole adventure had been frustrated by the default of the shipowner: and, similarly, he should procure a substituted ship if the vessel which he has chartered is not provided, if he can prudently do so at a reasonable freight. A party, however, is not necessarily bound to take steps to mitigate damages where he is in fact acting in a manner authorised by the contract notwithstanding a breach by the other party: thus, a shipowner is not bound, where he has an option either to retain goods on board or to land and warehouse them, to adopt the latter course in order to avoid demurrage⁷); if, however, he acts unreasonably in refusing to land and warehouse the goods, he may be unable to recover the unnecessary expenses thus caused⁸).

Damages for wrongs apart from breach of contract. The principal difference, in the case of mercantile transactions, between damages for breach of contract and damages in tort, i. e. for wrongs independent of contract, is that as to the latter the distinction between general and special damages is much more restricted; if the damages claimed are the necessary or natural result of the wrong, it is immaterial that the wrongdoer did not know the circumstances which made it a necessary or natural consequence that such damages would follow his act. The rules as to damages recoverable in tort may be summarised thus:

1. Any damages are recoverable which are the natural and probable consequences of the wrong in the actual circumstances, whether the wrongdoer knew of the circumstances or not⁹).
2. Any damage which the wrongdoer in fact foresaw as a probable consequence of his act; and
3. Any damage which he foresaw or ought to have foreseen because of special circumstances known to him at the time when he did the act, are recoverable.

Recovery of interest. There is no common law principle allowing the recovery of interest on the mere non-payment of a debt; and apart from express agreement interest at common law can only be recovered where there is an implied contract to pay it; such a contract may be implied from mercantile usage, as in the case

¹) *Wilson v. Hicks* (1857) 26 L. J., Ex. 242.

²) *Hudson v. Hill* (1874) 43 L. J., Ex. 273.

³) *Dimech v. Corlett* (1858) 12 Moo. P. C. 199.

⁴) *Frost v. Knight* (1872) L. R. 7 Ex. p. 112.

⁵) Cf. *The Argentino* [1894] A. C. p. 324.

⁶) *Jebsen v. E. & W. I. Dock Co.* (1875) L. R. 10 C. P. 300: cf. *The Ruabon* [1900] A. C. p. 12.

⁷) *The Arne* [1904] P. 154.

⁸) *Lyle v. Cardiff Corporation* (1899) 5 Com. Cas. p. 98.

⁹) Cf. *France v. Gaudet* (1871) L. R. 6 Q. B. 199; and see *Sharp v. Powell* (1872) L. R. 7 C. P. 253.

of negotiable instruments¹⁾, or contracts to give a negotiable instrument as a security, or from the course of business between parties, as on merchants' accounts rendered, or on an implied contract to indemnify, as where a surety who has paid is claiming indemnity from his principal or contribution from a co-surety. Such cases can rarely arise on contracts of affreightment. By express stipulation, however, interest may be made payable on any debt, e. g. on unpaid freight²⁾; such an agreement does not give a lien on the goods unless a lien is given expressly, but the interest would be recoverable by action. Where there is a common law right to interest by implied or express contract, such interest may in principle be recovered by action claiming the interest apart from the principal.

By statute, interest in the nature of unliquidated damages (and therefore only recoverable in an action for the principal debt or sum or for damages) may be awarded by the jury (or the court if sitting without a jury³⁾) in certain cases⁴⁾:

1. Where by virtue of a written instrument a debt or sum certain is payable at a time certain, interest may be allowed from the time when the debt or sum became payable⁵⁾. This provision only applies where there is a certain sum due absolutely and in all events from one party to the other⁶⁾, and it can rarely apply to a contract of affreightment; freight is usually adjusted as a balance of the accounts between the parties, and then it is not a sum certain; and a sum is not payable at a time certain if the date depends on any contingency, such as 'arrival' or 'two months after ship's report inwards'⁷⁾: it might apply to time-hire payable in advance without deductions.
2. Where payment of a debt or sum certain, not payable by virtue of a written instrument or not payable at a certain time, has been demanded in writing with notice in the demand that interest will be claimed from the date of the demand until payment⁸⁾. Such notice to be effectual must be given before action brought. In this case also the debt must be as certainly due as where it is created by a written instrument; but when it has been ascertained the demand for interest may be validly made if it refers to the debt. Notice under this provision may usefully be given when a balance of freight or of a general account is stated or agreed or otherwise made certain.
3. On any policy of insurance⁹⁾.
4. In actions of conversion or trespass to goods¹⁰⁾. Where, for example, a shipowner claiming a lien for freight or dead freight landed goods into the warehouse of a dock company to preserve the lien and was found to have no claim whatever to such a lien, so that he had in fact converted the defendant's goods by refusing to deliver them, the goods-owners were allowed interest on the sum which they were forced to deposit¹¹⁾; the same principle might be applied to the balance where the shipowner's claim is excessive.

The mercantile rate of interest allowable where interest runs at common law is generally 5 per cent.; but where interest may be given as damages under the Civil Procedure Act it is to be 'at the current rate' and there is no rule that this is 5 per cent.¹²⁾, and the amount is a question of fact, although 5 per cent. may be allowed¹³⁾.

Injunctions. The remedy by injunction is not one given as a right *ex debito justitiæ*, but is discretionary (i. e. to be exercised on well settled principles of judicial discretion); it is not allowed where damages are the proper remedy or

¹⁾ Now confirmed by statute; 45 & 46 Vict. c. 61, s. 57.

²⁾ Cf. *E. Clemens Horst Co. v. Norfolk &c. S. S. Co.* (1906) 11 Com. Cas. 141.

³⁾ But not in an arbitration unless express power to award it is given.

⁴⁾ Civil Procedure Act, 1833 (3 & 4 Will. IV. c. 42). ss. 28, 29.

⁵⁾ *Ibid.* s. 28.

⁶⁾ *L. C. & D. Rly. Co. v. S. E. Rly.* [1893] A. C. p. 436.

⁷⁾ *Merchant Shipping Co. v. Armitage* (1873) L. R. 9 Q. B., p. 114.

⁸⁾ Civil Procedure Act, 1833, s. 28.

⁹⁾ *Ibid.* s. 29.

¹⁰⁾ *Ibid.* s. 29.

¹¹⁾ *Red R S. S. Co. v. Allatini* (1909) 14 Com. Cas. p. 92.

¹²⁾ *L. C. D. Rly. v. S. E. Rly.* [1892] 1 Ch., p. 133.

¹³⁾ See *Red R S. S. Co. v. Allatini*, *supra*, and *Dreyfus v. Peruvian Guano Co.* (1889)

where the applicant has himself failed to act equitably¹). It is an equitable remedy to prevent the future invasion of a legal right, and where it is appropriate it may be obtained forthwith after the issue of a writ²), even *ex parte*, and it may be continued as an interim injunction up to the final determination of the action: in any such case of an interlocutory injunction the applicant is required to give an undertaking in damages to compensate the other party if the claim is not made good. In shipping matters the remedy by injunction has been applied to the case of interference by the mortgagee of a ship with the rights of a charterer under a valid charterparty made with a mortgagor shipowner³), to threats to discharge cargo at a place excluded by the express terms of a bill of lading⁴) and to threats to employ a ship otherwise than in a manner consistent with rights under a charterparty⁵). The remedy by injunction is not available against a foreigner out of the jurisdiction in respect of what he does out of the jurisdiction⁶), but a British subject resident abroad is amenable to it⁷).

Specific performance. The remedy of specific performance is on principle wholly inapplicable to contracts relating to the use of a ship, but, indeed, as the terms of charterparties are almost wholly affirmative it is rather by way of exception that the court has allowed injunctions to issue to prevent the doing of that which is only forbidden by implication⁸). Regarding a ship merely as a chattel there is no reason why specific performance of a contract to sell or deal with her in some particular manner should not be enforced if she, or the party required to do the act, is within the jurisdiction.

Declarations of rights by the court. A party to a mercantile contract is entitled to obtain from the court an order declaring his present or future rights under the contract, even if he does not or cannot claim any present relief⁹). This rule does not give a right to have speculative or academic questions discussed, but is to be applied where a definite and useful result can be obtained. Thus the validity of a mortgage of a British ship and the rights of the mortgagee thereunder¹⁰), the question of liability to load cargo under an agreement with 18 months yet to run¹¹), and the validity of the by-laws of a London dock company¹²) have been discussed on applications for a declaration.

Interpleader. Where a person is under a liability in respect of money or goods in which he claims no interest except for his charges in respect of them, and is being sued or expects to be sued by two or more adverse claimants, and is willing to pay the money or transfer the goods into court or as the court may direct, he may procure the issue of an 'interpleader' summons, on which the adverse claimants will be required to substantiate or abandon their claims, with the result that the claims will be contested by the adverse claimants, while the applicant for the interpleader summons will, if he has acted *bona fide*, usually be allowed his costs¹³). This procedure has been found useful to a master who is in doubt as to the person to whom he ought to deliver goods, as delivery to a person other than the person entitled to receive them, where there are adverse claims, would expose him to an action for conversion: such adverse claims may arise where bills of lading are issued in sets¹⁴), or where the adverse claimants claim under rights which have not a common origin¹⁵), or in the case of a consignee or shipper against whom freight is claimed

¹) *Bucknall v. Tatem* (1900) 83 L. T. 121.

²) *Wood v. Atlantic Transport Co.* (1900) 5 Com. Cas. 121.

³) *De Mattos v. Gibson* (1859) 4 De G. & J. 276; cf. *Collins v. Lamport* (1864) 34 L. J., Ch. 196.

⁴) *Wood v. Atlantic Transport Co.* (1900) 5 Com. Cas. 121.

⁵) *Le Blanch v. Granger* (1866) 35 Beav. 187; but see also *Bucknall v. Tatem* (1900) 83 L. T. 121.

⁶) *Badische Anilin v. Johnson* [1897] 2 Ch. 322.

⁷) *'Morocco Bound' Syndicate v. Harris* [1895] 1 Ch. 534.

⁸) *De Mattos v. Gibson* (1859) 4 De G. & J. 276.

⁹) R. S. C. Ord. XXV, r. 5.

¹⁰) *The Manar*, No. 2 (1903) 89 L. T. 218.

¹¹) *Société Maritime v. Venus S. S. Co.* (1904) 9 Com. Cas. 289.

¹²) *London Association &c. v. L. & I. Joint Docks Committee* [1892] 3 Ch. 242.

¹³) R. S. C., Ord. LVII.

¹⁴) *Glyn Mills & Co. v. E. & W. I. Dock Co.* (1882) 7 App. Cas. 591; cf. *Burgos v. Nascento* (1909) 100 L. T. 71.

¹⁵) R. S. C. Ord. LVII r. 3.

by more than one person, e. g. by mortgagor and mortgagee of a ship, or shipowner and purchaser of a ship, or shipowner and charterer. It is probable that an interpleader summons may be issued to bring in a foreign claimant who is out of the jurisdiction¹⁾, but the process is only applicable to money or goods within the jurisdiction.

XV. Carriage of Passengers by Sea.

Statutory provisions. The carriage of passengers is largely regulated by statute²⁾, by which provisions of two categories are made:

1. Dealing with all passenger steamers, and
2. Dealing with 'emigrant ships'.

A passenger is a person carried in a ship³⁾ who is not master or owner or member of the crew or the owner's servant, and a passenger steamer is any steamer, British or foreign, which carries passengers to, from or between any places in the United Kingdom, including passengers embarked or disembarked by means of a tender⁴⁾. A passenger steamer which carries more than 12 passengers must be surveyed annually and obtain a certificate⁵⁾ stating the limits within which she may ply and the number of passengers which she may carry⁶⁾. She may not carry passengers on more than two decks⁷⁾, of which only one may be below the waterline⁸⁾, and if she carries steerage passengers⁹⁾, the master must sign a passenger-list¹⁰⁾ and the ticket of a cabin passenger must then be a contract ticket in a form approved by the Board of Trade¹¹⁾. Steerage passengers¹²⁾, whether on an emigrant ship or not, who do not obtain a passage to their destination as agreed, or who suffer detention, are entitled to a return of passage-money and to subsistence¹³⁾, and it is an offence to land them at any port except the agreed port of destination, without justification by consent or by necessity¹⁴⁾. The expenses of wrecked or rescued passengers of a ship carrying steerage passengers may be defrayed out of public funds¹⁵⁾, or the passenger may be forwarded by the governor of a colony or a British consul¹⁶⁾. If a ship brings steerage passengers to the British islands, the master must deliver a steerage passenger list, and may not carry more steerage passengers than an emigrant ship sailing from the British islands might carry, and he must provide such provisions and water as would be required on an emigrant ship sailing thence¹⁷⁾. The provisions relating to 'emigrant ships' are wholly statutory (M. S. A. 1894, Part. III and 1906, Part. II) and the statutes should be consulted in regard thereto.

Duty of shipowner to passengers. A shipowner who undertakes to carry passengers is bound to use a high degree of care, skill, and foresight to carry them safely¹⁸⁾; he is required to provide an adequate vessel, but he does not warrant that it shall be in all respects perfect for its use as a passenger vessel, i. e. that it is free from all defects which may cause peril although no such defect could have been detected by any care, skill, or foresight. It is a misdemeanour to send or to attempt to send a British ship to sea in a state so unseaworthy as to be likely to endanger the life of any person, or knowingly to take her to sea in such a condition,

¹⁾ R. S. C., Ord. XI., r. 8 A.

²⁾ M. S. A. 1894, 1906.

³⁾ Practically he is a person for whose passage a fare is paid: *The Lion* (1869) L. R. 2 P. C. 525.

⁴⁾ M. S. A. 1894, s. 267; 1906, ss. 13, 15.

⁵⁾ Ibid. 1894, s. 271; 1906, s. 21. The survey may be dispensed with in the case of foreign ships: M. S. A. 1894, s. 363.

⁶⁾ Ibid. 1894, s. 274, 283; 1906, s. 22.

⁷⁾ Ibid. 1906, s. 16.

⁸⁾ M. S. A. 1906, s. 16.

⁹⁾ M. S. A. 1894, s. 311.

¹⁰⁾ Ibid. s. 320: the effect is to prevent the carrier from introducing exceptions.

¹¹⁾ M. S. A. 1894, s. 320; 1906, s. 17.

¹²⁾ Ibid. s. 14.

¹³⁾ M. S. A. 1894, ss. 328, 329.

¹⁴⁾ Ibid. s. 330.

¹⁵⁾ Ibid. ss. 332, 334, the Crown having a remedy against owner, charterer and master.

¹⁶⁾ Ibid. ss. 333, 334.

¹⁷⁾ Ibid. ss. 336—338; 1906, s. 17, and Order of 25 Jan. 1908.

¹⁸⁾ *Readhead v. Midland Rly.* (1869) L. R. 4 Q. B. 379.

unless in either case the going to sea can be shown to be reasonable and justifiable¹). The common law liability, therefore, of a carrier of passengers by sea is practically a liability for the negligence of himself, his servants, or agents, such negligence being a breach of a duty to use a high degree of care; he is not an insurer of passengers as he is of goods.

Carriage of passengers. Where a charterparty provides for the carriage of a full and complete cargo of merchandise, the charterer (there being no demise of the ship) has no right to require the carrying of passengers in the cabins, nor has the shipowner a right to use the cabins to accommodate passengers²). Where a ship is offered as a general passenger ship, it may be that any person fit to be carried who is willing and accepts the offer of carriage is entitled to a passage according to priority of application: but probably in the ordinary case of passenger vessels with advertised terms the advertisement is a mere offer to treat. A passenger does not necessarily become entitled to a particular berth when he becomes entitled to be carried³), but if his contract is for a particular berth he is entitled to that berth, although his damages may be only nominal if he does not get it.

The right to be carried and the right to receive the passage-money arise when the contract is made; payment may be contemporaneous with the contract or subject to any stipulated terms; if there are no such terms the passage-money is due when custom, if any, prescribes payment. *Prima facie* the contract is indivisible, so that if the passage-money is paid and the voyage is begun, no part of the fare is returnable if the voyage is frustrated without any default of the shipowner⁴); but if the voyage becomes impossible, by no default of either party, but through some unforeseen catastrophe, before the whole passage-money has become payable, the loss will to that extent fall on the ship⁵). The shipowner has a lien on the passenger's baggage for the passage-money, but cannot detain the passenger himself or the apparel which he is actually wearing⁶). When a mortgagee of a ship takes possession he cannot recover from the mortgagor passage-money already received by him⁷).

Effect of conditions on passenger-ticket. The express terms of a contract to carry a passenger are usually recorded in a ticket issued by the carrier to the passenger; the ticket is not necessarily the contract, but conditions stated upon it may bind the passenger. The parties are free to make such a contract as they choose⁸), and the passenger is bound by conditions to which he has expressly assented or to which his assent must be implied. Assent to conditions is implied where he takes a ticket which contains conditions or refers to conditions of carriage, if in fact the carrier has done what is reasonably sufficient to call the passenger's attention to the conditions. What means are reasonably sufficient is a question of fact, which may vary in each case with the intelligence and capacity of the passenger⁹), but the mind of the passenger must in some way be informed of the existence of conditions¹⁰); and the more stringent the conditions the greater will be the obligation on the carrier to bring them to the knowledge of the passenger¹¹). If there is nothing on the face of the ticket to show that there are conditions the carrier cannot rely on them¹²); but it is not necessary to show that the passenger has actually read the conditions if there has been a reasonable opportunity for him to become acquainted with them¹³). Whether the carrier has taken reasonably sufficient steps to bring the conditions to the attention of the passenger is a question of fact¹⁴); and if the conditions are to form part of the contract, these steps must

¹) M. S. A. 1894, s. 457.

²) *Shaw Savill v. Aitken* (1883) 1 C. & E. 195.

³) *Dysart v. Montgomery* (1874) 8 Ir. R., C. L. 245.

⁴) *Cf. Gillan v. Simpkin* (1815) 4 Camp. 241.

⁵) *Cf. Krell v. Henry* [1903] 2 K. B. 740.

⁶) *Wolf v. Summers* (1811) 2 Camp. 631.

⁷) *Willis v. Palmer* (1859) 7 C. B. N. S. 340.

⁸) Except in the case of cabin passengers on 'emigrant ships', or of any steerage passenger: M. S. A. 1894, s. 320.

⁹) *Acton v. Castle M. P. Co.* (1895) 1 Com. Cas. 135.

¹⁰) *Richardson v. Rountree* [1894] A. C. 217.

¹¹) *Cf. Henderson v. Stevenson* (1875) L. R. 2 H. L. Sc. 470.

¹²) *Ibid.*

¹³) *Marriot v. Yeoward* [1909] 2 K. B. 987.

¹⁴) *Cf. Parker v. S. E. Ry. Co.* (1877) 2 C. P. D. 416.

be taken at the time when the contract is being made, i. e. the conditions must form part of the terms of the offer which the passenger accepts by agreeing to take a ticket.

Subject to modification by express terms, it is implied in a contract to carry a passenger by sea that he shall be carried with reasonable care and reasonable diligence, and that he shall submit to the reasonable control of the master.

Negligence of master or crew. The duty of the shipowner to the passenger being to carry him with reasonable care, i. e. a high degree of care, the shipowner is liable to the passenger for the negligence of his servants in the course of their employment when acting for the purposes of the shipowner, if the negligence causes injury to the passenger. This liability extends to any injuries caused by negligence in respect of all the means of transit which the shipowner invites the passenger to use, although the object to which the injury is due may not belong to the shipowner¹). The shipowner is free to restrict his liability by any conditions of carriage to which the passenger expressly agrees or which are sufficiently brought to the passenger's notice when the contract is made²), so that the liability may be either modified or extinguished. The shipowner is also entitled to limit his liability for injury to a passenger where the injury occurs without his own actual fault or privity³). In the event of the death of the passenger as the result of negligence for which the carrier is responsible, the passenger's representatives may have a right of action under the Fatal Accidents Acts⁴) if the passenger himself, had he survived, could have sued. Where the injury or death is caused by the sole negligence of a ship other than the carrying ship, the rights of action are against the other ship or its owner exclusively; where both the carrying ship and another ship are negligent and injury or death is caused, there is a right of action against each ship, subject, in the case of the carrying ship, to any contractual restrictions⁵).

Passenger's luggage. A shipowner is a common carrier of passenger's luggage, but in respect of sea-transit the Carriers Act of 1830 does not apply⁶), and he may contract so as to restrict his liability or so as to make himself not liable at all⁷). Where the passenger retains control of part of his luggage, the duty of the shipowner is the same as it is towards the passenger himself, viz. to take reasonable care of such luggage⁸), and ceases to be that of a common carrier. The shipowner may also be protected from any liability for loss of luggage by fire⁹); and from any liability for loss of gold, silver, diamonds, watches, jewels, or precious stones forming part of the passenger's luggage, whether retained by the passenger in his control or not, unless the passenger has at the time of shipment declared their true nature and value¹⁰); and he may limit his liability for loss or damage to luggage as in the case of other goods¹¹); and this right extends to cases where the transit is under a contract to carry partly by land and partly by sea¹²). The right to immunity or to limitation of liability is only given where the loss or damage occurs without the actual fault or privity of the shipowner.

Reasonable diligence. The shipowner, apart from express stipulation, is bound to carry a passenger, with whom he has made a contract, with reasonable diligence; there is no implied term that the vessel shall sail precisely at the time advertised, and the obligation of the shipowner is satisfied if the vessel proceeds without unreasonable delay¹³); punctual sailing may by express terms be made a condition of the contract¹⁴), so that a prospective passenger may on breach of the condition

¹) *John v. Bacon* (1870) L. R. 5 C. P. 437 (a hulk used by passengers as a means of access to the ship).

²) *Marriott v. Yeoward* [1909] 2 K. B. 987.

³) *The Yarmouth* [1909] P. 293.

⁴) (1846) 9 & 10 Vict. c. 93; (1864) 27 & 28 Vict. c. 95; (1908) 8 Edw. VII, c. 7.

⁵) Cf. *The Bernina* (1888) 13 App. Cas. 1.

⁶) It does apply to any stage of land-transit where the transit is both by land and sea; *Le Conteur v. L. & S. W. Rly.* (1866) L. R. 1 Q. B. 54.

⁷) *Marriott v. Yeoward* [1909] 2 K. B. 987.

⁸) *Smitton v. Orient S. N. Co.* (1907) 12 Com. Cas. 270.

⁹) *M. S. A.* 1894, s. 502 (I); *The Diamond* [1906] P. 282; cf. p. 466.

¹⁰) *M. S. A.* 1894, s. 502 (II); *Smitton v. Orient S. N. Co.* (1907) 12 Com. Cas. 270.

¹¹) *M. S. A.* 1894, s. 503.

¹²) *L. & S. W. Rly. v. James* (1872) L. R. 8 Ch. 241.

¹³) *Crane v. Tyne Shipping Co.* (1897) 13 T. L. R. 172.

¹⁴) *Cranston v. Marshall* (1850) 5 Exch. 395.

treat the contract as at an end and recover any part of the passage money he may have paid and damages for the delay. The transit must also be continued with reasonable diligence when once begun, and for failure in this respect the carrier may be liable in damages; these damages will be measured by ascertaining the cost to the passenger of carrying out in a reasonable manner the obligation which the carrier has failed to perform¹⁾; it does not follow that by reason of delay the passenger is entitled to incur the expense of hiring a special conveyance and to recover it from the carrier: if a passenger in a similar situation, but without any default of the carrier, would incur the expense, then it is probably reasonable that the carrier who is in default should be made liable, but if a passenger who incurred such delay by his own fault and not through the fault of the carrier would not incur such expense, then the carrier should not be charged with it²⁾. The carrier may by express terms limit his duty of diligence wholly or partially, so that he may become not liable for delay or not liable for the abandonment of the transit altogether³⁾.

Control of passengers. The master of a ship has authority to exercise a reasonable degree of control over any passenger as the safety of the ship and those on board requires that he should have such power: the measures which he may take and the mode in which he shall exert his authority depend upon the necessity or urgency in any particular case. He may use any necessary force⁴⁾ for so long a period as may be required⁵⁾, but he may not continue the use of force longer than necessity demands⁶⁾, and the abuse of his right of control may expose him and those who act with him to an action of false imprisonment⁷⁾. In cases where he has to preserve decency and order, rather than to consider the safety of the ship, the master has a more limited power of control over passengers; he may exclude from the general table a passenger who is guilty of ungentlemanly conduct and may require a passenger who has behaved to him in an offensive and threatening manner to take his meals in the passenger's own cabin⁸⁾, and he may use force to maintain order⁹⁾. The master of a passenger steamer has certain statutory powers in the case of passengers who are drunk or disorderly or molest other passengers, and in the case of persons who obstruct or injure machinery or tackle or impede the navigation¹⁰⁾ of the vessel.

XVI. The Court of Admiralty.

The early history of jurisdiction in Admiralty matters although it is now in the process of elucidation¹¹⁾, still offers several problems to the legal historian. The very introduction of the title of Admiral is obscure¹²⁾, but the name itself probably did not denote any specific change in the duties or authority of the official who held the post of *custos portuum et maris* in the time of king John, or who like William de Wrotham, the archdeacon of Taunton, had the care of the king's ship and the management of naval affairs¹³⁾. In 1232 we already find *libertates et liberae consuetudines* attached to the office of *custodia maris*¹⁴⁾, but for the actual administration of the law maritime we have in the early days to look rather to local

¹⁾ *Le Blanche v. L. & N. W. Rly.* (1876) 1 C. P. D. 286.

²⁾ Cf. *Bright v. P. & O. S. N. Co.* (1897) 2 Com. Cas. 106.

³⁾ Cf. *The Mariposa* [1896] P. 273; but not in the case of emigrants.

⁴⁾ *Aldworth v. Stewart* (1866) 14 L. T. 862.

⁵⁾ *Boyce v. Bayliffe* (1807) 1 Camp. 58.

⁶⁾ *King v. Franklin* (1858) 1 F. & F. 360.

⁷⁾ *Aldworth v. Stewart*, *ubi supra*.

⁸⁾ *Prendergast v. Gempton* (1837) 8 Car. & P. 454.

⁹⁾ *Noden v. Johnson* (1850) 16 Q. B. 218.

¹⁰⁾ M. S. A. 1894, s. 287.

¹¹⁾ Cf. Selden Society, vols. VI, XI.

¹²⁾ Gervase Alard, one of a notable family of sea-captains of the Cinque Ports, is styled Admiral in 1300, but as early as 1283 William de Leybourne was the king's Admiral to the West: and cf. Rymer, Foed. I, 861.

¹³⁾ The constant association of ecclesiastics with naval affairs from the earliest days forms an interesting feature in the history of the Court of Admiralty; it was due no doubt in part to the superior learning possessed by the majority of 'clerks', but it probably was also found convenient because they were more familiar with the Civil Law, which has always had more influence in ecclesiastical and admiralty cases than in any other department of English Law

¹⁴⁾ Then held by Peter de Rivaulx (Petrus de Rivallis); cf. Close Rolls, 16 Hen. III, p. 152.

courts than to any central organization. The collection of laws known as the Laws of King Edward the Confessor¹⁾ mentions maritime jettison, but the earliest record of any court dealing with the law maritime is probably to be found in the Domesday of Ipswich²⁾. In this, and no doubt in other similar local courts of which the records, if indeed any records were kept, either have perished or have remained unpublished, a speedy remedy in accordance with the law maritime was available, the court sitting near the waterside³⁾ and often adjourning a case for further hearing from tide to tide, if not from hour to hour. There are, however, sufficient indications that until the rise of the Court or Courts of the Admiral the necessary jurisdiction could in penal or quasi-penal cases of a maritime character be exercised by the Courts of Common Law, or by the Commissions of Oyer and Terminer, or more frequently by the Chancellor (who, as a cleric, would be familiar with civil as well as canon law), or by the King in Council. Such jurisdiction, however, is beyond the scope of this article, and having been mentioned must be dismissed⁴⁾.

The Admiralty Court seems to have had its origin between the years 1340 and 1360, after the battle of Sluys had given Edward III the command of the sea for a considerable number of years; in the latter year John Beauchamp was appointed 'Admirallus omnium flotarum navium' and his patent or commission is the first which contained a provision giving 'potestatem audiendi querelas . . . et cognoscendi in causis maritimis et justitiam faciendi⁵⁾'. The first purely civil case in the Court of the Admiral seems to be that of the 'Cog Thomas'⁶⁾, where the original dispute was in respect of an alleged breach of charterparty by the master of a vessel chartered to carry wine from Spain to England in that on the outward voyage he deviated to Bordeaux to avoid capture and there wrongfully abandoned the adventure. From this date the records of cases other than the common claims in respect of piracy and spoil become more frequent⁷⁾. It is now possible to trace the development of the court in which the Admiral himself might sit, or his lieutenant or his deputy⁸⁾. When a litigant was dissatisfied with the decision of the court it was open to him to appeal, and the king would then appoint a commission to hear the appeal. This tribunal usually consisted of two or more knights and two or more doctors or bachelors of laws, and occasionally two or more merchants; the constitution of the tribunal by the appointment of knights and doctors was precisely the same as in the case of appeals from the Court of Chivalry or of the Constable or Constable and Marshal, and in practice the same persons are found as commissioners in cases from either court indifferently. The law here administered was not the common law of England but the maritime law of England, and the presence of the civilian lawyers as commissioners marks the difference between the principles of Admiralty and of Common Law, which has endured to the present day. The difficulty which the common law judges felt was that their procedure made no provision for the trial of cases where the cause of action could not be said to have arisen in some particular place within their jurisdiction, from which a jury could be summoned⁹⁾: it was clearly impossible to summon a jury from the high seas if the contract had been made there, or from Bordeaux or some other town if the

¹⁾ These cannot be attributed to a date earlier than 1070.

²⁾ Possibly referring to a period towards the end of the 12th century; cf. *Black Book of the Admiralty* (Rolls Series) vol. II.

³⁾ The precise place of sitting was material, as it was held that there could be no maritime jurisdiction in a court at any considerable distance from a place where the tide ebbed and flowed.

⁴⁾ Cf. *Selden Society*, vol. VI, p. XV *et seq.*

⁵⁾ 1360, 18 July; Rymer, *Foed.* III, 505. Earlier in the same year a similar commission was given to John Pavely.

⁶⁾ 1368, 20 Dec. (Close Rolls, 42 Edw. III, 458), *Herbury v. Stotter*.

⁷⁾ Cf. Close Rolls, 1369, 43 Edw. III, 53; 1371, 45 Edw. III, 224; Patent Rolls, 1382, 5 Ric. II, 2. The references are to the Record Series Edition.

⁸⁾ The earliest known patent of appointment of a judge of the Court of Admiralty is that of Master William Lacy, bachelor in laws, to be chief judge and commissary general of the king in the principal Court and other Courts of Admiralty in England, 10 March 1483, 23 Edw. IV; Patent Rolls, p. 346.

⁹⁾ It is however clear that where the cause of action did arise within the jurisdiction a court of common law or of Oyer & Terminer could hear it; cf. *Whyte v. Hereward* (1297) (25 Edw. I; Calendar of Justiciary Rolls, Record Series, Ireland, p. 92); a case of breach of covenant in a charterparty, tried at Limerick.

contract had been made abroad. Judges of a later era found no such difficulty when they discovered the device of allowing a fictitious venue, so that a plaintiff might allege that his cause of action arose on the high seas, to wit in the parish of Stepney, or in New York, to wit in the parish and manor of Greenwich, an allegation which the defendant was not allowed to deny. Owing in part to this obstacle to suits at common law and to the absence of any technicalities as to venue in civil law, purely maritime matters found a natural resort in the courts where civil law was known and practised, a resort the more congenial because, as in the case of the law merchant, it was there possible to appeal to those general rules of universal acceptance on which both maritime and commercial laws were so largely based¹).

The rules of maritime law as administered in England have at least a common ancestry with the rules and ordinances of which so many codes were formulated before the Court of Admiralty arose. These ordinances deal much more with the control and management of a ship and her crew, and the rights of a master, a seaman, or a part-owner, than with the use of a vessel as a profit-making chattel; they seem to have travelled westwards through the Mediterranean and after undergoing many modifications and alterations without any very substantial changes to have reached the distant shores of the Baltic Sea. Of all these codes that of Oléron (by some said to have been promulgated by Richard Cœur-de-Lion) was the most favorably regarded in England; this was probably due to the personal union in the kings of England from Henry II (1154—1189) onwards of the sovereignty of Guienne and England, and the great and constant traffic between England and such ports as Bordeaux and La Rochelle. The purpose of the codes was to regulate common incidents of navigation and commerce, but the jurisdiction of the Court of the Admiral was much more comprehensive; piracy and prize were peculiarly within his jurisdiction, which until 1835 extended to criminal matters as well as to civil claims. But few years elapsed after the formation of a Court of Admiralty before a long contest between the Courts of Common Law and of Admiralty began, in which the civilians urged the benefits of similarity of jurisdiction and procedure to the system known throughout the continent, while the common law invoked the traditional English feeling in favour of trial by jury rather than before a judge and assistants, and against the introduction of alien jurisprudence. It would be inopportune here to discuss this secular contest²), but at the end of the eighteenth century the fortunes of the Court of Admiralty had waned and its jurisdiction had become very much contracted. The Court then had two branches, the Instance Court, which dealt with such civil and criminal matters as were still left to the Admiralty³), and the Prize Court. This latter branch flourished exceedingly during the Napoleonic wars under the guidance of Lord Stowell⁴), the most eminent judge who has ever sat in the Court of Admiralty: but even his illustrious career did not regain for the Admiralty the jurisdiction it had lost. The Instance Court seems to have reached its nadir in 1835⁵), but in 1840 the passing of the Admiralty Court Act, 1840,⁶) began to restore its faded prosperity, and the later Act of 1861⁷) extended the scope of its jurisdiction so widely that even a civilian of the fifteenth century would have been satisfied. By virtue of the operation of the Judicature Acts 1873 and 1875⁸), the Court obtained jurisdiction to try any case which could be brought in a court of common law, and for twenty years it did in fact deal with many cases arising out of the use of ships or upon charterparties; with the establishment of the Commercial Court in 1895 cases not purely maritime tended to disappear from the Admiralty Court, and its business is now principally confined to the matters within its original jurisdiction or matters in which it has jurisdiction under the Admiralty Court Acts or the Merchant Shipping Acts.

¹) The statute 32 Hen. VIII, c. 14, s. 10 (1540) was designed to give merchants a summary remedy in admiralty in cases where a ship negligently delayed her voyage.

²) See stat. 13 Ric. II, st. 1, c. 5; 15 Ric. II, c. 3; 2 Hen. IV, c. 11; Selden Society, vols VI and XI and the introduction to each volume; Roscoe's Admiralty Practice, or Williams and Bruce, Admiralty Practice, Introduction.

³) Viz. wrongs committed on the high seas, salvage, possession actions, contracts of hypothecation, and actions by seamen for wages.

⁴) William Scott, Lord Stowell (1745—1836).

⁵) Cf. *The Neptune* (1835) 3 Hagg. Adm., 129.

⁶) 3 & 4 Vict. c. 65.

⁷) 24 Vict. c. 10.

⁸) See especially Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 11.

The effect of legislation has therefore been to establish a more powerful Admiralty Court with jurisdiction, such as was claimed in its early days, in cases of wrongs done at sea (usually collision cases), salvage, possession, bottomry and respondentia, wages and disbursements, necessities, claims in respect of mortgages of ships, towage, ownership or title, and claims in respect of building, equipping or repairing ships; it also has special jurisdiction in cases concerning the national character of ships¹⁾, and under the Foreign Enlistment Act, 1870, the Slave Trade Act, 1873, and the Naval Prize Act, 1864. The local Courts of Admiralty disappeared when the great Municipal Reform Act of 1835²⁾ was passed, with the exception of the Admiralty Court of the Cinque Ports³⁾; to some extent these local courts have been replaced by the County Courts, to which jurisdiction in specified matters only and subject to a pecuniary limit of jurisdiction, has been given by the County Courts Admiralty Jurisdiction Acts, 1868 and 1869. In these courts, which are appointed by Order in Council⁴⁾, the principles applied are the same as in the Admiralty Division of the High Court, except that a County Court can exercise jurisdiction *in rem* in cases merely concerning claims arising out of agreements for the use or hire of ships; and this is so wherever the owner of the ship may reside⁵⁾. Provision has also been made by statute for the exercise of Admiralty jurisdiction in all colonies⁶⁾, and also in places where British jurisdiction is exercised under the Foreign Jurisdiction Act, 1890⁷⁾, such as Shanghai and Constantinople.

Jurisdiction *in rem* and *in personam*. Jurisdiction *in rem* is in English law confined almost entirely to jurisdiction to enforce claims against shipowners and their ships, and is exercised almost wholly in Admiralty Courts⁸⁾; it may affect owners of ships or goods, not only by reason of collision or salvage or other peculiarly maritime events, but also in some cases where there is a contract for the carriage of goods or a claim for loss of life or injury to a person⁹⁾. It is therefore advisable to discuss the nature of the right *in rem* and the special features of an action *in rem* in English law. The law of England is believed to provide in one way or another a remedy for any civil wrong, whether arising out of a breach of contract or out of a wrong independent of contract, such as a refusal to pay demurrage due under a charterparty or a claim for damage to a person or property inflicted by a stranger; but this remedy is *prima facie* by personal action, i. e. an action *in personam*, in which the relief given by common law is usually in the form of damages which may or may not be recoverable after judgment, according to the ability of the wrongdoer to pay the damages awarded and of the claimant to obtain execution of his judgment against the wrongdoer. The distinctive feature of a remedy *in rem* is this, that where the claimant is entitled to proceed *in rem* he can, by following the prescribed procedure, procure the arrest and keeping in the custody of the law of the property belonging to the alleged wrongdoer or person in default in connection with which his claim arises, and he can thus become assured that in the event of his claim being substantiated he will at least have the *res* which is under arrest (or its proceeds, if, as may always be done, it has been replaced by bail, security, deposit, or sale as an equivalent) to answer his claim. Where his remedy is only by personal action he has no means of assuring himself that the property of the defendant will be available to meet his claim until, after obtaining judgment against the defendant, he is in a position to enforce his judgment debt by the ordinary processes of common law execution against the defendant's property: the value of this right is not necessarily great, so that the process *in rem* which assures him of some contribution (unless he is defeated by the existence of some other claim with a preferential right) towards his judgment debt offers a material advantage where it is available.

¹⁾ Cf. *The Maori King* [1909] A. C. 562.

²⁾ 5 & 6 Will. IV, c. 76.

³⁾ A court of great historic interest but little modern importance; it used to sit in St. James's Church, Dover (cf. Hist. MSS. Commission, 14th Report [4], 86): it may now sit anywhere.

⁴⁾ See O. in C. 19 May 1899.

⁵⁾ Cf. *The Rona* (1882), 7 P. D. 247; *Pugsley v. Ropkins* [1892] 2 Q. B. 184.

⁶⁾ See Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict. c. 27).

⁷⁾ *Ibid.* s. 12; cf. M. S. A. 1911 (1 & 2 Geo. V. c. 42).

⁸⁾ Recent statutes, such as the Shipowners' Negligence (Remedies) Act, 1905, the Workmen's Compensation Act, 1906, give some powers *in rem* to all courts of record; cf. M. S. A. 1894, s. 688.

⁹⁾ A. C. A. 1861, ss. 6, 35; Maritime Conventions Act, 1911, 1 & 2 Geo. 5, c. 57, s. 5.

The res must be within the jurisdiction. The possibility of process *in rem* exists when the *res* in respect of which the claim arises is found within the territorial jurisdiction of the State under whose authority a court exercising jurisdiction *in rem* acts: in cases in which process *in rem* is allowed the court will entertain an action *in rem* over any ship found within its territorial jurisdiction, whether the vessel be British or foreign; and when once an action *in rem* has been properly initiated the case will proceed in the manner in which proceedings in the Admiralty Division are required to proceed, whatever the nationality of the vessel or other *res*, as such matters are governed by the *lex fori* as to form and procedure¹) and evidence, and the remedy to be given²). Where it is necessary to decide as to existence of a contract, the court may have to consider the law of the place where it was made or of the place where it is to be performed; but whether the contract is one which an English court will enforce at all is a matter to be determined according to English law³).

Jurisdiction by agreement if res outside the territorial limits. Where the *res* is beyond the jurisdiction of the English Court of Admiralty, it is not unusual for the owner of the *res* to agree with the claimant, in cases where the court would have jurisdiction if the *res* were within the territorial jurisdiction, that the case shall proceed as if the *res* were in fact within the jurisdiction of the English Court: in such cases, save that there can be no actual arrest of the *res*, the matter proceeds as if the *res* had in fact been arrested here, bail or security being given as if the *res* had in fact been arrested and it was desired to effect its release: this practice obtains where the claim is one in which, under the local maritime law where the *res* in fact is, the claimant would be entitled to have the *res* made available by seizure to answer his claim, so that the agreement really amounts to an election by the parties to try the case before a particular *forum* in lieu of the local *forum*.

Process in personam in Admiralty. A claimant in Admiralty matters always has an equally available, but not necessarily an equally effective, remedy by procedure *in personam* where he finds the person against whom he claims within the jurisdiction of the English Courts or is allowed to serve him, as a British subject, with a writ out of the jurisdiction or, as an alien, with notice of a writ. In some cases procedure *in personam* is the only procedure available, as where one vessel is lost in a collision; in others it is the only remedy practicable, as where the offending *res* is in an unknown locality or in a place where maritime liens are not recognised or where it is inadvisable to proceed before the local tribunals.

There are, moreover, cases in which only a personal action is allowed in England, such as actions against a pilot for negligence causing damage to the ship piloted by him or to another ship⁴); or claims arising out of a breach of a contract of carriage which cannot be brought within the terms of the Admiralty Court Act, 1861⁵). It is unnecessary here to discuss the general jurisdiction *in personam*, which the Admiralty Division has as a co-ordinate branch of the High Court of Justice, but it is in respect of this jurisdiction that it has since 1875 adjudicated in many important cases on charterparties and policies of marine insurance.

XVII. Maritime Liens.

Whatever may be the true origin of the present system of procedure *in rem*⁶) it is in effect intimately connected with the existence and operation of maritime liens.

Nature of maritime liens. A maritime lien is a right which is given to a person for services rendered to or damage done by a maritime *res*⁷); except in some cases of wages, it is also always a right in respect of which there is a personal liability of the owner of the *res* for services to him or damage done by his *res* in the course of its ordinary employment, the owner being presumed to be liable if there has

¹) Cf. *Leroux v. Brown* (1852) 12 C. B. 801 (as to applicability of the English Statute of Frauds).

²) *The Tagus* [1903] P. 44.

³) *Rousillon v. Rousillon* (1880) 14 Ch. D. 351.

⁴) Cf. *Reg. v. City of London Court* [1892] 1 Q. B. 273.

⁵) S. 6.

⁶) See Williams & Bruce, *Admiralty Practice*, 3rd ed., pp. 16 *et seq.*, 82; Kennedy, *Civil Salvage*; *The Burns* [1907] P. p. 148, per Moulton, L. J.

⁷) Cf. *The Ripon City* (1897) 67 L. J., P. 101.

been a breach of duty, whether he is personally in default or not. Common law or possessory liens are rights over the property of another and depend for their efficacy on possession: a maritime lien, resembling in this respect equitable liens or rights against the property of another, is independent of possession (which, indeed, except in the case of salvage could hardly be enjoyed by the person entitled to the lien), and attaches to the whole *res* against which it exists from the moment it arises and irrespective of any subsequent events affecting the *res*: in effect, if there is a good maritime lien, it amounts to a diminution in value of the *res*, in whosoever possession the *res* may thereafter be, to the extent of the just claim under the lien until the lien is satisfied. As some maritime liens are preferred to others, the holder of a maritime lien may himself not have a right to look to the full apparent value of the *res* as his security, as where the holder of a bottomry bond finds that the vessel is already subject to a maritime lien for collision-damage. This peculiar nature of a maritime lien has been authoritatively enunciated in the case of *The Bold Buccleugh*¹⁾ by the Judicial Committee of the Privy Council: "A maritime lien is the foundation of a proceeding *in rem*, a process to make perfect a right inchoate from the moment the lien attaches; and whilst it must be admitted that where such a lien exists a proceeding *in rem* may be added, it will be found to be equally true that in all cases where a proceeding *in rem* is the proper course, there a maritime lien exists²⁾ which gives a claim or privilege upon the thing, to be carried into effect by legal process. This claim or privilege travels with the thing into whatsoever possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached." At the time when this decision was given, the Judicial Committee of the Privy Council was the final Court of Appeal in Admiralty causes for England, and *The Bold Buccleugh* was an English cause; all the weight therefore which such a decision commands³⁾ must be given to this decision: it must, however, be read subject to the modification that the subsequent statute of 1861⁴⁾, by giving jurisdiction to be exercised either *in personam* or *in rem* in matters in which that statute gave jurisdiction to the Admiralty Court, has made it no longer possible to say that where a remedy *in rem* exists, there a maritime lien also exists, as in cases where there was no maritime lien before the Act of 1861, there is now a remedy *in rem*, but no corresponding maritime lien.

Maritime liens by statute. A maritime lien, at any rate in English law, although where the civil law prevails a different view may be taken⁵⁾, is not so much favoured as being in accordance with natural justice that it will be deemed to have been created without the intention to do so being manifest, and this principle has been applied to the cases of a master's disbursements⁶⁾ (whereupon a special enactment was passed to give the master a maritime lien for disbursements) and of necessities supplied to a foreign ship, when the view entertained for upwards of 40 years that a maritime lien had been given⁷⁾ was finally controverted⁸⁾. The maritime liens for disbursements now given by statute⁹⁾, and for damage by vessels to harbours, docks, etc. given by the Harbours etc. Clauses Act, 1847¹⁰⁾, are the only cases of maritime liens created by statute, and all other maritime liens exist only where they existed under the inherent jurisdiction of the Court of Admiralty as exercised before 1840. It must not be assumed that where English law creates a maritime lien for a wrong done by a ship, it necessarily follows that such a lien will attach where a wrong of the nature contemplated is done outside the jurisdiction of the English Courts¹¹⁾ and is not wrongful where it is done. Similarly, although jurisdiction in Admiralty causes has been given by statute¹²⁾ to selected County Courts in England

1) (1851) 7 Moo. P. C. 267, pp. 284—285.

2) This particular statement is no longer accurate.

3) *The Cayo Bonito* [1903] P. 215.

4) A. C. A. 1861 (24 Vict. c. 10) s. 35.

5) Cf. *The Henrich Björn* (1886) 11 App. Cas. 270.

6) *The Sara* (1889) 14 App. Cas. 209.

7) By the A. C. A. 1840, 3 & 4 Vict. c. 65.

8) *The Henrich Björn* (1886) 11 App. Cas. 270.

9) M. S. A. 1894, s. 167.

10) (1847) 10 & 11 Vict. c. 27, s. 74.

11) *The M. Mozham*, (1875), 1 P. D. 107.

12) County Courts Admiralty Jurisdiction Acts (1868) 31 & 32 Vict. c. 71, and (1869)

and Wales, subject to certain limitations as to the nature of the causes which they may entertain and as to the pecuniary limits of the claims in various cases, and although this jurisdiction may in all cases be exercised either *in rem* or *in personam*, the Acts do not create any new maritime lien in cases where a maritime lien does not exist apart from the Act.

Effect of extending the original jurisdiction where a maritime lien existed. Where, however, the statutes regulating Admiralty jurisdiction purport to extend the jurisdiction in matters in which a maritime lien already existed in similar cases apart from the extending statute, it seems that under the extended jurisdiction a maritime lien will attach, as in *The Bold Buccleugh*¹⁾ (a case of collision in the body of a county), and in salvage cases²⁾.

What maritime liens are recognised. The practical result is that by English law a maritime lien is given in cases of damage by collision wherever it may occur, damage to harbours and docks, salvage, wages, disbursements, and bottomry; and these liens are recognised by any English court competent to entertain an action where such a lien exists. In actions concerning the supply of necessities, towage, ownership, possession, registered mortgages and damage to cargo by the carrying ship, a remedy *in rem* is given, but not a maritime lien.

Maritime liens distinguished from statutory rights in rem. The difference in effect between a maritime lien and a statutory right to proceed *in rem* is this, that where the claim is based on a right which carries with it a maritime lien, no claim not carrying with it a right to a maritime lien superior to the former can deprive the claimant of the benefit of the lien, whereas if the right *in rem* is purely the creature of statute it is postponed to all claims which have previously attached before the arrest; the claimant can procure the arrest of the property and get the benefit of that process, but he takes it as he finds it, i. e. subject to prior claims: if the owner of the *res* when the claim is made in respect of a right *in rem* given by statute without creating a maritime lien is not the same person as the owner when the breach of duty giving rise to the claim occurred, the right *in rem* is defeated, as the *res* itself only becomes chargeable with the debt (as all such rights *in rem* under statute arise from the breach of an express or implied agreement by the owner) when the suit is actually instituted³⁾ and there is no breach of any duty by the person who is the owner at the time of the arrest.

Remedies on judgments in rem. With regard to the extent of the remedies in actions *in rem* and *in personam*, it seems that in the case of actions *in rem* a distinction is to be drawn between suits *in rem* in which the owner of the *res* does not appear to defend the suit [in which event the amount recoverable in the suit cannot exceed the value of the *res*] and suits *in rem* in which the owner of the *res* does appear, in which event he becomes personally liable for the full amount of damages awarded, even if such damages exceed the value of the *res*⁴⁾. This is not a place in which to discuss the controversy; but if process *in rem* was originally a process to compel appearance, it is not unreasonable that a judgment *in rem* should be followed, where there has been an appearance by the owner, by the consequences of a judgment *in personam*, and that is the effect, if not the reason, of the decisions; a vessel arrested in an action *in rem* and released on bail has been taken in execution to satisfy the balance of the judgment for which the bail was insufficient⁵⁾; in fact the *res* is not a security to answer the judgment but a security for so much of the judgment as it can satisfy.

Remedies on judgment in personam. Where there is a judgment *in personam* the successful party is entitled to recover, if he can, the full amount from the property of the other party; but he has no security that he will recover anything.

Rights in rem and in personam cumulative. The rights, if a lien exists, are cumulative; a claimant could not resort to both at one time, but if, having recovered judgment in an action *in rem*, he failed to get satisfaction, he could sue *in personam* for the balance or *vice versa* as in the *John Mary*⁶⁾, where after an

¹⁾ (1851) 7 Moo. P. C. 267; cf. A. C. A. 1840, s. 6.

²⁾ M. S. A. 1894, s. 565.

³⁾ *The Two Ellens* (1872) L. R. 4 P. C. 161.

⁴⁾ *The Gemma* [1899] P. 285; see Williams & Bruce, Admiralty Practice, pp. 18—24; and for a case of a foreign vessel where the owners appeared, *The Duplex* [1912] P. 8.

⁵⁾ *The Freedom* (1871) L. R. 3 A. & E. 495.

⁶⁾ (1859) Swa. 471.

action *in personam* for collision-damage, an action *in rem* was allowed, although the vessel had meanwhile been sold to a third person; and in *Nelson v. Couch*¹⁾ where, after an action *in rem* for collision-damage, in which the *res* was insufficient to satisfy the damages (and the owner had not appeared) an action *in personam* was allowed²⁾. It was only where the claimant could have recovered in the earlier action the compensation which he claimed in the second action that he could be defeated by a plea of *res judicata*.

In practice such cases are not now likely to occur, as the principal object of the reforms effected by the Judicature Acts 1873—1875 was to enable all Courts in each action to give all the appropriate remedies required in each case³⁾, so that there has been no such case of a second action since 1875: but where a seaman or master is seeking to recover wages and the owner has become insolvent the case might occur now.

Maritime liens over property of insolvent owners. Where a maritime lien is claimed against a *res* of a limited liability company no action may, after a winding-up order, be proceeded with or commenced against the company except by leave of the Court⁴⁾, and any sequestration put in force against the estate or effects of the company after the commencement of the winding-up is void⁵⁾. Sequestration seems to include 'arrest'⁶⁾, and therefore in such cases there would be a difficulty in enforcing a maritime lien by any proceeding in Admiralty. The proper course is to appear and claim in the winding-up⁷⁾, or, where a stranger to the winding-up, such as a mortgagee in possession of a ship, is a necessary party, to get leave to proceed in Admiralty⁸⁾.

Where a maritime lien is claimed against the *res* of a person subject to the English Bankruptcy Acts, any action to enforce it against his property, after the presentation of a bankruptcy petition against him, may be stayed⁹⁾, and therefore it may become necessary to assert the claim in the bankruptcy proceedings. However, both in winding-up and in bankruptcy the priority of claimants with a maritime lien will be respected and preserved; and in bankruptcy a claimant with a maritime lien is a secured creditor¹⁰⁾.

XVIII. Collision.

Jurisdiction in damage claims. In considering the law applicable to damage it is necessary to advert briefly to the present extent of the jurisdiction in Admiralty. The inherent jurisdiction in Admiralty has always extended to damage received by or done to a vessel on the high seas¹¹⁾, that is to say outside territorial waters, whether the ships concerned are both British, or one British and one foreign¹²⁾, or both foreign¹³⁾. The court may, since the passing of the Admiralty Court Act 1861, entertain suits for damage done in foreign waters, whether the ships are both British, or one foreign and one British¹⁴⁾, or both are foreign¹⁵⁾. It exercises jurisdiction also in the case of territorial and inland waters, since modern legislation has removed the restrictions which mediaeval statutes imposed on the bringing of such cases into the Admiralty Court, in any case where the collision is in British waters; if the damage has occurred in foreign territorial waters there is a preliminary question whether the act of the ship alleged to be in default was wrongful at the place where the damage was done, as an English court can only entertain an action

1) (1863) 15 C. B. N. S. 99.

2) Ibid. see per Willes, J., pp. 108, 9.

3) See Judicature Act, 1873, s. 25 (7) and *The Dictator* [1892] P. 304.

4) Companies (Consolidation) Act, 1908 (8 Edw. 7. c. 69), s. 142.

5) Ibid. s. 211.

6) *In re Australian Direct Co.* (1875) L. R. 20 Eq. 325 (master's claim for wages).

7) Buckley on Companies, 9th. ed., p. 351.

8) *In re Rio Grande do Sul S. S. Co.* (1877) 5 Ch. Div. 282 (master's claim for disbursements).

9) Bankruptcy Act, 1883, s. 10.

10) Ibid. s. 168.

11) Cf. *The Zeta* [1893] A. C. 468.

12) Cf. *General Steam N. Co. v. Guillo* (1843) 11 M. & W. 877.

13) *The Johann Friederich* (1839) 1 W. Rob. 35.

14) *The Diana* (1862) Lush. 539.

15) *The Mali Ivo* (1869) L. R. 2 A. & E. 356 (collision between Norwegian and Austrian vessels in Turkish waters).

for a wrong committed within the jurisdiction of a foreign State if the act complained of is a wrong according to both the local¹⁾ and the English laws²⁾.

The jurisdiction therefore comprises cases:

1. Of damage done to or received by vessels on the high seas; this exists under the original inherent jurisdiction in Admiralty.
2. Of damage received by any ship or sea-going vessel, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the damage was received³⁾.
3. Of damage done by any ship⁴⁾, ship here meaning any vessel used in navigation and not propelled by oars⁵⁾.

The joint effect of the original inherent jurisdiction and of the Admiralty Court Acts is that the court has jurisdiction not only in suits for damage done on the high seas but also in suits for damage done elsewhere, as in the body of a county, and for damage received by a ship as well as for damage done by a ship, e. g. damage done to a vessel by a pier-head⁶⁾ or by a vessel which is not a ship within the Act of 1861, and for damage done to a ship as defined in the Act of 1861, although it is done by a craft which is not a ship or sea-going vessel⁷⁾.

Meaning of damage. Although mere proof of injury without proof of negligence is insufficient to give a right to damages, it is convenient to discuss first the meaning of "damage" in Admiralty law. Except in the case of damage to cargo it always implies that a vessel has done or has suffered damage, but not necessarily by collision, although that is by far the most frequent cause of action. Damage may be inflicted without actual impact or contact, as where one vessel was negligently allowed to drift down towards another, so that to avoid imminent risk of collision it was necessary to slip the latter's anchor and chain⁸⁾, where the damage was the value of the anchor and chain lost; or where a vessel by reason of being navigated at too great a speed in narrow waters created a swell which sank a barge⁹⁾; or a vessel by anchoring in the fairway caused another to take the ground in attempting to avoid her¹⁰⁾; or a vessel by improper navigation drove another into collision with a third vessel¹¹⁾. Again damage may be done by a ship to a stationary object, as where a vessel was negligently brought into contact with a landing-stage and damaged it¹²⁾, or where a vessel was negligently moored on an oyster bed, not in the ordinary course of navigation, and of which the existence¹³⁾ was known.

What must be proved in claims for damage. In an Admiralty action for damage the principles upon which one person can be held liable to another are precisely the same as at common law; it is an action to recover damages for injury to property or person or for loss of the use or enjoyment of property by reason of the negligence of another¹⁴⁾. The commonest case in Admiralty is an action for damage by collision, but in all cases the principles are the same. The action is usually one to realise the benefits of a maritime lien, and to establish his right to do so a claimant must prove:

1. That there has been a breach of some duty existing either according to the principles of common law or under a statute¹⁵⁾, and
2. That the person sued or his servants or agents are responsible for the breach of duty, and
3. That the breach of duty caused damage to the claimant.

¹⁾ *The M. Moxham* (1875) 1 P. D. 107, where the alleged wrong was committed by a British vessel in Spanish waters.

²⁾ Cf. *Carr v. Francis Times* [1902] A. C. 176.

³⁾ A. C. A. 1840, s. 6.

⁴⁾ A. C. A. 1861, s. 7.

⁵⁾ Ibid. s. 2.

⁶⁾ *The Zeta* [1893] A. C. 468.

⁷⁾ Cf. *Everard v. Kendall* (1870) L. R. 5 C. P. 428.

⁸⁾ *The Port Victoria* [1902] P. 25.

⁹⁾ *The Batavier* (1854) 9 Moo. P. C. 286.

¹⁰⁾ *The Industrie* (1871) L. R. 3 A. & E. 303.

¹¹⁾ *The Two Sisters* [1896] P. 117.

¹²⁾ *The Veritas* [1901] P. 304.

¹³⁾ *The Swift* [1901] P. 168.

¹⁴⁾ *The Mediana* [1900] A. C. 113.

¹⁵⁾ Cf. Harbours & Docks Clauses Act, 1847 (10 & 11 Vict. c. 27) s. 74.

Property to which the maritime lien extends. Ship and freight. The difference between an action *in rem* and an action *in personam* has already been discussed; in a damage action, if the proceedings are *in rem*, the maritime lien extends to the ship as she exists at the time of the arrest, with all her equipment, gear and furniture; it does not extend to cargo on board, except that the cargo may be arrested in respect of any freight due but unpaid, in order to secure the payment of the freight into Court. "It is beyond all question that the cargo on board a ship which does damage to another ship in collision is in no respect responsible for the damage. It is equally clear that the freight due, the property of the owners of the ship doing the damage, is attachable to make good that damage; and in ordinary cases the cargo is arrested for the purpose of making the owners of the cargo who at that time owe the freight to the shipowners pay (the freight due) into court to answer the damage which the latter are bound to make good. But the cargo is liable to arrest for no other purpose whatever". The owners of the cargo are, as such owners, in no respect to blame for the delict of the ship¹).

What freight is subject to the lien? The freight which the goods-owner can thus be compelled to pay is net freight after making such deductions as may be allowed under the contract of carriage, and it must be due at the time of the arrest. If therefore the vessel in fault can only carry the cargo to a place short of its destination there will in ordinary cases²) be no freight payable unless the cargo-owners voluntarily accept their goods there or by their own default prevent the forwarding of the goods to their destination³), or the vessel is entitled to deliver at the place where she is⁴). Where there is a maritime lien on the freight the claimant may, at least where the cargo all belongs to one owner, require the payment of all freight due in respect of the whole cargo, even though only a portion of it remains on board at the time of the arrest⁵). On payment of the freight the cargo-owner is entitled to a release of his goods.

Meaning of negligence. Negligence is in law a breach of a duty recognised by law to exercise reasonable care with regard to the person or property of another where there is a duty to exercise such care; it may be a duty to refrain from acting carelessly or a duty to act carefully; a breach of the duty becomes actionable when the breach causes damage to the person to whom the duty is owed.

Negligence must be proved by evidence. The mere occurrence of damage is not *per se* sufficient evidence of negligence; a claimant must prove some negligent act or negligent omission. 'That is the fact to be proved. If that fact is not proved the plaintiff fails, and if in the absence of direct proof the circumstances which are established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmative of the proposition'⁶). Negligence, therefore, when alleged, has to be established by proof of the absence of reasonable care where there was a duty to exercise it; in the case of damage it must be proved by showing an absence of such skill and care as is to be expected in the circumstances, which may include negligence in sending a vessel to sea in a condition which those responsible knew or ought to have known to be a possible source of danger to other ships or persons, such as insufficient crew or inefficient equipment (this however does not extend to latent defects). It is not, therefore, an absolute duty identical in extent in all cases, but the degree of care rather depends on the facts in each case; where a ship is concerned there is a duty to take reasonable care and to use reasonable precautions, but: 'Much greater care is reasonably required from the crew of a ship who ought to keep a look-out for miles, than from the driver of a carriage who does enough if he looks ahead for yards; much more skill is reasonably required from the person who takes command of a steamer than from one who drives a carriage'⁷).

The fact of collision not proof of negligence. The mere fact of collision is no sufficient cause of action without proof of negligence and damage; and negligence is not *prima facie* more imputable to the vessel which runs into another in motion

1) *The Flora* (1886) L. R. 1 A. & E. p. 47.

2) See p. 411.

3) *The Soblomsten* (1866) L. R. 1 A. & E., p. 297.

4) *The Teutonia* (1871) L. R. 4 P. C. 171.

5) *The Roecliff* (1869) L. R. 2 A. & E. 363.

6) *Wakelin v. L. & S. W. Rly.* (1886) 12 App. Cas., p. 45.

7) *The Voorwarts; The Khedive* (1880) 5 App. Cas. p. 891, per Lord Blackburn.

than to the vessel run into; it is imputable to any vessel which is proved to have been negligently handled.

Proof of failure to use reasonable care. Where it is proved that damage has been caused by the failure of those on board a vessel to use that degree of reasonable care which is demanded of a competent master or seaman, there is a *prima facie* case of negligence to be answered by the owner of the vessel which has so failed in its duty. The degree of care which is reasonable in the case of ships must vary with the circumstances of each case: the test is whether those responsible have exercised ordinary care, caution and maritime skill¹⁾ in the circumstances, and the circumstances are necessarily various.

Defences in claims for damage by collision. The defences to a claim for collision-damage may, besides the ordinary case of disproof of the evidence of negligence given by the claimant, be:

1. That the damage was due to the Act of God, or to inevitable accident, and that therefore no one is to blame; or
2. That it was due to the fault of the claimant only; or
3. That it was due to the joint negligence of both parties, so that both parties are in fault; or
4. That it is not negligence for which the defendant is answerable.

The Act of God and 'inevitable accident'. The Act of God means an accident due to natural causes such as lightning, frost, tempest or earthquake, independent of human agency; it may be foreseen as a possibility, e. g. a cyclone, but it cannot be averted. This no doubt is also an 'inevitable' accident, but the latter term is applied to other accidents independent of the agency of natural forces²⁾, and in Admiralty law it is 'that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution and maritime skill. If a vessel charged with having occasioned a collision should be sailing at the rate of 8 or 9 knots an hour when she ought to have proceeded only at the speed of 3 or 4, it will be no valid excuse for the master to aver that he could not prevent the accident at the moment it occurred; if he could have used measures of precaution, that would have rendered the accident less probable'³⁾. It will be observed that this definition requires that precaution should have been used as well as care and caution and skill at the time of the danger, and an accident is not in the legal sense 'inevitable' if reasonable precautions could have averted it: it is not sufficient to prove that when the danger approached there was no want of care and skill; if vessels are in a position of mutual danger, there is no inevitable accident if either of them is in default by reason of having allowed herself to get into such a position; if she has been equipped adequately and with reasonable care as to crew gear⁴⁾, hull and machinery⁵⁾, and has been properly navigated, yet nevertheless she finds herself in danger of collision, then a plea of inevitable accident may be used, e. g. to show that the damage was caused solely by the default of a third vessel⁶⁾ or by a dense fog which could not be foreseen⁷⁾. The allegation of negligence is always an allegation to be proved against the person alleged to have been negligent, and while it is sufficient to prove the absence of negligence as a defence, the greater burden of proving that what happened was inevitable may be assumed by a defendant against whom some evidence of negligence has been given, where he undertakes to prove that no blame at all can attach to him for want of precaution and care before the collision became inevitable. It follows that such a defence is not open to a vessel where there has been a disregard of the ordinary rules of seamanship, e. g. as to look-out, or moderate speed in thick or foggy weather or when about to run into snow or fog, or anchoring in a suitable place.

Negligence solely that of the claimant. Secondly, it may be shown that the negligence causing the damage was negligence of the claimant only; this implies that not only does the defendant disprove the plaintiff's case but also that he can establish a case of negligence against the plaintiff; and this is often done by way

1) *The Marpesia* (1872) L. R. 4 P. C. p. 220.

2) *Nugent v. Smith* (1876) 1 C. P. D. 435.

3) *The Virgil* (1843) 2 W. Rob. 205; cf. *The Marpesia*, *supra*.

4) *The Virgo* (1876) 3 Asp. 285.

5) She would not be responsible for latent defects undiscoverable by reasonable care.

6) *The Schwan, The Albano* [1892] P. 419.

7) *The Nador* [1909] P. 300.

of counter-claim in the plaintiff's action. As the question of what must be proved to establish negligence has already been considered, there are no special features to be discussed here.

Contributory negligence: its effect in Admiralty. A third defence which is available in collision actions is that of contributory negligence. It is unnecessary here to discuss the origin of the doctrine of contributory negligence, but as in some events the doctrine has a different effect in Admiralty from that which it has at common law the position must be explained. Where damage is caused by negligence, there are three possible sets of circumstances:

1. The defendant B has been proved to be negligent, but the plaintiff A could by the exercise of reasonable care have avoided the injury and the consequent damage.
2. A has been negligent, but B by the exercise of reasonable care could have avoided the injury and damage.
3. A and B have both been negligent, and the proximate cause of the damage is the joint result of the negligence of both, or in other words either of them could have avoided the accident and neither of them did.

At common law, and in Admiralty also, A can recover no damages in the first case; in the second case he can recover full damages to the extent to which B is liable; but in the third case Admiralty and common law part company, for at common law neither party can recover anything, while in Admiralty the loss was formerly divided equally¹⁾ and is now divisible in proportion to the culpability of each vessel, or equally where degrees of culpability cannot be fixed²⁾.

English rule as to damages where two or more vessels are in fault. Whether negligence can be said to be contributory or not must be largely a consideration of time; where both parties are and continue to be in fact negligent, a time must come after which both of them cease to be able to avert the consequences of their negligence, and so an injury is done. In this event, in any English Court, the losses on both sides are brought into hotchpot, i. e. are treated as one sum and in virtue of what has been called *rusticum judicium* each party had formerly to bear an equal share. This rule of Admiralty law was preserved in force by statute³⁾; there was no attempt to apportion the blame, as strict justice was deemed to be unattainable; but the court is now required to apportion the liabilities according to the different degrees of fault, or equally if different degrees of fault cannot be established⁴⁾.

Difficult questions necessarily arise as to the limits of the doctrine of contributory negligence; but the ordinary meaning of negligence, viz. a breach of a duty to exercise ordinary care, caution and maritime skill is perhaps the only safe guide; where the negligence of one vessel puts another vessel into a position in which the latter cannot by the exercise of ordinary care and skill avoid a collision then only the former vessel is to blame: but if the latter could have avoided the consequences by using ordinary care, then the original negligence of the former vessel is not the cause of the collision, and the latter vessel alone is to blame⁵⁾.

The working out of the rule of division of loss is dealt with below in discussing damages in Admiralty actions⁶⁾.

Division of loss now the universal English rule. The doctrines of contributory negligence and of division of loss are applied in all cases of collision-damage where contributory negligence is found to exist, in whatever English court the action may be⁷⁾, and the rule of division of loss is expressly directed to be applied in all cases (whatever the nationality of the ships concerned), wherever the damage was done. It is applied to damage to cargo on board either vessel⁷⁾; and also where the collision is between two ships owned by the same owners⁸⁾.

1) *The Margaret* (1884) 9 App. Cas. 873, p. 881; cf. *The Blow Boat* [1912] P. 217.

2) Maritime Conventions Act, 1911, s. 1.

3) Judicature Act, 1873, s. 25 (9).

4) Maritime Conventions Act, 1911, s. 1; *The Rosalia* [1912] P. 109.

5) *The Margaret* (1886) 9 App. Cas. p. 887.

6) See p. 463.

7) See p. 463.

8) *Chartered Mercantile Bank of India v. Netherlands Steam Co.* (1883) 10 Q. B. D. 521.

Presumption of fault on breach of Collision Regulations. Before the passing of the Maritime Conventions Act¹⁾ the rule of division of loss was frequently applied in cases where the court was bound by statute²⁾ to hold that a ship was in fault because she had infringed some one or other of the Collision Regulations which in the circumstances was applicable: on proof of such infringement the court was bound to hold the infringing ship to blame³⁾, even though she had committed no really negligent act, if the breach could by any possibility have contributed to the collision, unless the court was satisfied that in the circumstances it was necessary to depart from the regulation⁴⁾. It was immaterial whether the infringement did or did not contribute to the collision if by any possibility it could have contributed to it⁵⁾; and the burden of proving that the infringement could not possibly have contributed to the collision lay on the party guilty of the infringement⁶⁾. The penal consequences, however, only followed where there had been some opportunity of complying with the regulation infringed⁷⁾; and departure from the regulations could be justified by proof of necessity⁸⁾; it was not necessary also to show that it was successful⁹⁾.

Presumption of fault. Failure to stand by. A similar presumption of fault was imposed where after a collision either vessel failed to stand by to assist the other vessel, so far as it could be done without danger to the vessel required to stand by, her passengers and crew¹⁰⁾. This presumption was less frequently important than the presumption under section 419 (4), as where a vessel was in fact negligent it was superfluous, and where she was proved not to have been negligent there was 'proof to the contrary'¹¹⁾ rebutting the presumption¹²⁾; but it would have sufficed to impose liability on a ship in the absence of any other evidence save the fact of collision, or where the circumstances were equally consistent with the negligence of either vessel. The present duty of a master to render assistance to any person in danger at sea¹³⁾ is not to detract from the voluntary character of his services, if any are rendered¹⁴⁾; and, even before this provision was enacted, where two vessels had been in collision by the fault of one, the other might earn salvage by rendering assistance.

Abolition of presumption of fault by the Maritime Conventions Act. The statutory presumptions of fault under the Merchant Shipping Act now are abolished¹⁵⁾, with the effect that a breach of any of the Collision Regulations now raises no presumption of fault, except in so far as the same evidence which proves a breach of a regulation may be excellent evidence to prove negligence in fact. As before the repeal of these provisions, evidence that a vessel has disregarded the customary mode of navigation is evidence of negligence, even where she was not bound by regulation to observe that mode of navigation¹⁶⁾; and, similarly, disregard of the ordinary rules of seamanship, such as moderate speed in thick or foggy weather or keeping a good look-out is very cogent evidence of negligence; so, too, a breach of a local rule of navigation is very good evidence of negligence unless it is explained by other evidence justifying the departure from the rule¹⁷⁾.

Presumption of fault in local waters. How far the repeal of these provisions as to presumptions of fault will abolish such presumptions in all waters is a difficult problem. Clearly there is now no such presumption where local rules have

¹⁾ 1911 (1 & 2 Geo. 5, c. 57) s. 4.

²⁾ M. S. A. 1894, ss. 419 (4), 422.

³⁾ Cf. *The Voorwarts and The Khedive* (1880) 5 App. Cas. 876.

⁴⁾ Cf. *The Benares* (1883) 9 P. D. 16.

⁵⁾ *The Corinthian* [1909] P. p. 280.

⁶⁾ *The Arratoon Apcar* (1889) 15 P. D.

⁷⁾ *The Voorwarts* (1880) 5 App. Cas. p. 894.

⁸⁾ *The Concordia* (1866) L. R. 1 A. & E. p. 98.

⁹⁾ *The Benares* (1883) 9 P. D. 16. Cf. *The Hazelmere* [1911] P. 69.

¹⁰⁾ M. S. A. 1894, s. 422.

¹¹⁾ *Ibid.* s. 422 (2).

¹²⁾ *The Tryst* [1909] P. 333.

¹³⁾ M. C. A. 1911, s. 6 (1).

¹⁴⁾ *Ibid.* s. 6 (2).

¹⁵⁾ M. C. A. 1911, s. 4.

¹⁶⁾ *The Fyenoord* (1858) Swa. 374; *The Kennet* [1912] P. 114.

¹⁷⁾ *The Raithwaite Hall* (1874) 2 Asp. 210.

been made by a competent authority under the Act¹⁾ in such a manner as to import the penal clause²⁾ with its penal consequences, as these consequences no longer attach; but where the local rules are made under an Act which creates such presumptions as formerly were created by s. 419 (4), or where they contain a valid rule imposing such consequences, there may still be presumptions of fault. Where nothing in the Merchant Shipping Act, or in a local Act under which rules have been made, or in the rules so made, creates a presumption of this kind, breach of a rule is evidence, not proof, of negligence³⁾.

Liability for damage. Who may be made liable for damage. In Admiralty, as at common law, the person whose negligence causes damage is legally responsible for it; he may be a seaman, pilot, master or other ship's officer, against whom the right of redress is not necessarily of great value; or he may be some person who is answerable for the acts of another, as the shipowner or a charterer by demise.

When does a maritime lien for damage attach? 'The result of the authorities cited appears to me to be this, that the maritime lien resulting from collision is not absolute. It is *prima facie* a liability of the ship which may be rebutted by shewing that the injury was done by the act of some one navigating the ship not deriving his authority from the owners⁴⁾; and that, by the maritime law, charterers in whom the control of the ship has been vested by the owner are deemed to have derived their authority from the owners, so as to make the ship liable for the negligence of the charterers who are *pro hac vice* owners. These propositions do not lead to the conclusion that where as between the charterers and the person injured, the charterers are not liable, the ship remains liable nevertheless. On the contrary, I draw from these premises the conclusion that whatever is a good defence of the charterers against the claim of the injured person is a good defence for the ship . . .⁵⁾. If it can be established that a person in charge of a ship has been guilty of wilful damage or of negligence causing injury to the person or property of another, that person can be held liable; and if it can further be established that that person stood in the relation of servant to another and that he was negligent in the course of his employment, a liability is established against the employer also⁶⁾. In the ordinary course those employed about a ship are the servants of the owners, and the fact of ownership has been held to be *prima facie* evidence that the master and crew are the owner's servants⁷⁾. The ordinary rule of English law is that the employer is answerable for every such wrong of the servant or agent as is committed in the service and within the scope of his authority, though no express command or privity of the master be proved⁸⁾. In the case of collision, where an act of a servant coming within this principle does damage, the servant is personally liable and a maritime lien arises against the ship; but if the act is merely a wrongful act of the servant not done in the course of his employment, the owner is not answerable and no maritime lien attaches⁹⁾. The employer might be held liable for the acts of servants causing damage to others; but no maritime lien will exist unless in the course of their employment they use the ship as the instrument of mischief: 'to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage'¹⁰⁾. The liability of the owner and the attaching of a maritime lien seem to be convertible terms, whether the owner be the real owner or owner *pro hac vice*. 'It is right in principle and only reasonable in order to secure prudent navigation that third persons whose property is damaged by negligence in the navigation of a vessel should not be deprived of the security of the vessel by arrangement between the persons interested in her and those in possession of her: and I consider that it is

1) M. S. A. 1894, s. 421 (2): e. g. the Humber rules.

2) Ibid. s. 419 (4).

3) *The Harton* (1884) 9 P. D. 44.

4) Serious questions may arise under the Maritime Conventions Act, 1911, as to the effect of s. 9 (4) in extending the liability of the ship where damage is done by 'any person other than the owners responsible for the fault of the vessel'.

5) *The Tasmania* (1888) 13 P. D. p. 118, per Sir James Hannen.

6) *River Wear Commissioners v. Adamson* (1877) 2 App. Cas. p. 767, per Lord Blackburn.

7) Ibid. p. 768.

8) *Lloyd v. Grace, Smith & Co.* [1912] A. C. 716.

9) *Currie v. M'Knight* [1897] A. C. 97.

10) Ibid. p. 101.

also right and reasonable that persons who have rendered services to a vessel under circumstances which entitle them to treat her as owned by the persons in possession should have the same rights against the vessel as if her real owners had been in possession¹⁾. It seems to follow that no act of an owner can defeat the right of third parties to claim a maritime lien in respect of damage by a vessel for which, if the owner had remained in possession, he would have been answerable: he may demise her to a charterer²⁾ or, it is submitted, leave her in the possession and custody of another for sale³⁾, and yet there will be a maritime lien for damage done by the vessel, enforceable against the vessel by virtue of the default of the *dominus pro tempore*, if he permits her to be in the possession and employment of another so as to become subject to maritime liens, although the real owner may not be personally responsible⁴⁾.

Liability of shipowners. The question of ownership is a question of fact; *prima facie* the registered owner is the employer of master and crew. Where a vessel is owned by co-owners all those who are co-owners on whose behalf the vessel is being employed (i. e. excluding any who have brought an action of restraint and obtained security) are liable for the default of their co-owners personally or of their servants. Their liability is joint and several, i. e. a person injured may sue either one or some or all; but, if he does not sue all, a judgment against such as he does sue is a bar to his thereafter suing the others. Each co-owner has a right to require the other co-owners to bear their rateable proportion of damages recovered in an action against himself, and where a part-owner has paid the sum due in respect of the liability for a collision under a decree in an action for limitation of liability, the sum may be brought into the part-ownership accounts as a disbursement⁵⁾.

Liability of trustees. Where the legal owner is a trustee, he is entitled to be indemnified against liabilities incurred by him as legal owner, in any case (where he has not committed a breach of trust) by an adult beneficiary⁶⁾, and at least to the extent of the trust property where a beneficiary is an infant⁷⁾.

Personal liability of the master or person in charge. The negligence of the master or other person in charge of a vessel, if she causes damage to a third person, gives a right of action against the person actually negligent; the right is co-extensive with the right against the employer, but the person injured cannot, after recovering judgment *in personam* against either the employer or the servant, subsequently sue the servant or the employer (as the case may be) for the same wrong, though the judgment remains unsatisfied. Where the master is also a part-owner, he cannot (but his co-owners can), limit his liability⁸⁾ for a collision occurring with his actual fault and privity⁹⁾ and is liable for the full damages¹⁰⁾. Where he is only a servant and the owner is not answerable for his negligence, a remedy *in rem* cannot be enforced against the employer, and the remedy against the master must be *in personam*¹¹⁾.

Negligence of a king's ship. Where the negligence is that of a king's ship, there can be no action against the Crown, and the only person who can be sued is the person actually in default, i. e. the person deemed to be in charge whose negligence causes the injury¹²⁾, not necessarily the captain; and the captain is not responsible for the negligence of others properly in charge, as he is not their employer. The Maritime Conventions Act, 1911, is to be construed as one with the Merchant Shipping Acts, 1894—1907, so that it does not apply to king's ships, no special provision having been made that it shall do so¹³⁾; it seems therefore to follow that where there is a case of joint default by a king's ship and any other, there is now no rule of division of loss available, and nothing can be recovered by either party.

¹⁾ *The Ripon City* [1897] P. pp. 244, 245.

²⁾ *The Lemington* (1874) 2 Asp. 473.

³⁾ As in *The Orient*, cited in Williams & Bruce, p. 83 (n).

⁴⁾ Cf. *The Ripon City* [1897] P. p. 244.

⁵⁾ M. S. A. 1894, s. 505.

⁶⁾ *Hardoon v. Belilios* [1901] A. C. 118.

⁷⁾ Cf. *In re Raybould* [1900] 1 Ch. 199.

⁸⁾ See p. 465.

⁹⁾ *The Yarmouth* [1909] P. 293.

¹⁰⁾ As he is an actual wrongdoer.

¹¹⁾ Cf. p. 445.

¹²⁾ Cf. *The Sanspareil* [1900] P. 267.

¹³⁾ M. S. A. 1894, s. 741.

Excuse of obedience to orders that must be obeyed. As a shipowner can only be held liable for his own negligence or for the negligence of his servants, it follows that it is a good defence that he or his servants were acting under superior orders, that is, orders which he is required by law to obey. Such orders may be those of:

1. Compulsory pilots, or
2. Harbour and other similar authorities, or
3. Other officials entitled to issue orders as to navigation and handling of his ship.

Defence of compulsory pilotage. A pilot is any person not belonging to a ship who has the conduct (i. e. control) thereof¹). If the ship is bound to employ a pilot by law²) and does so, that pilot is not a servant of the shipowner, and the shipowner is not liable for his acts or defaults. He remains liable for the acts and defaults of his servants while the pilot is on board, but for the acts of the pilot who, as to navigation in the pilotage waters, supersedes the master, he is not liable; for collisions and damage done by the pilot's neglect or default in British waters only the pilot is liable.

This immunity of the shipowner is a peculiar feature of English law, and is rarely found elsewhere. It only extends to cases of compulsory employment of a pilot who is not one of the owner's servants on the ship or another ship of the same owner; if, as frequently happens, the master has a pilotage certificate qualifying him to act as pilot in particular waters³), the owner, if he does not take a pilot from outside, remains liable for the acts of the master *qua* pilot as well as *qua* servant.

Compulsory pilotage in British waters. The English pilotage law extends only to the United Kingdom and the Isle of Man⁴), but within those limits it applies to all ships, British or foreign, which are under an obligation to have a pilot: there is no general obligation to take a pilot, but a particular obligation in certain areas for particular classes of ships. The chaos of the law with regard to compulsory pilotage is one of the least creditable features of English maritime law. It is fully discussed in a work of recognised authority⁵); and it is deemed better to indicate here only a few general propositions. The effect of legislation is to continue in force compulsory pilotage where it was made compulsory by the act of 6 Geo. 4, c. 125, subject to all exemptions then in operation⁶); vessels carrying passengers between any two places in the United Kingdom, Channel Islands, and the Isle of Man must carry a qualified pilot⁷); but a vessel passing through an intermediate pilotage district from a place outside that district is exempt from employing a pilot in that district (except, presumably, where she is required to carry a pilot under s. 604), unless she is going to load or discharge in the district⁸).

If no qualified pilot is available⁹), an unqualified pilot may be employed¹⁰), but one qualified may supersede the unqualified pilot¹¹); whether the owner incurs any liability by failure to allow a qualified pilot to supersede an unqualified pilot is not clear on the statute¹²).

Negligence of a compulsory pilot. Where the negligence is that of a compulsory pilot¹³) in British waters, neither shipowner nor master is responsible for any injury caused¹⁴), and as a rule the authority which licenses the pilot to act is exempted by statute from liability. The shipowner's liability for his acts in foreign waters depends on the local law and its effect in making the pilot controller or adviser. The only mode of proceeding against a compulsory pilot for injury caused by his

1) Ibid. s. 742.

2) Ibid. s. 603.

3) Ibid. s. 599.

4) Ibid. s. 572.

5) Marsden's Collisions at Sea, 6th ed., 1910, pp. 242 *et seq.*

6) M. S. A. 1894, s. 603; and cf. s. 625.

7) Ibid. s. 604.

8) Cf. *The Winston* (1884) 9 P. D. 85.

9) Cf. *The Carl XV*. [1892] P. 324.

10) M. S. A. 1894, s. 596.

11) Ibid. s. 597.

12) Ibid. ss. 598, 622 (2).

13) See p. 448. If both vessels are to blame, only a vessel not having a compulsory pilot can be made to pay damages: *The Hector* (1883) 8 P. D. 218.

14) M. S. A. 1894, s. 633.

negligence is by an action *in personam*; if he is a Trinity House pilot¹⁾ his liability is limited to the amount of his pilotage fee together with the amount of his bond (£100)²⁾.

Negligence of a non-compulsory pilot. Where the pilot is not compulsory, the owner is liable for his defaults as for the defaults of other servants; so where the pilot is taken on board under compulsion of law, but the employment is continued for the benefit of the owner, the owner is responsible, but if the pilot is necessarily taken on board in a pilotage district and is navigating within that district, the shipowner is protected, and continues to be protected from liability so long as the pilot is authorised to be on board as pilot, since in such cases the pilot never becomes the owner's servant³⁾.

Evidence to support a plea of compulsory pilotage. It is for the shipowner to make out a defence of compulsory pilotage, and to do so he must prove:

1. That he had taken on board a qualified, i. e. duly licensed⁴⁾, pilot (or, where no qualified pilot is available, an unqualified pilot⁵⁾).
2. That the pilot was acting in charge of the ship in a district in which the employment of such a pilot was compulsory by law⁶⁾. Compulsion by law exists where an act is prescribed to be done by a statute which imposes a penalty on a person who fails to do the act⁷⁾. The period of compulsion extends from the time when the vessel is required to take the pilot up to the time when he ceases to be compulsorily in charge; including all the incidents of navigation on the way: 'Can it make any difference whether the ship is anchored, compulsorily but temporarily, because of the state of the tide? I cannot see that it makes any difference at all. If it did it would be sufficient to anchor a ship at any spot within the harbour, and then say the pilotage ceased . . . It seems to me that what is pilotage into a harbour, where it is left general, must be determined by the place in that harbour to which the vessel is intended and destined to go, and if, for any temporary purpose, she is interrupted in getting there, because of tide, wind, fog, and so forth, she is none the less on the way to the place to which she has to go'⁸⁾, so that the compulsory pilotage will continue until the vessel actually reaches her destination within a compulsory pilotage area.
3. That the pilot was in sole charge; this is required because the exemption of the shipowner is based on the fact that a pilot compulsorily taken on board is not in the employment of the shipowner and is not his servant. This principle is sufficiently clear where the English law of compulsory pilotage is concerned; but where an English court is dealing with a question of foreign pilotage law it has to consider what the effect of that law is; if that law puts the pilot into a similar position to that of a compulsory pilot in British waters the same consequences follow as where the pilotage is in British waters: 'It must be remembered that this exemption from liability is founded upon the principle that the pilot is taken by compulsion of law, and that to him is committed the sole charge of the ship. These, at least, are the positions of British law which were relied upon by the defendants; but in the present case it is expressly declared in the 4th Article of the Suez Canal Regulations that the duty of the pilot is to act as the adviser of the captain in matters requiring local and practical knowledge of the Canal; but that the responsibility as regards the management of the ship devolves solely upon the master. This regulation appears to me to alter the usual relations of the master and pilot and to take away the reason of the law upon which the exception rests'⁹⁾; and similarly (as to Belgian law) 'though a pilot may be compulsory in the sense that if he is not accepted he must still be paid for, yet he is not a person legally in charge; the result being that although in point of fact the

¹⁾ M. S. A. 1894, ss. 618—621.

²⁾ Ibid. s. 619 (II).

³⁾ *G. S. N. Co. v. British &c. S. N. Co.* (1869) L. R. 4 Ex. 238.

⁴⁾ M. S. A. 1894, s. 586 (1).

⁵⁾ *The Carl XV.* [1892] P. 324; M. S. A. 1894, s. 596.

⁶⁾ M. S. A. 1894, s. 633; *The Nicolay Belozvetow* [1913] P. 1.

⁷⁾ Cf. Ibid. ss. 603 (2), 604 (1); *The Hibernian* (1872) L. R. 4 P. C. 511.

⁸⁾ *The Ole Bull* [1905] P. p. 65.

⁹⁾ *The Guy Mannering* (1882) 7 P. D. p. 56; cf. *ibid.* p. 134.

pilot is navigating and solely in charge, yet if the ship does damage in consequence of negligent navigation the owners are, according to Belgian law, responsible¹⁾, with the result that in a case of collision between two British vessels in the River Scheldt, where each was carrying a pilot under compulsion of Belgian law, the obligation to carry a pilot did not suffice in an English court to excuse the owner of the vessel in default.

4. That the damage was solely due to negligence of the pilot. 'The cardinal principle to be borne in mind in these pilotage cases . . . is that the pilot is in sole charge of the ship and that all directions as to speed, course, stopping, and reversing, and every thing of that kind, are for the pilot; and I entirely agree . . . with the opinions of very learned judges . . . as to the danger of a divided command and the danger of interference with the conduct of the pilot, and that if anything of that kind amounts to an interference or divided command serious risk is run of the ship losing the benefit of the compulsory pilotage . . . But side by side with that principle is the other principle that the pilot is entitled to the fullest assistance of a competent master and crew, of a competent look-out, and of a well-found ship²⁾'. If the vessel does injury while in charge of a compulsory pilot because her owners have sent her to sea in an inefficient condition of hull or equipment, or with an incompetent master or insufficient crew; or if at sea the master and crew do not obey the orders of the pilot as to navigation and manœuvres, or fail to give to the pilot their assistance and information as to existing circumstances³⁾ or any unusual feature about the vessel which the pilot should know, or if the pilot is actively interfered with, then the injury cannot be said to be due to the sole negligence of the pilot⁴⁾. The extent to which interference with the pilot in charge can be justified is necessarily indefinite; in cases of manifest incompetence, such as ignorance or intoxication, or of failure on his part to appreciate an imminent danger, or of other great necessity⁵⁾, it has been said that there is a duty to interfere; but if the interference cannot be justified on such grounds, the owner will be liable for the improper interference of his servants, as the injury will in fact be due to their acts, not to the acts of the pilot. What the position of the master will be where he has justifiably taken control out of the hands of the pilot, and subsequently injury is done by his negligence, has not been authoritatively decided, but it may be that he is not necessarily acting as a mere servant of the owner⁶⁾. The master has undoubtedly a duty to give information, counsel and warning⁷⁾, but except in the case of incompetence or wilful neglect he cannot safely do more: he remains responsible for the ordinary working of the ship and her readiness for such operations as may be required, such as having anchors prepared, lights ready, and a good look-out kept and a capable man at the wheel. Although an accident may be originally attributable to a compulsory pilot, yet, if any fault of the owner or of the master of the vessel has contributed to it, the responsibility remains with the owner⁸⁾.

Orders of dock-masters or harbour-masters. Where a ship is navigated or handled under the orders of a dock-master or a harbour-master whose orders the vessel is bound to obey, the owner is not liable for injury done by the vessel in consequence of obedience to such orders⁹⁾. 'When a vessel is within the jurisdiction of the harbour-master and he is giving his orders as to the place of anchorage, it is only in the last resort and when the danger is fully obvious that any rational man would think that the harbour-master's orders should not be attended to'¹⁰⁾. Precisely the same obligation as to efficient equipment of the vessel, and competence and prompt obedience to orders by the master and crew, and readiness for the normal incidents

1) *The Dallington* [1903] P. p. 81.

2) *The Tactician* [1907] P. pp. 250, 251; *The Elysia* [1912] P. 152.

3) Cf. *ibid.* p. 253.

4) Cf. *The City of Cambridge* (1874) L. R. 5 P. C. pp. 459, 460.

5) Cf. *The Argo* (1859) Swa. p. 464.

6) There seems to be no English decision on the point.

7) Cf. *The Lochlibo* (1851) 7 Moo. P. C. 427; and 3 W. Rob. 310.

8) *Clyde Navigation Co. v. Barclay* (1876) 1 App. Cas. 790.

9) *Reney v. Magistrates of Kirkcudbright* [1892] A. C. 264.

10) *Ibid.* p. 275.

of navigation, are expected of the ship as in the case of compulsory pilotage; and although the vessel is bound to obey orders it is no defence if the orders are executed carelessly¹⁾).

Liability of Dock or Harbour Authority and their officials. Where the ship-owner is exonerated by reason of his vessel having duly conformed to the orders of a harbour-master or similar official entitled to give orders, the official himself will be liable for damage done by reason of his negligent orders, and unless wholly or partially exempted (as by Act of Parliament or otherwise) his employers also²⁾ will be liable, whether they are a corporation or an individual trading for profit, or a corporation formed for public purposes and levying tolls for such purposes only and receiving no profits or emoluments³⁾; but it has been held that trustees receiving no tolls and no emoluments may not be so liable⁴⁾. Such authorities may in some cases limit their liability⁵⁾, and must be sued within six months of the injury⁶⁾.

Superior orders; convoy or fleet of transports. Where two or more vessels are sailing in company, and damage is done to one by another in the course of executing without negligence orders of an official whom the vessels were bound to obey, the owner of the vessel will be free from liability, because all the vessels in the convoy have impliedly agreed to take the risk of damage arising from such orders, or else on the simple ground that the vessel alleged to be in fault was doing no more than she was bound to do by statute or contract⁷⁾.

Who may sue for damages. In a damage action the parties entitled to sue may be:

1. Owners, whether registered owners or unregistered, and legal or equitable, provided that a beneficial owner is able to prove his beneficial proprietary interest; part-owners may sue collectively or individually.
2. The master and crew suing for loss of their personal effects, such as clothing and instruments of navigation, or for personal injuries; they can sue the owners of the wrong-doing ship even if their own vessel belongs to the same owners, as this is not a case of common employment⁸⁾, but where the negligence is solely that of the master or crew of the claimant's own vessel it is that of a person in common employment with the claimant and he cannot recover damages⁹⁾.
3. Persons injured, claiming either *in rem* if directly injured by a ship, or in any case *in personam*.
4. Persons whose property is injured, such as cargo-owners or passengers in respect of their effects.
5. Bailees or other persons who have at the time of injury a special property in the vessel or goods injured¹⁰⁾.

Subrogation: rights of underwriters. Underwriters who have indemnified an assured are subrogated to any rights of action which the assured may have; they cannot successfully bring any action which he could not bring, either by reason of his being himself in fault or of his having compromised or waived his claim or being unable to sue at all, as where the ship in fault is another vessel belonging to the assured or his wife¹¹⁾. Underwriters have a common interest with their assured sufficient to justify them in assisting him to assert or resist a claim.

Amount of damages. The amount of the damages recoverable depends in Admiralty sometimes on the form of action and sometimes on the statutory right to limit liability and sometimes on the application of the rule of division of loss where both are to blame. In an action *in rem* in which no owner appears no more can be recovered than the value of the *res* (less the marshal's charges and possession fees), but where an owner has appeared it is held that by appearance he becomes liable

1) *The Cynthia* (1876) 2 P. D. 52.

2) *East London Harbour Board v. Caledonia &c. Co.* [1908] A. C. 271.

3) *Mersey Docks &c. Trustees v. Gibbs* (1866) L. R. 1 H. L. 93.

4) *Forbes v. Lea &c. Board* (1879) 4 Ex. D. 116.

5) See p. 466.

6) Public Authorities Protection Act 1893 (56 & 57 Vict. c. 61).

7) Cf. *Hodgkinson v. Fernie* (1857) 2 C. B. N. S. 415.

8) *The Petrel* [1893] P. 320.

9) *Hedley v. Pinkney* [1894] A. C. 222; but he may get compensation.

10) Cf. *The Winkfield* [1902] P. 117.

11) *Simpson v. Thompson* (1877) 3 App. Cas. 279.

in personam for the whole damages recoverable, though they may, with or without the costs, exceed the value of the *res* or of the bail given, if any¹⁾, even if he be a foreigner resident out of the jurisdiction, so that he could not while beyond the jurisdiction be made defendant in an action *in personam*²⁾. Secondly, where a ship-owner is allowed to limit his liability, the limitation enures for his benefit by way of limiting the amount recoverable, but in no way affects the principle of assessment of the damages. Lastly, where both vessels are found to blame the loss is payable *prima facie* in proportion to the fault of each vessel, or, if the fault of one cannot be said to exceed the fault of another, equally³⁾.

Measure of damages: restitutio in integrum. The general principle in assessing damages is *restitutio in integrum*: to put the person injured into the same pecuniary position as that in which he was before the injury⁴⁾; this indemnity will include all direct loss, and also any consequential loss which has actually been caused and of which the amount can be satisfactorily proved. While the direct loss flowing from the collision itself can be ascertained without serious difficulties, the rule that you can only recover consequential losses if not too remote, leads to many disputes as to the inclusion of particular items.

Total loss. Where a vessel is totally lost by collision the damages are her market value as between willing vendor and willing purchaser at her home port at the time of the collision; this is a question of evidence and may depend on many circumstances, such as the possibility of procuring a similar vessel, and the condition and age of the vessel lost⁵⁾. Many vessels, such as some Atlantic liners, have no real market value for such a test to be applicable, and in such cases the measure of damages is the fair value of the vessel to her owner for business purposes as a going concern⁶⁾.

Assessment of value: what elements considered. In Admiralty the value at the time of the loss includes not the mere value of the vessel, but her value in respect of her existing engagements, so that the prospective profit to be made under her engagements has to be considered, although this principle may produce very different amounts of damages in two very similar collisions⁷⁾: the owner is therefore entitled to the freight which has been lost on the particular adventure (less the prospective cost of earning it), and may be allowed the further prospective profits of future employment already secured under a contract, less a deduction for contingencies⁸⁾.

Interest on damages. Where the vessel was earning freight no interest on damages is payable before the presumed date when the voyage would have been completed, from which time interest runs (at 4% usually) on the damages (i. e. value of ship + freight receivable) from the presumable day when payment would have been made⁹⁾, whereas if she was not earning freight, interest would run from the date of the collision¹⁰⁾ and if she was under a charter but not loaded, interest will only run from the date of the presumable payment of any sum allowed by way of profits¹¹⁾. Interest and profits are in effect mutually exclusive, except that where the wrongdoing vessel's liability is limited and so becomes less than the loss of the vessel injured, interest is given on the whole amount to which liability is limited as from the date of the collision¹²⁾.

Mitigation of damages. A person injured by the wrongful act of another is not necessarily entitled to recover all the subsequent loss if it is wholly or partially attributable to his own failure to act prudently after the injury, as it is his duty to mitigate the damages if it is reasonably possible to do so. The standard of prudence in the stress of a recent collision is not required to be greater than can reasonably be demanded of a man compelled to act in the circumstances of danger

1) *The Gemma* [1899] P. 285.

2) Cf. *The Vivar* (1876) 2 P. D. 29; *The Duplex* [1912] P. 8.

3) Maritime Conventions Act, 1911, s. 1.

4) *The City of Peking* (1890) 15 App. Cas. 438.

5) Cf. *The Clyde* (1856) Swa. 23.

6) *The Harmonides* [1908] P. 1, p. 6.

7) *The Racine* [1906] P. 273.

8) *Ibid.*

9) Cf. *The Kate* [1899] P. p. 174.

10) *The Northumbria* (1869) L. R. 3 A. & E. p. 12.

11) *The Kate*, *ubi supra*.

12) *The Northumbria*, *ubi supra*.

and difficulty created by such a collision. He should do what he can to save the ship by jettison, or by beaching her if advisable, or by accepting offers of assistance, or by standing by if there is reason not to abandon her totally forthwith. The same principle applies where the loss is not total; if the vessel can be repaired and her repaired value exceeds the costs of repair, or if although a particular adventure is frustrated, profits may be made by an adventure which can reasonably be substituted, there is a duty to do so; and where the person injured does not adopt such reasonable steps as may be available, the wrongdoer is only liable for the actual collision-damage, if he can prove that the remainder is not due to his negligence.

Loss after injury by collision; duty to repair. So too, although where a vessel is injured by collision and shortly afterwards is totally lost or receives further injury the loss or further damage is *prima facie* to be attributed to the original injury, the wrongdoer is at liberty to prove that the injured vessel, having had an opportunity of averting the further loss has not done what it was reasonable that she should do, as where after a collision a vessel reached a port of refuge and was there repaired, but only inadequately, and then proceeded on her voyage and was lost by reason of the inadequacy of the repairs¹).

Consequential damages. The person injured however is entitled to recover not only such losses as flow directly from the collision, but also losses which are the necessary consequence of injuring a vessel and thereby entailing expenses and loss of profit to her owners. Thus, where salvage services are rendered, the salvage awarded²) and the costs of giving security in a salvage action³) are allowed as damages; also necessarily towage expenses and life-salvage, and the expenses of removing the wreck where the owner of the vessel wrecked is legally liable to pay them⁴), or of raising a vessel where it is reasonable to do so, and bringing her to a dock to ascertain whether it is prudent to repair her at all⁵), even if it is decided not to repair (in such a case the value of the vessel as she stands would have to be credited against the damages). The expenses of detention for repairs, including the loss of use of the ship and the wages of servants properly retained in connexion with repairs, are allowed; the principle is that the owner is entitled to have made good to him the loss incurred by not having his vessel available either to earn profits which she was in the course of earning when injured, e. g. profits of fishing⁶), salvage or freight or prospective earnings under a contract of employment⁷); or where the loss is not in respect of profit-earning but of capacity to render valuable services, damages for the loss of the use of the vessel, even though it cannot be shown that any definite loss was caused, as in the case of a dredger⁸) or a warship⁹).

Sums payable to third persons. The damages recoverable include sums which have to be paid to third persons, such as claimants under the Workmen's Compensation Act¹⁰) or damages (subject to the rule of division of loss) payable to a third vessel by reason of the joint negligence of the claimant's ship and another¹¹).

XIX. Damage to Goods.

Damage to goods on board a vessel may found an action in Admiralty in four ways:

1. Damage by the negligence of a vessel other than the carrying vessel.
2. Damage by the joint or contributory negligence of the carrying vessel and another vessel.
3. Damage through the sole negligence of the carrying vessel; and
4. Damage by negligence, misconduct or breach of contract of the carrying ship, where the claim is by a goods-owner, consignee or holder of a bill of lading¹²).

¹) *The Bruxellesville* [1908] P. 312.

²) *The Legatus* (1856) Swa. 168.

³) R. S. C. Order XII, r. 21 A.

⁴) *The Wallsend* [1907] P. 302.

⁵) *The Empress Eugenie* (1861) Lush. 138.

⁶) *The Risoluto* (1883) 8 P. D. 109.

⁷) *The Kate* [1899] P. 165.

⁸) *The Marpessa* [1907] A. C. 241.

⁹) *The Astrakhan* [1910] P. 172.

¹⁰) *The Currie* [1909] P. 176; and see *post*, p. 459.

¹¹) *The Frankland* [1901] P. 161.

¹²) A. C. A. 1861, s. 6.

Damage by the negligence of a vessel other than the carrying vessel. Such damage is usually inflicted by collision as the natural or probable consequence of the wrongful act or default of some vessel; it gives a maritime lien enforceable *in rem* or by an action *in personam* against the actual wrongdoer or, if he was acting as a servant, against his employer. The principles applicable are precisely the same as in the case of a collision between ships; and the goods-owner has a similar right of action. In such cases a collective action is most usually brought by shipowner, master, crew or passenger suing for lost effects, or by owner, consignee or bailee in respect of goods. If the goods-owner, as he may, sues separately, the Court may, and probably will, stay his action until after the decree in the collision claim; but any such action must be brought within two years of the damage, unless the Court is satisfied that the period ought for good reason to be extended¹⁾.

Damage to goods by the common negligence of the carrying vessel and another. Where damage to goods on board one vessel is caused by the common fault of that vessel and one or more other vessels, the vessels jointly in fault are liable in proportion to the degree of fault of each vessel²⁾, or, if different degrees of fault cannot be established, equally³⁾. As the liability is only a liability to make good the damage in proportion to the degree of fault, it seems clearly to be a several liability in the case of the vessels on board which the goods are not being carried, for their proportion of the damage only: but as nothing in the Act is to affect liability under a contract of carriage, it seems to be in the case of the carrying ship a several liability for the whole damage, subject to the terms of the contract of carriage for the goods, which will usually be found to protect the carrying ship⁴⁾. As, however, apart from the contract of carriage she is only liable for a proportion of the damage, she may have a right of contribution⁵⁾. The goods-owner may sue any wrongdoer for his proportion of the damage, or, subject to the contract of carriage, the carrying ship for the whole; where the carrying ship is protected by the contract of carriage it will be to the goods-owner's interest to magnify the share of blame attaching to any other wrongdoer, and he is not bound by any agreement between the wrongdoers (unless he is a party to it) as to the apportionment of blame. It is for the carrying ship to prove that she is not liable for the damage; where the ship is a general ship with no contractual exemptions, this cannot be done unless she can prove that she is exonerated at common law or by statute, e. g. that the damage was due to the Act of God or to fire, and not to negligence contributing to the loss. The non-carrying ship must be sued within two years⁶⁾, unless the Court sees fit to extend the time⁷⁾.

Damage to goods where both vessels in fault belong to the same owner. The Maritime Conventions Act⁸⁾, in providing that the liability of two or more vessels for joint fault causing damage shall be proportionate to the degree of blame of each vessel, makes no reference to the ownership of the vessels, so that as between goods-owner and shipowner the same principles apply as if the vessels were in different ownership⁹⁾. The old rule was that if as regards the carrying ship the shipowner was protected by exceptions in the contract, he was only liable for one half the damage to the cargo, i. e. in respect of the non-carrying vessel; he is now liable for such proportion of the damage as the blame attributable to the second vessel bears to the blame attributable to the carrying vessel; but if not protected by exceptions, is liable for the whole damage in respect of the carrying vessel. To this extent the liability in respect of the second vessel as previously declared¹⁰⁾ is now modified. In respect of the carrying vessel he may rely on any statutory or contractual protection¹¹⁾ and in respect of either he may, unless he is not within the statutory provisions, limit liability. Any claim against the non-carrying vessel must be made

1) Maritime Conventions Act, 1911, s. 8.

2) Maritime Conventions Act, 1911, s. 1 (1).

3) Ibid. s. 1 (1) (a).

4) Ibid. s. 1 (1) (c).

5) See p. 461 (Division of loss).

6) M. C. A. 1911, s. 8.

7) Ibid. s. 8. proviso.

8) S. 1 (1).

9) See *supra*.

10) *Chartered &c. Bank v. Netherlands &c. Co.* (1883) 10 Q. B. D. 521.

11) Cf. *The Xantho* (1887) 12 App. Cas. 503 ('perils of the sea').

within two years unless the Court sees fit to extend the period¹⁾; there seems to be no period of limitation as against the carrying vessel except by virtue of the doctrine of laches or unreasonable delay.

Damage by the sole negligence of the carrying vessel. This subject, so far as it touches Admiralty law, may be divided into:

1. Damage by collision.
2. Rights of goods-owner to resort to procedure *in rem* in the special cases allowed by statute²⁾.

The former subject is so closely connected with the liability of the shipowner as a carrier that it is dealt with principally elsewhere³⁾.

Damage by collision, to goods on board a vessel. Unless a shipowner is protected by exceptions in the contract of carriage (or by the common law exceptions of the Act of God, or the King's enemies) he is liable for damage to goods on board his vessel by collision with another vessel. If in the contract there is an exception of "collision"⁴⁾, he is not liable for the effects of a collision due solely to the negligence of another vessel (unless that other vessel belongs to himself⁵⁾, but is liable for the effects of a collision due to the negligence of his own vessel or of his own and another vessel⁶⁾. If the exception is more general and is against "collision, accidents, loss or damage from any act or neglect or default of the servants of the owner in navigating the ship", he is not liable for the negligence of his own ship⁵⁾, though he will still be liable if the other ship belongs to him⁵⁾, in proportion to the degree of the negligence of the other ship, while if the other ship does not belong to him, he is not liable at all.

Claims *in rem* for damage to goods, under statute. Where an owner, or a consignee, or the assignee of a bill of lading, of any goods carried to any port in England or Wales, claims for damage to his goods by the wrongful act or breach of contract of the owner, master or crew of the carrying ship, the Admiralty Court has jurisdiction to entertain the claim⁷⁾, unless some owner or part-owner of the carrying ship is domiciled in England or Wales at the time when the suit is instituted. One object of this enactment was to enable claims to be made against a ship where the shipowner was not and was not likely to be amenable to an action *in personam* to obtain a remedy for breach of the contract evidenced by the bill of lading. It creates a new remedy⁸⁾ available in cases where before the Act a shipowner resident in England or Wales could have been sued⁹⁾. Before 1875¹⁰⁾ the Admiralty Court had no jurisdiction to entertain such claims *in personam* or at all except under this Act. The value of the Act of 1861 lies in the fact that it gave a remedy *in rem*¹¹⁾; but it did not create any maritime lien for such damage¹²⁾.

Claims by assignee of bill of lading, in contract and in tort. The only assignee who is allowed to sue under this section for breach of contract is an assignee to whom the property in the goods has passed, whether by such an indorsement as passes the property under the Bills of Lading Act or by a mortgage or pledge followed by the acquisition of actual possession¹³⁾; but where the claim is based on breach of duty other than a breach of contract any assignee to whom some property in the goods has passed may sue¹⁴⁾.

Claims by consignee of goods, in contract and in tort. Similarly, a consignee to whom by the consignment the property in the goods has passed, may sue under this enactment for damage to his goods by breach of the contract evidenced by the bill of lading; he may sue for a breach of duty other than a breach of such contract

¹⁾ Maritime Conventions Act, 1911, s.8.

²⁾ A. C. A. 1861, s. 6.

³⁾ See p. 425.

⁴⁾ *Lloyd v. General Iron Screw Collier Co.* (1864) 3 H. & C. 284.

⁵⁾ *Chartered &c. Bank v. Netherlands &c. S. N. Co.* (1883) 10 Q. B. D. 521.

⁶⁾ *The Xantho* (1887) 12 App. Cas. 515.

⁷⁾ A. C. A. 1861, s. 6.

⁸⁾ Not a new cause of action: *Sewell v. Burdick* (1884) 10 App. Cas. p. 88.

⁹⁾ *The St. Cloud* (1863) B. & L. p. 18.

¹⁰⁾ By the Judicature Acts it acquired such jurisdiction in 1875.

¹¹⁾ A. C. A. 1861, s. 35.

¹²⁾ *The Pieve Superiore* (1874) L. R. 5. P. C. p. 489.

¹³⁾ See *Sewell v. Burdick* (1884) 10 App. Cas. 74, esp. pp. 88, 89.

¹⁴⁾ *Sewell v. Burdick* (1884) 10 App. Cas. 74; *The Figlia Maggiore* (1868) L. R. 2 A &

if some property in the goods, not necessarily *the* property, has passed to him¹). Cases where there is a breach of duty apart from contract occur, e.g. where the goods are damaged by barratry²), refusal to comply with a direction to stop *in transitu*³), where negligence (not being excepted) causes damage⁴), or where the master withholds the necessary data for computing what should be tendered in respect of general average⁵).

What goods come within section 6. The goods in respect of which a claim may be made are goods laden for carriage on board the ship against which the claim is made; where this is the case the enactment applies whether the claim is for damage, or for loss, as in the case of short delivery where the goods do not in fact reach this country⁶); the section does not apply where the goods giving rise to the claim have not been laden, as where the master improperly refuses to load, so that the breach of contract occurs before loading⁷). The term "carried" used in the section does not mean "imported", but means that there is a contract of carriage in respect of the goods under which the goods ought to arrive or do in fact happen to arrive in this country in the course of the voyage, as for instance where the vessel calls for orders at an English port, or puts in by reason of accident⁸), although the goods are not to be delivered in England⁹), provided that there is then an existing cause of action¹⁰). When once circumstances have thus given a right of action under the section¹¹), that right attaches against the ship during the period of limitation of such actions¹²); but as there is no maritime lien, it will always be subject to existing charges and liens which have attached before the arrest of the *res*; the ship, however, can within that period be arrested so long as she is found within the jurisdiction and in the same ownership.¹³)

Against what ship a claim *in rem* lies. The remedy *in rem* is confined to the particular vessel with which the contract of carriage was made, and in which the goods or some of them arrive¹⁴) or ought to have arrived in an English port. Where goods were shipped on a vessel and after damage by fire were transhipped and brought to England on another vessel, such other vessel could not be sued, as there was no breach of contract and the former vessel on arrival here could not be sued because she carried no goods hither¹⁵). The remedy is further restricted to cases where no owner or part-owner¹⁶) is domiciled in England or Wales at the time when the suit is instituted¹⁷). A defence based on such a domicile must be pleaded and proved before judgment¹⁸); the domicile in question seems to be that of any person who was an owner at the time when the cause of action accrued, if there has been a subsequent change in ownership¹⁹): and the question of domicile is immaterial when the claim is made in a County Court having Admiralty jurisdiction²⁰). The vessel may be either British or foreign, as the words of the Act are designedly general²¹).

Rights under bill of lading: incorporation of charterparty. The object of the section is to remedy grievances of holders of bills of lading; where a holder is qualified to sue, his rights must be ascertained from the bill of lading; for a breach of the contract expressed in it he can clearly sue, but where he desires to rely on terms im-

1) Cf. *Sewell v. Burdick* (1884) 10 App. Cas. pp. 94, 95.

2) *The Chasca* (1875) L. R. 4 A. & E. 446.

3) *The Tigress* (1863) Br. & L. 38.

4) *The Figlia Maggiore* (1868) L. R. 2 A. & E. 106.

5) Cf. *The Norway* (1864) Br. & L. 226.

6) *The Danzig* (1863) Br. & L. 102.

7) *The Dannebrog* (1874) L. R. 4 A. & E. 386.

8) Cf. *The Patria* (1871) L. R. 3 A. & E. p. 459.

9) *The Pieve Superiore* (1874) L. R. 5 P. C. 482.

10) *The Pieve Superiore* (1874) L. R. 5 P. C. 482.

11) A. C. A. 1861, s. 6.

12) I. e. six years from the accruing of the cause of action.

13) *The Pieve Superiore*, *ubi supra*.

14) *The Danzig* (1863) Br. & L. 102.

15) *The Ironsides* (1862) Lush. 458.

16) Owner will include a charterer by demise.

17) A. C. A. 1861, s. 6.

18) *Ex parte Michael* (1872) L. R. 7 Q. B. 658.

19) *The Ella A. Clark* (1863) Br. & L. 32.

20) Cf. *The Rona* (1882) 7 P. D. 247.

21) *The Mecca* [1895] P. pp. 114, 115.

ported from a charterparty, he must be able to show that he is entitled to rely on those terms¹⁾, so that if they are not incorporated, he has no right under the section. The extent of incorporation will depend on the incorporating clause, and the bill of lading holder may be defeated by the incorporation of charterparty exceptions²⁾ occurring in a clause of which he seeks the benefit³⁾. Whether the holder of the bill of lading can sue the owner of a chartered ship will depend upon his knowledge of the facts at the time of shipment⁴⁾, as that will decide who is the person with whom the contract is made. If he is suing for a breach of duty independent of the contract his rights are not thus restricted.

Shipowner may limit liability. Where proceedings are instituted under this section in respect of damage to any goods whatsoever⁵⁾ on the ship of the contracting shipowner⁶⁾, he comes within the express words entitling him to limit liability⁷⁾, and is therefore entitled to limit his liability, where the damage is caused without his actual fault or privity⁸⁾; and he will be entitled to protection against liability for fire or theft of valuable but undeclared articles⁹⁾.

Priority of claims for damage to goods. A plaintiff in a suit against the carrying vessel for damage to goods, having no maritime lien, is postponed to any valid subsisting charge, such as a maritime lien or a mortgage, and will be defeated by the claims of a purchaser¹⁰⁾, and there seems to be no reason to limit this to cases of *bona fide* purchase without notice of the claim. If the plaintiff succeeds, the Court will make a decree that the ship or the shipowner is liable and will refer the amount of damages to be ascertained by the Registrar and Merchants. The costs of the action are in the discretion of the Court, and it is advisable to remember that in such cases the County Court jurisdiction extends to claims not exceeding £300, whether in contract or in tort.

XX. Damage by Personal Injury.

Jurisdiction *in rem* and *in personam*: can there be a maritime lien? Until quite recently no action *in rem* could be brought in Admiralty for any fatal injury to a person¹¹⁾, and in the case of injury less than fatal the person damaged could only sue *in rem* if the damage was caused by those on board the ship with the ship as the noxious instrument¹²⁾: whether, where the ship was the noxious instrument, a maritime lien accrued to the person injured is a moot point: "the phrase that it must be the fault of the ship itself is not a mere figurative expression, but it imports, in my opinion, that the ship against which a maritime lien for damages is claimed is the instrument of mischief, and that in order to establish the liability of the ship itself to the maritime lien claimed, some act of navigation of the ship itself should either mediately or immediately be the cause of the damage"¹³⁾. That case, it is true, was not a case of personal injury, but the jurisdiction in Admiralty in damage causing personal injury is as old as its jurisdiction in damage to property¹⁴⁾, and on principle, where original jurisdiction existed in Admiralty and is extended *in pari materia* by statute the same incidents attach to the extended jurisdiction as to the original jurisdiction. Apart from such possible cases of jurisdiction *in rem* as occurred in *The Sylph*¹⁵⁾, only an action *in personam* would lie, either by the person injured as an action directly in respect of his injuries, or by the representatives of a person fatally injured, under the Fatal Accidents Acts¹⁶⁾ or the Employers' Liability Act, 1880¹⁷⁾, which latter Act did

¹⁾ *The Norway* (1864) Br. & L. 226.

²⁾ *The Northumbria* [1906] P. 292.

³⁾ Cf. *The Europa* [1908] P. 84.

⁴⁾ *Baumvoll v. Furness* [1893] A. C. 8 Cf. p. 386, *ante*.

⁵⁾ *The Stella* [1900] P. 162 (n).

⁶⁾ M. S. A. 1906 (6 Edw. 7, c. 48), s. 71.

⁷⁾ M. S. A. 1894, s. 503 (1) (b). See p. 464.

⁸⁾ *The Yarmouth* [1909] P. 293.

⁹⁾ M. S. A. 1894, s. 502; *The Diamond* [1906] P. 282.

¹⁰⁾ *The Pieve Superiore* (1874) L. R. 5 P. C. p. 492.

¹¹⁾ *The Vera Cruz* (1884) 10 App. Cas. 59.

¹²⁾ *The Theta* [1894] P. 280. Cf. *The Vera Cruz* (1884) 9 P. D. p. 99.

¹³⁾ Per Lord Halsbury, L. C., in *Currie v. M'Knight* [1897] A. C. p. 101.

¹⁴⁾ Cf. stat. 15 Ric. 2, c. 3.

¹⁵⁾ (1867) L. R. 2 A. & E. 24: cf. *The Theta* [1894] P. 280.

¹⁶⁾ (1846) 9 & 10 Vict. c. 93; (1864) 27 & 28 Vict. c. 95; (1908) 8 Edw. 7, c. 7.

¹⁷⁾ 43 & 44 Vict. c. 42.

not as a rule apply to seamen. In any of these cases the action would be against the actual wrongdoer or any person answerable for his acts. A statutory process *in rem* was introduced in a limited class of cases, and in actions against shipowners only, in 1906¹⁾, and in claims under the Workmen's Compensation Act, 1906, against shipowners for compensation²⁾ from 1 July 1907, and in actions for damages for loss of life or personal injury without restriction as to locality or status of the defendant in 1911, where the proceedings are brought in a Court having Admiralty jurisdiction in respect of damage³⁾.

Who may sue or be sued for loss of life or personal injury. Any person, whether passenger, pilot, master, seaman or apprentice or otherwise being on board a vessel is, if injured by negligence while on board that vessel, *prima facie* entitled to sue for damages for personal injuries caused by negligence, whether due to:

1. Negligence of those in charge of the vessel on which he is, or
2. Negligence of those in charge of any other vessel, or
3. Joint negligence of his own or any other vessel or vessels.

The *prima facie* right may be negatived for various reasons, such as:

1. A valid contract whereby the right to sue has been abandoned⁴⁾; or
2. The person's common employment with those who have been guilty of negligence; or
3. His own contributory negligence;

and in any case he must prove, as against the shipowner, if he is suing the shipowner, negligence for which the shipowner is himself answerable⁵⁾. As against the actual wrongdoer he will always have a right of action, but it may be worthless: if, however, the actual wrongdoer is either the master or a member of the crew the claimant will have presumably a right of action *in rem*⁶⁾. Where a person is fatally injured in circumstances in which, but for his death, he could at the time of his death have brought an action for damages for the injury, his representatives are entitled⁷⁾ to sue for damages (not for the damages which could have been claimed by the deceased person, but for the damages which the family of the deceased person has sustained by his death, apart from any question of insurance moneys). When any such representatives recover damages, they will recover full damages (subject to a shipowner's right to limit liability).

The Shipowners' Negligence (Remedies) Act, 1905. By the Shipowners' Negligence (Remedies) Act, 1905⁸⁾, it is provided that where a judge of a Court of record⁹⁾ in England¹⁰⁾ on application in due form¹¹⁾ is shown:

1. That the owners of any ship¹²⁾ are probably liable to pay damages for fatal or other personal injuries either caused by or sustained on, in or about the ship in any port or harbour in the United Kingdom¹³⁾, in consequence of the wrongful act, neglect or default of the owners, master, officers or crew of the ship or of any defect in the apparel or equipment of the ship; and
2. That the ship is in any port or river in England or Ireland or within three miles of the coast thereof; and
3. That no owner resides¹⁴⁾ in the United Kingdom or, if an owner is a corporation, that it has no office in the United Kingdom at which service of writs can be effected¹⁵⁾,

¹⁾ Shipowners' Negligence (Remedies) Act, 1905: see below.

²⁾ W. C. A. 1906: see p. 458.

³⁾ Maritime Conventions Act, 16 Dec. 1911, 1 & 2 Geo. 5, c. 57, s. 5.

⁴⁾ See p. 429 (carriage of passengers).

⁵⁾ See p. 445.

⁶⁾ Maritime Conventions Act, 1911, s. 5: Shipowners' Negligence (Remedies) Act, 1905, s. 1.

⁷⁾ Fatal Accidents Acts 1846—1908; *The Caliph* [1912] P. 213.

⁸⁾ 5 Edw. 7, c. 10.

⁹⁾ Principally the Court of Appeal, the High Court of Justice, all County Courts and the City of London Court, the Mayor's Court of London, the Tolzey Court of Bristol, the Liverpool Court of Passage, and the Hundred Court of Salford; but there are many minor Local Courts of Record.

¹⁰⁾ Including Wales; stat. 20 Geo. 2, c. 42, s. 3.

¹¹⁾ I. e. under Rules of Court where any have been made.

¹²⁾ A term here used *in pari materia* with M. S. A. 1894, s. 688, and therefore probably having the meaning given in s. 742 thereof.

¹³⁾ This excludes the Isle of Man and the Channel Islands.

¹⁴⁾ Cf. p. 491.

¹⁵⁾ Cf. p. 491; *De Beers v. Howe* [1906] A. C. 455.

then the judge may order the detention of the ship until the claim for damages is satisfied or security has been given to abide the event of any action and to pay all costs and damages that may be awarded.

Effect of the provisions of the Act. The effect of this statute appears to be as follows:

1. Where personal injury is *caused by* the ship in a port or harbour in the United Kingdom and the ship is found in a port or river in England, the person injured has alternative remedies:
 - a) to sue *in rem* as before the statute¹⁾; or
 - b) to procure the detention of the vessel, even before action brought, under the statute.
2. Where personal injury is *caused by* the ship in a port or harbour in the United Kingdom, and the ship is found in a port or river in Ireland, a new remedy *in rem* is given by procuring an order of detention from an English or Irish Court of record, while the right *in rem* could be enforced by action in Ireland apart from the statute¹⁾.
3. Where the injuries are fatal, whether caused by or sustained on, in or about the ship, so that any proceedings to recover damages²⁾ will be under the Fatal Accidents Acts, 1846—1908, or the Employers' Liability Act, 1880, or by an employer who has paid or is being required to pay compensation under the Workmen's Compensation Act, 1906³⁾, and who shows the judge that he is or will probably be entitled to be indemnified⁴⁾, the principle established in the case of the *Vera Cruz*⁵⁾ is abolished in cases to which the Act applies⁶⁾, a statutory right *in rem* to procure the detention of the ship being given.
4. In any case where the injuries, whether fatal or not, are not *caused by* the ship, a statutory right *in rem*, but no maritime lien, is given, provided that they are sustained on, in or about the ship in the circumstances required by the statute.

No new maritime lien; mode of enforcing new right *in rem*. It is submitted that no maritime lien is given by the Act, as the applicant must show a *prima facie* case of liability of *the*⁷⁾ owners for the default of themselves or their servants, and the legislature has never been held to create a maritime lien by implication. What is given is a new statutory right *in rem*, supplementary in some cases to a maritime lien. Where the right *in rem* is exercised the mode of exercise is prescribed by reference to the M. S. A. s. 692⁸⁾.

Claims against shipowners under the Workmen's Compensation Act. Compensation payable under the Workmen's Compensation Act, 1906⁹⁾, to a master, seaman or apprentice¹⁰⁾ for injury by accident arising out of and in the course of the employment is payable irrespective of any default of the employer and is not technically damages; the Shipowners' Negligence (Remedies) Act, 1905¹¹⁾, therefore, did not extend to claims for such compensation the benefit of procedure *in rem*, and accordingly the act of 1906 makes provision for process *in rem* where compensation is claimed to be due from the owners of a ship as such owners. This Act applies to injuries received, in the case of such masters, seamen and apprentices, outside as well as within the United Kingdom¹²⁾, and therefore the restriction to injuries arising in a port or harbour in the United Kingdom is not reproduced, but it will be necessary to show to the judge of the Court of record, the case being one where the

¹⁾ *The Theta* [1894] P. 200; whether he has a maritime lien is still an open question. In *Currie v. McKnight* [1897] A. C. p. 101, Lord Halsbury, L. C., distinctly suggests that there is such a lien.

²⁾ Workmen's compensation is not damages, and similar provisions are made under the Workmen's Compensation Act, 1906, for detention of vessels.

³⁾ 6 Edw. 7, c. 58; and cf. Workmen's Compensation Rules, 1907, r. 38.

⁴⁾ W. C. A. 1906, s. 6 (2).

⁵⁾ (1884) 10 App. Cas. 59.

⁶⁾ I. e. cases of injuries received in port or harbour in the United Kingdom.

⁷⁾ The natural meaning of 'the owners' is 'the owners at the material time'.

⁸⁾ 5 Edw. 7, c. 10, s. 1 (3).

⁹⁾ 6 Edw. 7, c. 58, ss. 7, 11.

¹⁰⁾ Being 'workmen' within the meaning of the Act: s. 13.

¹¹⁾ 5 Edw. 7, c. 10.

¹²⁾ *Schwarz v. India Rubber etc. Co.* [1912] 2 K. B. 299. In all other cases it only applies to injuries received in the United Kingdom.

injury did not occur to a master, seaman or apprentice of a ship registered in, or with a resident owner or managing owner in, the United Kingdom¹):

1. That the owners of the ship are, as such, probably liable to pay compensation under the Act.
2. That the ship is to be found within the territorial limits of England or Ireland.
3. That no owner resides in the United Kingdom²), or, if an owner is a corporation, that it has no office in the United Kingdom at which service of writs can be effected³).

No new maritime lien: Procedure under the Act and Rules. The Workmen's Compensation Act creates no new maritime lien, so that wherever a claim is made for the detention of a ship, it is only under a statutory right *in rem*, and the right cannot be enforced against a person who was not the shipowner or one of them when the right to claim compensation accrued. The mode in which the right is to be asserted is prescribed by the Act⁴), and the procedure for procuring detention of the ship has been laid down by the Workmen's Compensation Rules⁵), viz. on applications by persons claiming compensation (r. 37) and on applications by employers claiming indemnity⁶) (r. 38). Where a shipowner is claiming indemnity, he may, although he is not himself entitled to limit his liability in respect of such compensation, be confronted by the person against whom he claims indemnity, with a claim to limit⁷).

Jurisdiction under the Maritime Conventions Act, 1911. The slovenly system of legislation by reference to particular statutes has long been a bane of English legislation, but the more slovenly and still less convenient method of legislation by general reference to "any enactment which confers on any court Admiralty jurisdiction in respect of damage" which appears in the Maritime Conventions Act 1911⁸), will, it must be hoped, not be adopted in future. It is now provided that any court which exercises Admiralty jurisdiction in respect of damage by virtue of any enactment shall be entitled to entertain claims *in rem* or *in personam* for loss of life or personal injuries⁹). The term Admiralty jurisdiction has not hitherto been a term of art; it is not really convertible with "jurisdiction in Admiralty", and it is probable that it means jurisdiction *in rem*, that being a characteristic and exclusive feature of Admiralty procedure. If that be so, the principal statutes under which jurisdiction *in rem* is exercised in Admiralty in cases of damage are:

1. The Admiralty Court Act, 1840, s. 6.
2. The Admiralty Court Act, 1861, ss. 6, 7; so that jurisdiction *in rem* in cases of loss of life or personal injury is acquired by the Admiralty Division of the High Court.
3. County Court (Admiralty Jurisdiction) Act, 1868, s. 3 (3); and
4. County Courts (Admiralty Jurisdiction) Act, 1869, ss. 3, 4; so that jurisdiction in such cases is acquired by County Courts having Admiralty jurisdiction¹⁰).

It might be held that under the Merchant Shipping Act¹¹) every court of record, and also every court in which a decree of limitation of liability can be made¹²) come within the scope of the section, but for practical purposes it is sufficient to apply the section to the Admiralty Division¹²) and to County Courts¹³). Such a construction gives full operation to the section and avoids all questions of locality where the

¹) W. C. A. 1906, s. 7 (1); for them s. 11 could not apply.

²) S. 11 (1).

³) S. 11 (3).

⁴) W. C. A. 1906, s. 11 (3); M. S. A. 1894, s. 692; W. C. Rules, r. 24.

⁵) W. C. R. 1907, rr. 37, 38.

⁶) W. C. A. 1906, s. 6; *The Rigel* [1912] P. 99.

⁷) W. C. A. 1906, s. 7 (f).

⁸) 1 & 2 Geo. 5. c. 57, s. 5.

⁹) The new rule will clearly apply to Colonial Courts of Admiralty (not being in Canada, Australia, New Zealand, South Africa, or Newfoundland) under 53 & 54 Vict. c. 27, s. 2 (2).

¹⁰) 1894, s. 688.

¹¹) *Ibid.* s. 504.

¹²) Most simply by reading '(and) for loss of life or personal injury' at the end of A. C. A. 1861, s. 7.

¹³) By reading 'for loss of life or personal injury' in C. C. (Adm. Jur.) Act, 1869, s. 4, after 'otherwise'.

injury was received, or of nationality of the ship, or of domicile of the owner, while it retains the usual limitation of amount for County Court jurisdiction.

Loss of life or personal injury caused by the common fault of two or more vessels. Before the passing of the Maritime Conventions Act it had been established that where a person himself free from blame lost his life by reason of negligent navigation of two or more vessels, on one of which he was, his representatives could recover full damages against either wrongdoer without being affected by the rule of division of loss¹⁾, but only in an action *in personam*; similarly, where a person on board one of the vessels was injured by the negligence of both, he could, if not himself to blame, recover his full damages against either wrongdoer; but in practice his right against the carrying ship was usually less effective than his right against the other ship, as the carrying ship could rely on various defences, such as a negation or limitation of the carrier's liability by virtue of terms in the contract of carriage, or common employment, or contributory negligence; the other ship had not so many possible defences, but could plead contributory negligence of the claimant as a complete answer to any claim for damages at all²⁾. No action *in rem* would lie, at any rate unless the vessel sued was the noxious instrument causing the injury³⁾. It had however been held in Ireland that a pilot suing *in personam* for injury caused in a collision for which he was partly to blame could recover damages⁴⁾, but this was of doubtful authority in England.

It is now expressly enacted⁵⁾ that where a person on board one vessel is killed or suffers personal injury by reason of the common fault of the carrying vessel and another or other vessels, there shall be a joint and several liability of the owners of the vessels⁶⁾; and where the action is in a Court having by statute Admiralty jurisdiction in cases of damage the liability is *in rem* or *in personam*⁷⁾. The effect of the Act is that any person injured (or the representatives of any person killed, if the person killed would at the moment of his death have a right to sue for damages) has a right to sue not only the actual wrongdoers, but also either vessel or her owner, or both vessels or both owners collectively. The former rule that where an action is brought against one wrongdoer⁸⁾ or one wrongdoing vessel⁹⁾ only, to the exclusion of the other wrongdoers or other vessels, and the action is prosecuted to judgment, then the right of action against the other owners or vessels is forfeited, probably still is preserved¹⁰⁾, and operates even though the judgment remains unsatisfied.¹¹⁾

Defences under the Maritime Conventions Act. Any defence open to a person sued for loss of life or personal injury to a person on board a vessel jointly in fault is preserved, so that statutory¹²⁾ or contractual immunity or common employment or contributory negligence can still be pleaded as before the Act, as well as defences which amount to a denial of the claimant's case, such as the Act of God, or the King's enemies or inevitable accident; and the right to limit liability is retained.

Effect of the Maritime Conventions Act on actions for personal injury. The statute is one in which Parliament has shown an intention¹³⁾ that it shall apply to any case of loss of life or personal injury which comes before a Court exercising Admiralty jurisdiction in any part of the British Empire (excluding courts in Canada, Australia, New Zealand, South Africa, and Newfoundland¹⁴⁾), wherever the injury may have happened, so that the locality of the injury¹⁵⁾ or the nationality of the

¹⁾ *The Bernina* (1888) 13 App. Cas. 1.

²⁾ Cf. *The Circe* [1906] P. 1.

³⁾ *The Theta* [1894] P. 280.

⁴⁾ *Boucher v. Glyde S. Co.* [1904] 2 Ir. R. 129; where the Irish Court applied the rule of division of loss.

⁵⁾ Maritime Conventions Act, 1911, s. 7.

⁶⁾ This is probably not meant to give a remedy against an owner for acts for which he would not be answerable apart from the Act; see the proviso to s. 2.

⁷⁾ *Ibid.* s. 5.

⁸⁾ *Brinsmead v. Harrison* (1872) L. R. 7 C. P. 547.

⁹⁾ *The Avon & Thomas Jolliffe* [1891] P. 7.

¹⁰⁾ This does not interfere with the rights of contribution *inter se* given by s. 3 of the Act.

¹¹⁾ If the injury gives a maritime lien, this rule would probably not apply.

¹²⁾ E. g. a statute limiting the time within which the action must be brought.

¹³⁾ S. 9 (3).

¹⁴⁾ *Ibid.* s. 9 (1).

¹⁵⁾ Even if it happens within the territorial limits of an excluded dominion: it is only a question of procedure and therefore governed by *lex fori*.

vessel¹⁾ or the territoriality of the waters are not material; but the general rule that, where an action in tort is brought in England for a wrong committed outside the jurisdiction, it must be shown to be a wrong by the law of the place where it was committed, and also by the law of England, will still apply²⁾. On a fair construction of the Act *secundum subjectam materiam* it can only be held to deal with loss of life or personal injury having some connexion with a vessel, and not to give a general jurisdiction in all cases of loss of life or personal injury.

Common Employment. Similarly, the Act does not deprive the employer, i.e. the shipowner, of his right, where the injury was caused by the negligence of a fellow-employee of the person injured, to rely on the defence of "common employment". There is not presumed to be, in an engagement under which personal services are to be rendered, a warranty by the employer against the risks incidental to the employment, so that where the employer has not been personally negligent (as where he provides fellow-servants whom he has no reason to believe to be competent or provides apparatus for use in the employment without having taken reasonable precautions to ensure that it is safe for use when supplied), he is not liable to one employee for injuries caused by the negligence of another employee, whether the latter be of a higher, or equal, or a lower grade in the service. This purely common law doctrine was modified by the Employers' Liability Act, 1880, in the case of many employments, but seamen were excluded from that Act; a person, however, who is not employed on a ship in the ordinary duties of a seaman and is not by occupation a seafaring man, may be not a seaman for the purposes of the Employers' Liability Act, although he would come within the wider definition of the Merchant Shipping Act³⁾, as being engaged in any capacity on board any ship; and he may therefore be entitled to sue for injuries caused by the negligence of a foreman⁴⁾. Employment is not necessarily common because there is a common master or even a common object if that object is remote; the employment must be such that the risk of injury from the negligence of one servant is so much a natural and necessary consequence of the employment which the other servant accepts, that it must be included in the risks which are considered in fixing the wages⁵⁾; and therefore where two ships of the same owner collide by the negligence of the crew of one, and a seaman on the other is injured, it may well be that there is no common employment⁶⁾, although on the other hand in some cases of common service to one shipowner on different vessels there may also be common employment; it is quite possible that the crews of one owner's vessels constantly following one route to and fro are in common employment for the purposes of the principle here discussed.

XXI. Division of Loss.

Former law. Before the passing of the Maritime Conventions Act, 1911, Parliament had been careful to preserve in full operation the rule peculiar to Admiralty law, whereby if damage resulted to either or both of two ships from the joint fault (or "contributory negligence") of each, each ship was required to bear one half of total resulting damage⁷⁾. The rule was applied to all cases of collision between ships, both to damage to ships and to damage to cargo, wherever the collision might happen and whatever the nationality of the ships, and in whatever English Court the action might be brought, whether in Admiralty or at common law. The importance of this rule was much enhanced by the provisions of the Merchant Shipping Act, which created certain statutory presumptions of fault, without any further proof of negligence⁸⁾, so that a finding of contributory negligence or "both to blame" was in practice much more frequent than were cases of true contributory negligence. The English rule had long been recognized as a "*rusticum judicium*", perhaps more equitable than the common law rule, but despairing of the possibility of attaining perfect fairness between the parties, such as division of the loss in proportion to the

¹⁾ Cf. *Davidson v. Hill* [1901] 2 K. B. 606.

²⁾ Cf. *Kendrick v. Burnett* (1897) 25 R. 82; but if the injury is received on the high seas there is perhaps no reason to regard any law other than *lex fori*, i. e. English Law.

³⁾ M. S. A. 1894, s. 742.

⁴⁾ *Macbeth v. Chislett* [1910] A. C. 220.

⁵⁾ *Morgan v. Vale of Neath Rly.* (1866) L. R. 1 Q. B. p. 580.

⁶⁾ *The Petrel* [1893] P. 320.

⁷⁾ Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (9).

⁸⁾ M. S. A. 1894, ss. 419 (4), 422 (1).

culpability of each. Moreover it seemed at times to press with peculiar hardship on a cargo-owner who by his contract of carriage had exonerated his carrier from liability for negligence and was unable to recover more than half his loss from the other vessel, although she might really have incurred nineteen twentieths of the culpability; but this was often more an apparent than a real hardship, as the cargo-owner received some consideration for giving up his remedy against the carrier in fixing the freight. There was a greater hardship in such cases on the non-carrying vessel, where the losses were more accurately apportioned, and she was only slightly to blame, but having a several liability for the whole, could recover nothing from the other wrongdoer by reason of his contractual exemption¹).

Changes effected by the Maritime Conventions Act. The effects of a finding of contributory negligence or "both to blame" have been considerably modified by this Act. Owing to the form in which the modifications are made it is advisable to consider them separately in relation to:

1. Damage or loss to vessels jointly in fault.
2. Damage or loss to cargo or property on board a vessel jointly in fault with another or others.
3. Damage or loss to an innocent vessel or property on board her, by the joint fault of one or more other vessels.
4. Loss of life or personal injury suffered by a person on board a vessel jointly in fault with another vessel.

Before considering these cases in detail there are two preliminary points to observe.

Joint fault. There is no longer any reason to confine the rule of division of loss to cases of actual collision, so that the difficult, and practically unsolved, questions that arose between tug, tow and a third vessel, or tug and tow, will at least assume a new form if they are again raised. All that is now required to introduce the rule of distribution of loss is joint fault of two or more vessels causing damage or loss to the vessels or things on board, or loss of life or personal injury to persons on board; and except in such cases there seems to be no case in which the rule can apply.

Vessels jointly in fault. The rule formerly in force applied to ships, but a wide meaning was given to the term²); the present rule applies to vessels, which term includes "any ship or boat or other description of vessel used in navigation³)"; the explanation of the term is not exhaustive, and "vessel" seems at least to include any craft which can be navigated, even though it be by oars only or by towage only.

Loss of or damage to vessels; meaning of "jointly in fault". Where one or more vessels sustain damage or loss by the joint fault of each vessel, each vessel is liable to make good the damage or loss in proportion to the degree in which it was in fault, or, if varying degrees of fault cannot be established, the loss or damage is to be apportioned equally⁴). In order that vessels may be jointly in fault it must be shown that the fault of each vessel has contributed to the damage⁵), so that a case of contributory negligence arises, i.e. where the damage or loss would not have occurred but for the contemporaneous negligence of each vessel at a time after which she could not avert the loss or damage. If either vessel could, before the loss or damage occurred, by taking any reasonable step have averted the loss, then she alone is to blame, because the cause of the damage was her ultimate negligence in not taking that step, not the earlier negligence of another vessel. Where the acts of negligence are consecutive the rule in admiralty is the same as at common law, and the vessel finally in fault is alone to blame; where the acts of negligence are simultaneous the rule of division of loss applies.

Decree against one vessel only, not against each. Under the old rule, when damage was divided equally, there were not two decrees, one against each vessel, but one decree against the vessel which had suffered the smaller damage; under the new rule it is to be presumed that there will similarly be one decree against the vessel which as a result of the finding is liable to pay. The rule suggested may be

¹) The former French law seems to have been to this effect.

²) *The Dunstanborough* [1892] P. p. 363 (n).

³) M. S. A. 1894, s. 742; Maritime Conventions Act, 1911, s. 10.

⁴) Maritime Conventions Act, 1911, s. 1 (1); *The Sargasso* [1912] P. p. 200.

⁵) Ibid. s. 1 (1) (b).

stated in general terms thus: Where the proportion which a vessel's loss bears to the total loss is greater than the proportion of her fault to the total fault, the decree will be in her favour; conversely, where the proportion which her loss bears to the total loss is less than the proportion of her fault to the total fault, the decree will be against her for the difference between her loss and her liability¹⁾.

Division of loss where the blame is apportioned equally. The rule hitherto in force was that the loss of each ship was halved, and then the smaller sum was subtracted from the larger, and a decree made for payment of the balance so found to the ship which suffered the larger loss. It would probably be convenient in future to have only one principle, whether the fault is apportioned equally or unequally, viz. to deduct the total loss of the vessel whose liability exceeds her loss from her share of the liability and to make a decree for payment of the difference to the other vessel²⁾.

Decree for payment of balance by one party: effect between shipowner and insurer. As the result of the application of the rule of division of loss was not to establish cross-liabilities of each ship, but a single liability of one ship to pay a balance to the other, the shipowner who received payment was not within the terms of a policy of insurance with a "Running-Down clause" in respect of the damage to his ship: it was a sum which had been allowed against him in account, not a sum 'which he shall become liable to pay and shall pay'³⁾. This result in practice is avoided by a provision that as between insurer and assured the matter shall be treated as if there had been cross-liabilities.

Division of loss where vessels are jointly to blame for damage to goods on board one of them. The liability of the shipowners to the goods-owner has already been discussed⁴⁾; their liability *inter se* remains to be considered. From the terms of the Act⁵⁾ the liability of the vessel which is not carrying the goods appears to be limited to such proportion of the damage as represents her degree of fault; but as the liability of the carrying ship, which is *prima facie* a liability to deliver the goods safely under the contract of carriage, is not to be affected by the Act⁶⁾, she must, if she is only to bear ultimately that proportion of the damage for which she is made liable by the Act, have a right to recover from the other wrongdoers any proportion of the damage in respect of which she has had to pay more than her share: but in any case she cannot recover from her fellow wrongdoers an amount which would make their contribution exceed their proportionate liability. The former rule that the goods-owner can in no case recover more than half his damages in such cases of joint fault⁷⁾ can now only apply where the fault is apportioned equally⁸⁾. The

¹⁾ For instance where ships A and B are to blame in the proportions of 4 to 3, there are three possible cases (1) A's loss exceeds her proportionate blame, (2) is in exact proportion to her blame; (3) is less than her proportionate blame. Assume the amounts in each of the cases to be as follows:

1. A's loss, £ 9000 | total loss: A's blame 4—7ths: A's share of loss £ 8000
 B's loss, £ 5000 | £ 14000: B's blame 3—7ths: B's share of loss £ 6000
 B pays A £ 6000 less £ 5000 i. e. B pays A the difference between B's share of the total loss and B's actual loss.

2. A's loss, £ 8000 | total loss: A's blame 4—7ths: A's share of total loss £ 8000
 B's loss, £ 6000 | £ 14000: B's blame 3—7ths: B's share of total loss £ 6000
 here neither ship will pay anything.

3. A's loss, £ 6000 | total loss: A's blame 4—7ths: A's share of total loss £ 8000
 B's loss, £ 8000 | £ 14000: B's blame 3—7ths: B's share of total loss £ 6000
 here A pays B £ 2000.

Under the old rule of equal division B would have had to pay A in Case 1 £ 2000 not £ 1000; in Case 2 A would have received £ 1000; and in Case 3 B would have received £ 1000.

²⁾ For instance, where the liability is apportioned equally (taking the figures used above):

1. A's loss, £ 9000 | total loss: A's liability £ 7000 | B has to pay
 B's loss, £ 5000 | £ 14000: B's liability £ 7000 | A £ 2000.
 2. A's loss, £ 8000 | total loss: A's liability £ 7000 | B has to pay
 B's loss, £ 6000 | £ 14000: B's liability £ 7000 | A £ 1000.
 3. A's loss, £ 6000 | total loss: A's liability £ 7000 | A has to pay
 B's loss, £ 8000 | £ 14000: B's liability £ 7000 | B £ 1000.

³⁾ *London S. S. &c. Insurance Co. v. Grampian S. S. Co.* (1889) 24 Q. B. D. 32, 663.

⁴⁾ See p. 452.

⁵⁾ M. C. A. 1911, s. 1 (1), which should be contrasted with s. 2.

⁶⁾ *Ibid.* s. 1 (1) (c).

⁷⁾ *The Drumlanrig* [1911] A. C. 16.

⁸⁾ M. C. A. 1911, s. 1 (1) (a).

owners of the vessels jointly in fault may agree the respective degrees of blame of their vessels¹⁾, but their agreement will not bind cargo-owners.

Contribution between vessels jointly in fault for loss of life or personal injury.

The general principles touching the recovery of damages or compensation for loss of life or personal injury have been considered elsewhere²⁾. Where such damage is caused to a person on board a vessel by the joint fault of that vessel and one or more other vessels there is a joint and several liability of each vessel, so that the person injured, or his representatives, if the injury is fatal, may sue all or any of the vessels in fault for the whole damage sustained. But as between the wrongdoers, i.e. the owners of the vessels in fault as answerable for the negligence of their servants, the ultimate liability is distributable in proportion to the degree of fault of each vessel³⁾: there is no provision that the liability shall be apportioned equally where different degrees of fault are not established, but this seems to be the only course open to the Court. The person injured may therefore recover his whole damages from any one of the wrongdoers⁴⁾, and if he does so, the wrongdoer who has paid has a *prima facie* right against any other wrongdoer to recover a contribution; the extent to which each wrongdoer is liable for the damage is the proportion which his fault bears to the whole damage and no more; so that any one wrongdoer who has been compelled to pay the whole will have to claim contribution from all the other wrongdoers if he wishes to recover the full contribution to which he is entitled; but if any one wrongdoer has or would have had a good answer to a claim by the original sufferer, he may set it up as a defence against the person seeking contribution⁵⁾; and this is so whether the defence would have been a complete or a partial answer to a claim by the original sufferer: e.g. a shipowner might contract with a passenger that he should not be liable to pay a sum exceeding £10 for personal injuries; the passenger may recover against the other ship £100 for damages in a collision in which both are in fault, but the carrying ship is 9-10th to blame; the other vessel can only recover £10, not £90 as a contribution.

Loss or damage to property on board an innocent vessel by the common negligence of other vessels. Since the Maritime Conventions Act⁶⁾ only applies to cases of damage to property on board a vessel in fault, the former law as to damage to property on board another vessel not in fault is preserved. The goods-owner may sue each or all of the wrongdoers and recover full damages, for which he can levy execution against each or all of such defendants as he may have sued to judgment; but if he recovers judgment against one or some only of the wrongdoers he thereby releases the others from any liability to himself⁷⁾, even though the judgment remains unsatisfied.

Injury to a person on board an innocent vessel by the common negligence of two or more other vessels. The Maritime Conventions Act⁸⁾ only applies to loss of life or injury to a person on board one of two or more vessels in fault: where the common negligence of two or more vessels causes loss of life or personal injury to a person on board an innocent vessel the law is left as it was before the Act. The person injured (or the representatives of a person killed) has a right of action against any one wrongdoer or against all of them; he is not bound to sue them all, but if he sues any one or more to judgment, his remedy against the others whom he has not so sued is gone⁹⁾, even though the judgment remains unsatisfied. As against wrongdoers against whom he has recovered judgment he may enforce his judgment by execution against all or any of them, up to the amount of his damages.

XXII. Limitation of Liability.

Development of the privilege. The right or privilege given in certain cases to limit liability in respect of damage to persons or goods on board a carrying ship, or on board any vessel, or on board any vessel in a dock, or to rights of any kind by

¹⁾ Cf. *The Drumlanrig* [1911] A. C. 16.

²⁾ See Damages for loss of life or personal injury, p. 456.

³⁾ Maritime Conventions Act, 1911, s. 3 (1).

⁴⁾ *Ibid.* s. 2.

⁵⁾ *Ibid.* s. 3, proviso; cf. *The Cairnbahn* (1912) 29 T. L. R. 60.

⁶⁾ S. 1.

⁷⁾ *Brinsmead v. Harrison* (1872) L. R. 7 C. P. 547.

⁸⁾ Ss. 2, 3.

⁹⁾ *Brinsmead v. Harrison* (1872) L. R. 7 C. P. 547 (action *in personam*).

land or water, is in England purely statutory, being developed from a very small beginning in 1734¹⁾, to include liability for collision-damage²⁾, and extended to foreign vessels and to personal injuries and to ships not yet completed, and with a fixed maximum of £8 or £15 a ton of the statutory tonnage of a vessel, by various enactments now consolidated in the Merchant Shipping Acts³⁾.

Statutory rights to limit liability. The effect of the various statutes may be summarised as follows: the owner [including a beneficial owner as well as a registered owner⁴⁾, and a part-owner although another part-owner may be in fault⁵⁾ or a charterer by demise⁶⁾, and the owner builder or other party interested in any ship built in the British dominions from the time of her launch until she is either registered⁷⁾ or becomes a foreign ship⁸⁾] of a ship [i.e. a vessel used in navigation and not propelled by oars⁹⁾ whether completed or in course of construction¹⁰⁾] being British [i.e. British and duly registered unless exempt from registration¹¹⁾ or between launching and registration] or foreign¹²⁾, or of a dock canal or harbour [in respect of damage to property only¹³⁾], British or foreign¹⁴⁾, may limit his liability where a claim is made against him for loss of life or personal injury or for damage to rights or property, in accordance with the following provisions:

Loss of life or personal injury. 1. Where loss of life or personal injury is caused:

- a) To any person being carried in the ship; this will include claims by master, crew, passengers, or any other person on board, but there can be no limitation against claims for compensation under the Workmen's Compensation Act¹⁵⁾, as these are not technically claims for damages¹⁶⁾ and the right is expressly denied by statute¹⁷⁾;
- b) To any person carried in any other vessel¹⁸⁾ by reason of the improper navigation¹⁹⁾ of the ship²⁰⁾.

Damage to rights or property. 2. a) Where loss or damage is caused to property or rights of any kind, whether on land or water and whether fixed or movable, by reason of the improper navigation¹⁹⁾ or management²¹⁾ of the ship; this provision²²⁾ is almost sufficiently comprehensive to include all the rights to limit liability in respect of property given by the principal Act²³⁾, and it must extend to injury to real property, including incorporeal hereditaments, such as a right of way, and rights of support, if caused by improper navigation or management of a ship: the earlier provisions were:

- b) Where any damage or loss is caused to any goods, merchandise or other things whatsoever²⁴⁾ on board the ship²⁵⁾; there is here no reference to the cause of the damage;
- c) Where any loss or damage is caused to any other vessel¹⁸⁾, or to any goods, merchandise or other things whatsoever²⁴⁾ on board any other vessel by reason

1) (1734) 7 Geo. 2, c. 15, see now M. S. A. 1894, s. 502.

2) (1813) 53 Geo. 3, c. 159.

3) Viz. 1894, ss. 503—509; 1898, ss. 1—4; 1900, ss. 1—3; 1906, ss. 69—71.

4) *The Spirit of the Ocean* (1865) Br. & L. 336.

5) *The Obey* (1866) L. R. 1 A. & E. 102.

6) M. S. A. 1906, s. 71.

7) M. S. A. 1898, s. 1.

8) M. S. A. 1906, s. 70.

9) M. S. A. 1894, s. 742.

10) M. S. A. 1898, s. 4.

11) M. S. A. 1894, ss. 2, 3, 72, 373, 374, 508; 1898, s. 1.

12) M. S. A. 1894, s. 503 (1).

13) M. S. A. 1900, s. 2 (1),

14) Ibid. s. 2 (3).

15) 6 Edw. 7, c. 58, s. 7 (1) (f).

16) M. S. A. 1894, s. 503 (1) (a).

17) W. C. A. 1906, s. 7 (1) (b).

18) A wider term than 'ship': M. S. A. 1894, s. 742.

19) I. e. wrongful or negligent act of any person for whom the shipowner is answerable, whether ashore or afloat: *The Warkworth* (1884) 9 P. D. 145.

20) M. S. A. 1894, s. 503 (1) (c).

21) Cf. *The Glenochil* [1896] P. 10.

22) M. S. A. 1900, s. 1.

23) M. S. A. 1894, s. 503 (1) (b) (d).

24) The widest term known; it prevents 'things' from being merely *ejusdem generis* with 'goods'.

25) M. S. A. 1894, s. 503 (1) (b).

of the improper navigation¹⁾ of the ship²⁾): here the cause of the damage is limited to improper navigation.

Extension of the privilege to Dock, Canal, Harbour and Conservancy Authorities.

3. Where any loss or damage is caused to any vessel or vessels³⁾, or to any goods, merchandise or other things whatsoever on board any vessel or vessels⁴⁾. There is nothing to restrict the right to British dock, canal, or harbour owners⁵⁾, and a wide meaning is given to the term dock, so that it shall include wet or tidal docks or basins, gridirons, ships, dry and graving docks, quays, wharves, piers, stages, and jetties: and the term dock owner or canal owner includes an authority having the control of a dock or canal. No definition is given of harbour or conservancy authorities, as they are defined in the Merchant Shipping Act⁶⁾. No right to limit liability in respect of loss of life or personal injury is given to such bodies.

Actual fault or privity. The right to limit liability, whenever it is given, is confined⁷⁾ to cases where the loss or damage has occurred without the actual fault or privity of the owner, which means some wrongful act of the owner himself who is seeking to limit liability⁸⁾, either his own act or neglect or by his express direction; any actual fault or privity alleged must be that of the actual owner, or *dominus pro tempore* as in the case of a demise of the ship⁹⁾, and not of a servant or agent merely¹⁰⁾, or else the actual fault or privity of a part-owner¹¹⁾, such as a master actually in charge of the ship at the time of the damage who also happens to be a part-owner; any co-owner not actually in fault or privy to the fault may limit his liability in proportion to his interest in the ship.

Amount to which liability may be limited. The pecuniary sum to which liability may be limited is based upon tonnage ascertained in the prescribed manner; the sum is larger where there is loss of life or personal injury; the limitations laid down are:

1. In respect of loss of life or personal injury, either alone or with damage to property or rights of any kind, a sum not exceeding £15 a ton¹²⁾.
2. In respect of loss or damage to property or rights of any kind, a sum not exceeding £8 a ton¹³⁾.
3. In respect of loss or damage to vessels or anything on board a vessel, where a dock, canal, harbour or conservancy authority is seeking to limit liability, a sum not exceeding £8 a ton of the tonnage of the largest registered British ship (excluding in the case of harbour or conservancy authorities ships built or fitted out in their area, or that have taken shelter or passed through that area, or merely landed mails or passengers there), which at the time of occurrence of the loss or damage is, or within 5 years preceding the occurrence has been, within the area over which the dock or canal owner or the harbour or conservancy authority performs any duty or exercises any powers.

Interest on the amount to which liability is limited. The sum calculated on tonnage is not the full measure of liability, as the invariable Admiralty practice has been to allow interest, usually at 4 per cent., on the amount as limited from the date of the loss or damage¹⁴⁾ until payment, in order to discourage delay and because payment is in theory due when the wrong is inflicted. The wrongdoer is also liable for the costs of proceedings, including the costs of the action for limitation of liability, if any, and the costs of any subsequent reference to assess damages, although he has no interest in the allocation of the sum paid in, and the struggle at the reference may be only between rival claimants, each seeking to reduce the claims of others.

¹⁾ I. e. wrongful or negligent act of any person for whom the shipowner is answerable, whether ashore or afloat: *The Warkworth* (1884) 9 P. D. 145.

²⁾ *Ibid.* s. 503 (1) (a).

³⁾ *Ibid.* s. 742.

⁴⁾ M. S. A. 1900, s. 2 (1).

⁵⁾ *Ibid.* s. 2 (3).

⁶⁾ M. S. A. 1894, s. 742.

⁷⁾ M. S. A. 1894, s. 503 (1); 1900, s.s 1, 2.

⁸⁾ *Asiatic Petroleum Co. v. Lennard's Carrying Co.* (1912) 18 Com. Cas. 23.

⁹⁾ *Cf.* M. S. A. 1906, s. 71.

¹⁰⁾ *The Yarmouth* [1909] P. 293.

¹¹⁾ *The Obey* (1866), L. R. 1 A. & E. 102.

¹²⁾ M. S. A. 1894, s. 503.

¹³⁾ *Ibid.* 1900, s. 1.

¹⁴⁾ *The Crathie* [1897] P. pp. 182, 183.

How far agreements fixing values are binding. Rival claimants are not bound by any finding or agreement as to the value of the ship in respect of which liability is limited, unless they are parties to it¹⁾; but they would be bound by any finding of the value by a competent Court in a case in which it was material to the parties before the Court to dispute the values alleged.

Distribution of the fund between life and property claims. As between claims for loss of life or personal injury and claims of any other kind, the former attach to the £7 (being the excess of £15 over £8) to the exclusion of all other claims, which can never attach to the £7. The other claims for loss or damage attach only to the £8, but not to the exclusion of any unsatisfied balance of the claims for loss of life or personal injury²⁾, i.e. as against the £8, claims of each class will rank rateably if any residue of claims of the former class is unsatisfied³⁾.

Measurement of tonnage. 1. For the purposes of limitation of liability the tonnage of ships is as to steamships, the registered tonnage⁴⁾ with the addition of any engine-room space deducted for the purpose of ascertaining that tonnage⁵⁾, but certified spaces appropriated to crew and apprentices will not be included⁶⁾, unless in the case of ships of foreign countries which have adopted the Tonnage Regulations the space for crew and apprentices is certified not to come up to the standard required in the case of a British ship⁷⁾. Subject to this exception, where a foreign country has adopted the Tonnage Regulations of the Merchant Shipping Acts, an Order in Council may provide⁸⁾, that the statement of tonnage in the foreign certificate of registry shall have the same effect as the statement of tonnage in a British certificate of registry⁹⁾; but in cases where the foreign certificate shows a result materially different from the result of measurement in this country under the Merchant Shipping Acts, an order may be made for re-measurement under those Acts¹⁰⁾. The effect therefore as to foreign ships is that where they have been, or can be, measured according to British law, their tonnage will be the tonnage so ascertained (unless the crew space is certified to be below the British standard); but where she has not been, and cannot be, so measured, evidence of her tonnage may be furnished by a certificate of the Surveyor General of Ships in the United Kingdom, stating what her tonnage would be according to British law¹¹⁾; and for any purpose of the Acts, where her foreign measurement differs materially from the measurement as it would be under the Acts, she may be re-measured in accordance with the Acts. As the registered tonnage for purposes of limitation of liability includes any engine-room space deducted to ascertain her registered tonnage for other purposes, it does not seem to be affected seriously, if at all, by the restriction of deductions for the space occupied by propelling power to 55% of the tonnage remaining after the deductions allowed from the gross tonnage¹²⁾.

Tonnage of sailing ships for limitation of liability. 2. The tonnage of a sailing ship, for the purposes of limitation of liability, is her registered tonnage¹³⁾; but where her crew space is certified to fall short of the standard required in the case of a British ship the deduction on account of that space may be disallowed¹⁴⁾.

1) *C. A. van Eijck & Zoon v. Somerville* [1906] A. C. 489.

2) *The Victoria* (1888) 13 P. D. 125.

3) E. g. if liability is limited to £15 a ton on 1000 tons, the fund available is £15 000, with accrued interest; if life claims amount to £20 000 they first receive £7000 with accrued interest; then if damage claims amount to £39 000, there is £52 000 unsatisfied (life £13 000, cargo etc. £39 000); these life claims will take of the £8000 and interest remaining $\frac{13}{52}$ nds or one quarter, cargo etc. claims will take $\frac{39}{52}$ nds or $\frac{3}{4}$ ths. The effect in such a case will be that life claims receive in all £7000 and £2000, or 45 per cent. of their amount, while cargo etc. claims receive £6000 or about 15 per cent. only.

4) M. S. A. 1906, s. 69.

5) M. S. A. 1894, s. 503 (2) (a).

6) *Ibid.*

7) M. S. A. 1906 (6 Edw. 7, c. 68), s. 55.

8) M. S. A. 1894, s. 84 (1).

9) Orders in Council under previous acts are preserved in effect by s. 745. See Statutory Rules and Orders, 1909, p. 490; 1911, p. 237.

10) *Ibid.* s. 84 (3).

11) *Ibid.* s. 503 (2) (c).

12) M. S. A. 1907 (7 Edw. 7, c. 92).

13) M. S. A. 1894, s. 503 (2) (a).

14) M. S. A. 1906, s. 55.

Effect of statements of tonnage in certificates. The effect of the statement of the tonnage of a British ship in its certificate, or of a foreign ship that has adopted the tonnage regulations of the Merchant Shipping Acts, is that the statement is evidence of the true tonnage, but not conclusive in the case either of a British¹⁾ or of a foreign²⁾ ship.

Separate losses on distinct occasions. In the case of sea-going³⁾ ships it is provided⁴⁾ that the owner shall be liable in respect of loss or damage on each occasion as if no other occasion of loss or damage had occurred; that is, he may not limit his total liability for all loss and damage to £15 or £8 a ton, but he may limit his liability for the loss or damage on each occasion to a fresh sum of £15 or £8 a ton: the test is whether the loss or damage is due to the same default or negligent act⁵⁾, or to a separate default or negligent act on each occasion. It is not conceivable that the introduction of the term "sea-going" entitles ships that do not go to sea to claim that they are in any better position.

Separate losses on one occasion. It is provided that an owner may limit liability (i.e. in one sum according to his tonnage) in respect of the whole of the losses and damages arising on any one distinct occasion, although the losses and damages may be inflicted on more than one person and may arise at common law or under some Act of Parliament⁶⁾. The provision only applies in terms to losses or damages arising under the Act cited, which contains no reference to loss of life or personal injuries, and although it is to be read and construed with the other Merchant Shipping Acts, it seems to have no reference to such liabilities; but in view of the terms of the principal Act, which gives a right to limit liability where loss of life, personal injury, or loss or damage to property "is caused", it is probable that a shipowner can always limit his liability in one sum for the effects of one cause; but dock, canal, harbour and conservancy authorities have no right to limit their liability in respect of personal injury or loss of life at all⁷⁾, although as to property they have the same right as shipowners. In cases where loss of life or personal injury is caused to any person on board a vessel by the joint fault of that vessel and one or more other vessels, there is a joint and several liability of each of the vessels⁸⁾; but any one of such vessels⁹⁾ may limit her liability, either when sued directly for the injury¹⁰⁾ or when sued by the owner of another vessel in default for a proportionate contribution¹¹⁾.

XXIII. Salvage.

Meaning and nature of Salvage. Salvage is the term used to denote:

1. The reward allowed to persons who voluntarily rescue a vessel, her apparel, and cargo, or the wreck thereof, or the lives of persons belonging thereto, from maritime perils, or
2. More loosely, the services rendered which entitle salvors to a salvage award.

The common law of England does not admit that the voluntary rendering of valuable services to the person or property of another carries with it any right to reward¹²⁾. English maritime law departs from this in the cases of salvage, and of general average: whether it is a question of implied contract or of rights independent of contract need not be discussed here. "With regard to salvage, general average, and contribution, the maritime law differs from the common law. That has been so from the time of the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability

¹⁾ *The Recepta* (1889) 14 P. D. 131.

²⁾ *The Franconia* (1878) 3 P. D. 164.

³⁾ The meaning of the term was discussed in reference to a different section (s. 260 of the present Act) in *Salt Union v. Wood* [1893] 1 Q. B. 370.

⁴⁾ M. S. A. 1894, s. 503 (3).

⁵⁾ *The Schwan, The Albano* [1892] P. p. 439.

⁶⁾ M. S. A. 1900, s. 3.

⁷⁾ M. S. A. 1900, s. 2, only applies to vessels or things on board vessels.

⁸⁾ Maritime Conventions Act, 1911, s. 2.

⁹⁾ The term used in the Maritime Conventions Act; but there is no provision anywhere to enable a vessel (M. S. A. 1894, s. 742) which is not a ship (M. S. A. 1894, s. 742) to limit liability.

¹⁰⁾ Maritime Conventions Act, 1911. Proviso to s. 2.

¹¹⁾ *Ibid.* Proviso to s. 3 (b), r. s. 3 (2).

¹²⁾ Cf. *Ruabon S. S. Co. v. London Assurance* [1900] A. C. p. 12

upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, or to anything except ships or goods in peril at sea. With regard to ordinary goods upon which labour or money is expended with a view of saving them or benefiting the owner, there can, so it seems to me, according to the common law, be only one principle upon which a claim for repayment can be based, and that is where you can find facts from which the law will imply a contract to repay or to give a lien¹⁾).

What services amount to Salvage services. Salvage services may be rendered either to life or to property, but in order that a salvage reward may be earned, there must be services which preserve life and are to be rewarded out of moneys provided by Parliament²⁾, or services to a ship or her apparel, or her cargo³⁾, and these must be meritorious services which contribute to the ultimate safety of property found in danger at sea⁴⁾; services which do not contribute to ultimate safety will not be salvage services, although they may entitle the person rendering them to some remuneration for his efforts⁵⁾. It seems indeed that where services which are in their nature salvage services are rendered under an express agreement, nothing will become payable as salvage in respect of such services unless some property is saved, so that where salvage services are in fact rendered, the ultimate preservation of some property is essential before a claim to reward can be made out, whether the services are rendered *in invitum*, or to a willing recipient, or under express agreement⁶⁾.

Life Salvage.

Jurisdiction in cases of life salvage. The jurisdiction to award life salvage is peculiarly the creature of statute; before any enactment had been passed to enable the High Court of Admiralty to award salvage for the preservation of life⁷⁾ *eo nomine*, the court in fact adopted, in cases where both property and life had been saved, a practice of making a higher award than where property alone was saved, but since 1854 the jurisdiction to award salvage for saving life is statutory also⁸⁾. The effect of the statute is that:

- a) As to British vessels from which life is saved in any waters, British or elsewhere, life salvage to a reasonable amount is payable to the salvor;
- b) As to foreign vessels from which life is saved wholly or in part in British waters life salvage is similarly payable; and
- c) As to foreign vessels where life is saved in waters beyond the limits of British jurisdiction, life salvage is payable where the country to which the foreign vessel belongs has consented that a British Court may award life salvage in respect of vessels of that country⁹⁾.

The provision that life salvage may be awarded where services are partly rendered in British waters gives rise to some little difficulty; it is always a question, not only whether the persons saved have been brought into British waters, but whether the bringing of them thither was part of the salvage services¹⁰⁾. A point of time may naturally be reached in any salvage case where the salvage services cease and mere carriage of persons or towage of vessels begins¹¹⁾; if the actual salvage continues within British waters there will be jurisdiction in British Courts to award life salvage. A foreign vessel may clearly sue in British Courts for life salvage services rendered to a British ship anywhere or to a foreign vessel in British waters.

Life salvage payable only out of property saved. The only funds against which a claim for life salvage can be asserted are the funds produced by the salvage of

¹⁾ Cf. *Falcke v. Scottish Imperial Assurance* (1886) 34 Ch. Div. p. 248.

²⁾ M. S. A. (Mercantile Marine Fund) 1898 (61 & 62 Vict. c. 44).

³⁾ *Wells v. Gas Float Whitton No. 2* [1897] A. C. 337.

⁴⁾ Cf. *The August Korff* [1903] P. 166.

⁵⁾ Cf. *The Benlarig* (1888) 14 P. D. 3.

⁶⁾ *The Renpor* (1883) 8 P. D. 115.

⁷⁾ This includes the lives of passengers as well as of master and crew; and the salvage need not be from the vessel herself but may be from her boats: *The Cairo* (1874) L. R. 4 A & E. 184.

⁸⁾ M. S. A. 1894, ss. 544, 555, which reproduce earlier statutory provisions.

⁹⁾ The Kingdom of Prussia is the only State which has at present so consented.

¹⁰⁾ *The Pacific* [1898] P. 170.

¹¹⁾ *Jørgensen v. Neptune &c. Co.* (1902) 4 F. 992.

property, viz. the ship from which the life or lives were saved, or her cargo¹). There is no right against the owner of the vessel or cargo *qua* owner, but only *qua* owner of property saved; the claim must be against a person who has an interest in property saved or recovered from the maritime dangers to which life and property were exposed. It is not necessary that the life salvor shall also be the salvor of the property²); the property may be rescued by others, e.g. specie recovered by divers employed by the owners of the specie³), or passage-money received from passengers carried on to their destination in cases where they could claim to be carried on by the ship-owner⁴).

There is thus no claim for life salvage merely against a person: so that where ship A was sunk by the negligence of ship B, and ship C rescued lives from ship A, ship C had no claim on the damages recovered by A from B for total loss, as nothing had been saved⁵), and there was therefore no property out of which life salvage could issue.

Life salvage payable out of all property saved, and in priority to other salvage. Life salvage, when awarded, is payable in respect of property saved, rateably out of the different interests saved, which may be ship, apparel, cargo, or freight, or any one or more of them; if an interest has been wholly lost, it cannot be made to contribute. Life salvage is payable in priority to any other claim for salvage, so that when the property saved is insufficient to pay all claims, life salvage must be satisfied first⁶).

What constitutes a life salvage service. The essential characteristics of all salvage services are considered below; but in connexion with life salvage there must have been actual danger to the persons rescued or serious apprehension of such danger⁷); the mere inconvenience of being landed on the coast of Labrador without any danger of starvation was not sufficient danger to found a claim for life salvage⁸), nor was a rescue from an uninhabited island near a savage coast in the Red Sea, where there was little water and no shelter, as there was no immediate danger⁹).

Statutory remuneration for life salvage. Where the property saved is insufficient to reward life salvage or where no property is saved, the Board of Trade may award in respect of the deficiency, remuneration out of moneys to be provided by Parliament¹⁰).

Statutory duty to save life at sea. It is a misdemeanour for the master or person in charge of a vessel to fail to render to a person in danger of being lost at sea such services as can be rendered without serious danger to the vessel rendering the services or to her crew or passengers (if any)¹¹). The duty so imposed extends to saving alien enemies¹²); but the fact that such services will henceforth be rendered under a statutory obligation is not to affect the right of any salvor to salvage¹³). The obligation appears to extend to all persons in charge of a British ship, wherever she may be, and to persons in charge of any ship, British or foreign, in British territorial waters (other than the territorial waters of the Dominions of Canada, Australia, New Zealand, and South Africa, and Newfoundland¹⁴), including any protectorate and Cyprus; and it extends to all waters, whether territorial, inland, or on the high seas, where the occasion may arise¹⁵) to render such services.

Salvage of Property.

Jurisdiction as to salvage of property. Salvage of property, as dealt with in the Court of Admiralty, has a very different history to that of life salvage. The

¹) *Cargo ex Sarpedon* (1877) 3 P. D. 28.

²) Cf. *The Suevic* [1908] P. 154.

³) *Cargo ex Schiller* (1877) 2 P. D. 145.

⁴) Cf. *The Medina* (1876) 1 P. D. 272; 2 P. D. 5; *The Mariposa* [1896] P. 273.

⁵) *The Annie* (1886) 12 P. D. 50.

⁶) M. S. A. 1894, s. 544 (2).

⁷) *The Suevic* [1908] P. p. 158.

⁸) *The Mariposa* [1896] P. 273.

⁹) *Cargo ex Woosung* (1875) 3 Asp. 50.

¹⁰) M. S. A. (Mercantile Marine Fund) 1898 (61 & 62 Vict. c. 44), s. 1, and M. S. A. 1894, s. 544 (3).

¹¹) Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), s. 6.

¹²) Ibid. s. 6 (1).

¹³) Ibid. s. 6 (2).

¹⁴) Ibid. s. 9 (1).

¹⁵) Ibid. s. 9 (3).

effect of legislation has been the removal of various ancient statutory restrictions on the jurisdiction in Admiralty to award salvage in respect of the locality where salvage services have been rendered. Salvage of property on the high seas has always been a matter cognisable by the Court of Admiralty; the Admiralty Court Act of 1840¹⁾ gave jurisdiction to decide all claims and demands in the nature of salvage for services rendered to any ship or sea-going vessel, whether the ship or vessel was in the body of a county or on the high seas at the time of the services; the Merchant Shipping Act, 1854²⁾ gave jurisdiction to allow a reasonable amount of salvage³⁾, for services to a vessel or her apparel or cargo, or for saving the wreck thereof, in places near the United Kingdom or in the tidal waters thereof; and to decide all claims for salvage⁴⁾, wherever the services were performed, or, in the case of wreck, wherever the wreck was found. As these modern enactments only operate to extend the jurisdiction of the court in respect of a subject-matter in which it already exercised jurisdiction on well-recognised principles, the same incidents, such as the enforcing of a maritime lien, have attached to the extended jurisdiction as attached to the old jurisdiction.

Elements of salvage of property. In order to constitute a salvage service to property three essential features must be present, namely:

1. Voluntary services rendered
2. To property exposed to maritime perils, and
3. Ultimate preservation of some of the property as a result of the service.

Voluntary nature of salvage services to property. The services must be voluntary; they must be rendered personally and spontaneously, and not in pursuance of pre-existing duty, whether contractual⁵⁾ or official. There is at any rate in life salvage so far a moral obligation that deviation to save life is no breach of any warranty in a policy of insurance or of any term in a charter-party; and there is now in the case of British ships or of ships in British waters a legal duty to render life salvage services⁶⁾; deviation, however, merely to save property may be a breach of warranty or contract, unless it is (as is frequently stipulated at the present day) expressly permitted. Every case of salvage may entail a deviation if it either takes the salvaging vessel out of her course or delays her progress on her original adventure even though she is following her original course, as where she tows a vessel found in distress on that course.

No salvage where there is a duty to save property. The disqualification by contractual duty operates to prevent owners, masters, crews, and persons coming within a similar category, such as pilots, from earning salvage where they are already bound to do what is in their power to preserve the property.

Salvage where both ships belong to one owner. The right of a shipowner not personally present to participate in a salvage award is based rather on an equitable principle that he is to be compensated for the use of his vessel as the instrument of salvage than on any service actually rendered by him; his property may have been put in peril or damaged or detained, and these matters will be considered in his compensation, but he has not rendered real salvage services in the same sense as the active salvors have done. As salvor, therefore, he does not participate, but as owner of the instrument of salvage; and if the salvage is of another ship belonging to himself, he can get no reward for saving his own vessel; and similarly where the same person is a part-owner of each vessel, the award should be reduced by the extent of his proportionate interest in the vessel saved⁷⁾.

Rights of crew where both vessels belong to one owner. The right of the master and crew to salvage in such cases is wholly different, as they are entitled to recover salvage for their services to both vessel and cargo, unless by some previous valid agreement they are debarred⁸⁾.

1) 3 & 4 Vict. c. 63.

2) Now re-enacted as M. S. A. 1894, s. 546.

3) Ibid. s. 510, to include all expenses properly incurred by the salvor in performing the services.

4) Now s. 565.

5) *Clan Steam Trawling Co. v. Aberdeen S. T. Co.* [1908] S. C. 651.

6) Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), s.s 6, 9.

7) *The Caroline* (1861) Lush. 334.

8) *The Sappho* (1871) L. R. 3 P. C. 690: and see p. 478.

Salvage where a vessel is chartered. Where one or other of the vessels is chartered other considerations are introduced. *Prima facie* a charterer is not entitled to share in salvage earned by the chartered ship (unless the charter-party amounts to a demise), but he may have a claim for damages for delay or deviation due to the salvage services¹). If the charter-party amounts to a demise, salvage will be for the benefit of the charterer²). The fact that the salving vessel is under charter to the owners of the property saved does not prevent her owners from obtaining salvage³); but if the vessel saved is under charter, the fact that the salving vessel belongs to the same owners may prevent the owners from recovering. In the comparatively infrequent case of a demise of a vessel, the charterer must be treated as owner, and the owner will have no interest except under his contract.

Rights of cargo-owner where both vessels belong to one owner. Where both vessels belong to the same owners, and cargo on board one is saved by the other, the liability of the cargo-owner to pay salvage to the shipowner will depend on the liability of the shipowner to make good any loss or damage in connection with the goods: if the shipowner is under no liability to the goods-owner, as where he is protected by exceptions⁴), he can claim salvage; but if he is under a liability it would be idle to allow him to recover that which he would have to pay back as damages⁵).

Master and crew as salvors of their own ship. With regard to salvage of their own vessel by master or crew, the Court scrutinizes narrowly such a claim, as they are already bound⁶) to do all that they can to avert wreck or loss of ship; they can only become salvors when they have ceased to have a contractual duty to perform, as where the master has discharged the crew⁷), or has justifiably abandoned the vessel, or, probably, where the vessel has been captured by an enemy. Where the contract of service has thus been dissolved the master or crew may become salvors. Passengers have been held to be much in the same position, but as they have no contractual duties, if they voluntarily elect to abide by the ship when they might escape, and thereafter render valuable services, they may become salvors, and for substantial services, such as taking command and bringing the vessel to port, they may receive substantial reward⁸).

Pilots as salvors. The services of a pilot are not lightly to be converted into salvage services⁹). He has duties in the nature of contractual duties for a specified remuneration; if, however, a pilot performs services which cannot reasonably be held to come within the duties for which he engaged as pilot, he may become a salvor, either of the vessel which he is engaged to pilot¹⁰) or of a vessel which his own ship has undertaken to save¹¹). A pilot may be justified by circumstances in refusing to take charge of a vessel merely as pilot, or, having taken charge, he may by change of circumstances become a salvor, unless he expressly has agreed otherwise¹²).

Tug as salvor of her tow. A claim by a tug which, having undertaken to tow a vessel, alleges that she has rendered salvage services is one which will be carefully scrutinized; it is not for the public benefit that a towage contract should easily be displaced so as to allow a claim for salvage to be substituted. The tug making such a claim must:

1. Disprove that there was any default by the tug, such as insufficiency of power or equipment or inefficiency of crew or want of skill; and
2. Prove affirmatively that the change from towage to salvage was brought about by some cause beyond the tug's control, such as *vis major* or inevitable accident¹³).

A tug does not undertake to carry out the towage at all hazards and in all circumstances, but it does (where a specific tug is not stipulated for by both parties)

¹) *The Alfen* (1857) Swa. 189.

²) Cf. *The Scout* (1872) L. R. 3 A. & E. 512.

³) *The Waterloo* (1820) 2 Dods. 433.

⁴) *Cargo ex Laertes* (1887) 12 P. D. 187.

⁵) *The Glenfruin* (1885) 10 P. D. p. 108.

⁶) M. S. A. 1894, ss. 157 (1), 220 (b).

⁷) *The Warrior* (1862) Lush. 476.

⁸) *Newman v. Walters* (1804) 3 B. & P. 612.

⁹) *The Aeolus* (1873) L. R. 4 A. & E. 29.

¹⁰) Cf. *Akerblom v. Price* (1881) 7 Q. B. D. 129.

¹¹) *The Santiago* (1900) 9 Asp. 147.

¹²) *The Anders Knape* (1879) 4 P. D. 213.

¹³) *The Maréchal Suchet* [1911] P. 1.

undertake that she shall be adequate in crew, handling and equipment to do the towage in the circumstances reasonably to be expected, with reasonable skill and care. If both tug and tow are negligent, the tug will not be allowed to claim as salvor of the tow¹).

Ship's Agent as salvor. *Prima facie* the remuneration of a ship's agent for any services rendered to the ship for which he is agent is provided by the payment of his disbursements, with commission at the usual rate on such disbursements²); but he is not wholly precluded from becoming a salvor; he may acquire a right to remuneration beyond that of an agent if he is requested by the owners of property to give assistance, and so may be entitled to claim both as agent and salvor³); the award may not be so great as if he, like ordinary salvors, was wholly dependent on the success of his efforts for any reward at all. It is a matter of nicety to distinguish agency services from salvage services, but where circumstances demand it the Court will do so⁴).

Public servants or officials as salvors. Another class of claimants, namely, public servants and persons having official duties towards vessels in distress need only be discussed briefly. So far as they render services similar to salvage in the course of their official duties they are not salvors, but for services which are beyond the scope of their ordinary duties they may become salvors. Officers and men of the Royal Navy owe a general duty to protect and aid British vessels, and mere assistance will give no right to salvage: but the case is altered when the officers and crew of a king's ship are called upon to do something which is not within the ordinary scope of the duties they are expected to perform⁵). They have no claim for the services rendered by the king's ship⁶); but for assistance given by themselves they may be rewarded on a scale increasing with the difference between what they did and what they were bound to do, but no award can be made until the consent of the Admiralty to the prosecution of the claim has been proved⁷). Similarly, coastguards are paid for their ordinary services, which include duties as to wreck, but they are encouraged to render services beyond their ordinary duty, such as putting out in circumstances of danger to save life or property, and then they are in the position of ordinary salvors. Claims by receivers of wreck, magistrates, or police officers, or other officials with public duties to a ship in distress, as salvors, can rarely be substantiated and only where their services are wholly outside their public functions.

Salvage by lifeboatmen. Lifeboatmen, or the actual crew of any lifeboat, are not public officials; but where a lifeboat is provided by a society and a crew go in it to save life, their remuneration is *prima facie* to be their pay from the society; if they allege that they have rendered services to property entitling them to salvage it is for them to prove it: in such a case the society would be rewarded as owner of the life-boat which is the instrument of salvage, the crew as actual salvors; persons who assist in launching a lifeboat or by giving information which brings about the launch and the subsequent salvage may be salvors in a minor degree⁸).

Only property at risk can be the subject of salvage. In the next place, the voluntary salvage services must be rendered to property at risk. It is not necessary that there should be immediate or actual distress or imminent and absolute danger⁹); but there must be a just cause of present apprehension of distress or danger, whether the cause lies in any mishap which has already occurred or in circumstances which make it likely that if no assistance is available a mishap will occur. Such causes are inevitably very various; they may exist by reason of incompetence or disability of officers, inadequacy of crew or equipment, deficiency of equipment for a particular locality, adverse winds, weather, currents or tides, lack of fuel or provisions, loss of adequate means of progress in a safe direction, proximity to a dangerous or hostile coast, inability to avoid pirates or sea-robbers, fire, or other of the endless dangers of the sea.

1) *The Duc d'Aumale* [1904] P. 60.

2) Cf. *The Crusader* [1907] P. 196, p. 207.

3) *The Kate B. Jones* [1892] P. p. 373.

4) *Cargo ex Honor* (1866) L. R. 1 A. & E. p. 91.

5) *Cargo ex Ulysses* (1888) 13 P. D. p. 208.

6) M. S. A. 1894, s. 557 (1).

7) *Ibid.*

8) Cf. *The Marguerite Molinos* [1903] P. 160.

9) Cf. *The Strathnaver* (1875) App. Cas. p. 65.

Salvage services not a question of contract. The test whether salvage services have been rendered to a vessel which is in distress is not whether the salvors have been requested to assist or whether their assistance has been acquiesced in (although such a request is evidence in support of the urgency of assistance), but whether services were in fact rendered to a vessel in need of them.

Signals of distress. Where efforts were made to assist a vessel which had shown signals of distress, a moderate salvage award was allowed to a vessel which in consequence of the signals endeavoured to give assistance¹), although her endeavours were practically unavailing; and now where a vessel improperly²) exhibits the authorized signals of distress³), and in consequence some one endeavours to assist her and thereby is exposed to labour, risk or loss, compensation can be recovered as if it were salvage⁴). It is of such importance to commerce and navigation that services rendered by request should be remunerated, that even where no direct benefit results from the services, salvage will be allowed⁵); and where the services are rendered under an express agreement which is not carried out, and the services do conduce, though in but a small degree, to the ultimate safety, salvage is earned⁶). The reason is that salvage is not dependent on contract; parties may fix the amount of salvage by contract, but the right to salvage exists apart from contract, and salvage may be recoverable where under a contract nothing could be recovered because the contract is indivisible and has not been performed⁷).

Services at request where no salvage services rendered. On the other hand, where services are rendered at request to a vessel not in need of active assistance, or by standing by or attempting to tow, the obligation to pay is wholly contractual, and the services give no right *in rem*, but there is no reason why an implied contract to pay should not be enforced⁸).

Success an essential element. The third element in a salvage service is success, by which it is meant that salvage can only be awarded for services which do in some degree contribute to the ultimate preservation of some property: the services must be useful by reason of their bringing the property to, or nearer to, safety or the means of safety. Services may be salvage services although the danger or some danger still exists when they terminate, if they have made ultimate safety more probable, e.g. by bringing a vessel which has been disabled or is otherwise in distress from a deserted part of the ocean into the track of shipping⁹). If property is ultimately saved, those who have meritoriously contributed to that result are entitled to some share in the reward, although it may be but small¹⁰); if the services in fact do no good or leave the property in greater danger than before, then no salvage is earned, however meritorious the service may have been, but if there has been a contract, contractual remuneration may have been earned¹¹).

Property liable and property not liable for salvage. It is essential to show that some property which can be made available in a suit for salvage has been brought to safety, and this property can only be a vessel¹²) or her apparel or her cargo, or her freight; and cargo will not include the effects of the master or crew, or such baggage of passengers as is in regular use, or ship's stores. There are, however, certain classes of property which cannot be arrested in an Admiralty action, such as king's ships or goods, vessels which are the property of a foreign State¹³) or any goods thereon, goods belonging to a friendly foreign State on board any vessel; and also certain mail-ships may be exempt from arrest¹⁴). Where salvage services are rendered to a vessel belonging to the Crown, perhaps the only admissible action is against her commander; where goods belonging to the Crown are the subject of salvage services

¹) *The Melpomene* (1873) L. R. 4 A. & E. 129.

²) *The Elswick Park* [1904] P. 76. Cf. Orders of 1896 and 1897.

³) M. S. A. 1894, s. 434 (1).

⁴) *Ibid.* s. 434 (2).

⁵) *The Cambrian* (1897) 8 Asp. 263.

⁶) *The Hestia* [1895] P. 193.

⁷) *Ibid.* p. 199.

⁸) Cf. *The August Korff* [1903] P. 166.

⁹) Cf. *The Camellia* (1883) 9 P. D. p. 29.

¹⁰) Cf. *The August Korff* [1903] P. 166.

¹¹) *The Benlarig* (1888) 14 P. D. 3.

¹²) *Wells v. Gas Float Whitton (No. 2)*, [1897] A. C. p. 345.

¹³) *The Jassy* [1906] P. 270.

¹⁴) Mail Ships Acts, 1891 and 1902; but the Acts are practically a dead letter.

to a vessel not owned by the Crown, the goods are not liable to arrest, but in practice the Crown by its proctor may submit to a decree in order that it may be guided as to the amount that should be paid, unless the contract with the carrier leaves the carrier liable for any loss that may occur, as where there was no negligence clause¹⁾, and in such cases the carrier can be sued *in personam* for the salvage of the goods of the Crown as he has benefited thereby. A foreign State may consent to pay salvage as assessed by the Admiralty Court²⁾).

Amount of a salvage award. The amount of a salvage award is in the discretion of the Court and is peculiarly at large; the jurisdiction is of an equitable character and the provision that, where salvage services are rendered in the waters of the United Kingdom³⁾, the Court may give a reasonable amount of salvage, does not in any way alter the principles previously applied. Public policy requires that salvors should be encouraged, but yet liberality is necessarily tempered by justice to those whose property is saved. The considerations which may influence the Court are numerous, but the nature of the services, the benefit to the owners of property saved, the means by which the services are rendered, such as special salvage vessels maintained at great expense⁴⁾, the risks and losses of salvors are, with the interests of commerce, the benefit to navigation, and the preservation of human life, the most weighty and the chief matters. The Court considers the value of the property saved and then the actual danger from which it has been saved⁵⁾. It follows that awards may vary from great sums to sums which barely exceed compensation for work and labour done; and that individual awards may press hardly on particular owners, but that the common benefit must make this inevitable. It is always found that a succession of inadequate awards tends to induce owners to forbid their vessels to be used to save property.

Danger as affecting the amount of the award. The danger from which life in the first place, and then property, are saved is a principal element; the danger may arise from the state of the vessel, her seaworthiness, ability to navigate, efficiency of officers and crew, the time of year, the place at or from which she is rescued, or the unlikelihood of other assistance; or it may arise from the nature or condition of the cargo, e.g. where it may shift or may explode or catch fire. The more imminent the danger the greater is the merit of the services, as the likelihood of escape was less.

Value of the property saved, an element affecting amount. The value of the property saved is a guide but not a measure; it is the limit of the amount which may be awarded, but if the full value were awarded there would be no benefit to its owners⁶⁾. No definite rules can be laid down, but it can be seen that whereas great danger enhances the award, great and large values tend to diminish the proportion borne by the award to the total value, as a small proportion of a very large value may suffice to reward even considerable services, whereas a large proportion of a small total value, may not compensate the salvor adequately. There is now no question of giving a definite proportion of the value of the property saved, and the fact that the property was derelict is only evidence of the imminence of danger; and the Court is influenced by imminence of danger more than by the momentary condition of the property⁷⁾.

Risk to salvors will be considered. Risk to salvors is not an essential element of salvage services, but "what enhances the pretensions of salvors most is the actual danger which they have incurred: the value of human life is that which is and ought to be principally considered in the preservation of other men's property"⁸⁾; awards have been increased where great danger to salvors has not been duly recompensed⁹⁾, but if there was but little risk, the award approaches more nearly to a fair remuneration for time and trouble¹⁰⁾.

¹⁾ *Cargo ex Port Victor* [1901] P. 243.

²⁾ *The Constitution* (1879) 4 P. D. 45.

³⁾ M. S. A. 1894, s. 546.

⁴⁾ *The Glengyle* [1898] A. C. 519.

⁵⁾ *The Werra* (1887) 12 P. D. 52.

⁶⁾ In actions where no owner of the property saved has appeared the whole value has occasionally been awarded (cf. *The Louisa* [1906] P. 145), and the same result has followed where the appraised value has not been realised (*The Georg* [1894] P. 330).

⁷⁾ *The Janet Court* [1899] P. 59.

⁸⁾ *The William Beckford* (1801) 3 C. Rob. 355.

⁹⁾ Cf. *The Glenduror* (1871) L. R. 3 P. C. 589.

¹⁰⁾ *The Otto Hermann* (1864) 33 L. J. Adm. 189.

Skill and energy of salvors. The skill displayed by salvors is a further element to be considered; if they have acted with energy and promptitude the services are more meritorious; if they have been negligent, the reward will be diminished in proportion to their lack of that competence which salvors are expected to possess. The Court, however, does not regard mere errors in judgment as proof of incompetence or negligence. What is rewarded is the preservation of property, so that if there is in fact no benefit there is no salvage; and if the incompetence or misconduct of salvors renders the services in fact valueless, the occasion for reward has disappeared; for instance, where, after rendering services which saved a vessel from one danger, the salvors wantonly bring her into a fresh peril equally great¹⁾ or wilfully neglect to take reasonable steps to ensure safety²⁾, salvage will be forfeited; but if property is in fact saved, salvage will not be forfeited unless there is bad faith or wilful misconduct or an intention not to do the whole duty expected of salvors. The Court always leans in favour of salvage services, so that it requires that charges of incompetence or misconduct should be made without delay and supported by adequate evidence.

Labours, losses and expenses of salvors. The labours, losses and expenses of salvors are material in assessing their reward. The time occupied is important, especially where the services are throughout hazardous, as showing the merit of the services and also as indicating the expenses and loss of profits entailed. The fact of deviation is important, as it may be a breach of warranty vitiating a policy of insurance or a breach of contract in a charter-party: it is, however, a common modern practice to give express liberty to deviate to save property. The responsibility for deviation is a matter reckoned in favour of the master of the salving vessel. Other incidental losses, such as straining of engines, breaking of hawsers, extra expenditure of stores, loss of prospective profits, are all proper to be considered in fixing the reward.

Character of salving vessel. The character of the salving vessel is also material. Steamers are highly efficient instruments of salvage, and are also often of considerable value, and therefore earn correspondingly high remuneration, especially where, as in the case of mail steamers or others running on scheduled times, there is a liability to damages or penalties for delay. The cargo on a salving vessel may be material either from its nature, e.g. where it is perishable, or by reason of the contractual liability of the shipowner to the cargo-owners. Where the Court finds that salvage has been effected through the agency of powerful and efficient vessels constantly maintained at the expense of enterprising persons in readiness to render salvage services, which may be required only at long and irregular intervals of time, it will be more than usually liberal in its award although the liberality may press heavily on the individual shipowner or underwriter³⁾.

Contributory values of property saved. *Prima facie* the various interests benefited by the salvage services contribute rateably to the salvage awarded; these interests are usually ship, cargo, and freight. The Court is averse from making distinctions between the risk to which each separate interest may have been exposed or from making its decree in such as form as to induce salvors to save any one interest or part thereof in preference to any other; but if in fact the services have been more valuable to one interest than to another, as where a very perishable cargo is saved in a vessel which is not really in great peril herself⁴⁾, the award may be divided so as to impose a larger share on the interests specially benefited. As a rule, however, no attempt is made to apportion salvage according to risk.

Contributory value of ship. The contributory value of the ship is her value on the completion of the salvage services⁵⁾, in her damaged condition if she has been damaged; her value is what she is worth in her actual condition to her owners.

Contributory value of cargo. The contributory value of cargo is its gross arrived value less the ordinary expenses of realising the value, such as brokerage, commission, customs dues, trade discount on sale, but not insurance. Cargo which is saved will either reach its original destination, in which case its value at the place where the salvage services end will, according to the rule in Admiralty, include freight *pro rata*

¹⁾ Cf. *The Duke of Manchester* (1846) 2 W. Rob. 470.

²⁾ *The Yan-Yean* (1883) 8 P. D. 149.

³⁾ *The Glengyle* [1898] P. 97; [1898] A. C. 519.

⁴⁾ *The Velox* [1906] P. 263 (where cargo and freight had to pay about one third of their value but ship about one tenth only).

⁵⁾ *The Hohenzollern* [1906] P. 339.

itineris peracti up to that place, or will not be brought on to its original destination; in this latter case its value is the value at the place it has reached or at the nearest available market if there is no market there, less the expenses of getting it there and selling it.

Contributory value of freight. The contributory value of freight is the freight unpaid and therefore at risk when the services are completed. If the salvors bring cargo on which freight will become payable to its destination, the value of the freight is the full amount unpaid less the expense of earning it¹⁾; if the cargo is brought to a port of refuge and subsequently forwarded to its destination, so that freight is earned, the salvors as against the shipowner²⁾ are entitled to salvage on freight *pro rata itineris peracti* less the expenses of forwarding the cargo and earning the freight; if the cargo is not forwarded, no freight is in fact earned unless the cargo-owner prevents the shipowner from forwarding the cargo or has agreed to pay either the freight originally agreed or a substituted freight³⁾, on which the salvor will be entitled to salvage. If no freight is earned, as where a derelict vessel with her cargo is brought to a port of refuge and the shipowner does not forward the cargo, there is no freight out of which salvage can be awarded⁴⁾.

As between the cargo-owner and the shipowner, salvage on freight is a liability of the shipowner, but as the freight is part of the arrived value of goods, it may for convenience be treated as payable by the cargo-owner. If the cargo-owner pays it, the shipowner must give him credit for the amount so paid when the liabilities of ship and cargo are ultimately adjusted.

Liability to pay salvage awarded. Each interest benefited by salvage services is liable for its share of salvage, rateably according to value unless a special allocation is made⁵⁾. The ship is not liable for the cargo's contribution, and the master cannot by any agreement as to salvage bind the owners of cargo, for their only liability is to pay a reasonable amount of salvage. If the shipowner has become bound⁶⁾ to pay salvors for salvage of cargo, he can recover as general average, not necessarily the cargo's rateable proportion of the amount which he has paid or agreed to pay, but the amount which a jury think reasonable⁷⁾. The shipowner may well be bound to pay the full amount, where the master has reasonably and properly arranged for salvage for a specified sum, and the shipowner has his remedy against the cargo which is in his possession and need not be given up until the cargo-owners have given security⁸⁾ to make a reasonable contribution. As between salvors and cargo-owners, the right of salvors is to make the cargo-owner a party to the suit, and to have the cargo arrested and appraised; if the cargo is not within the jurisdiction of English Courts, no process *in rem* is available against it here; and no award of salvage can be made here unless either the cargo-owner is a party to a suit *in personam* or the cargo or security equivalent thereto has become available in an action *in rem* here.

Apportionment of Salvage.

Mode of apportionment of salvage. The salvage reward, whether assessed by the Court or by agreement, may always be apportioned, and in the case of dispute may be apportioned by the receiver of wreck⁹⁾ or by the Court in any case¹⁰⁾; and where the services are rendered outside the United Kingdom, a Court having Admiralty jurisdiction may apportion the amount in cases of delay or dispute¹¹⁾; the Admiralty Division has inherent power to apportion any sum awarded for salvage, whatever its amount and wherever the services were rendered. The apportionment may be procured either in an action specially brought for apportionment, or on motion for apportionment, or in the salvage action itself as part of the relief claimed.

¹⁾ *Cargo ex Galam* (1863) Br. & L. 167.

²⁾ *The Norma* (1860) Lush. 124.

³⁾ Cf. *The Soblomsten* (1866) L. R. 1 A. & E. p. 297.

⁴⁾ Cf. *The Cito* (1881) 7 P. D. 5.

⁵⁾ As in *The Velox* [1906] P. 263.

⁶⁾ As in *The Prinz Heinrich* (1888) 13 P. D. 31.

⁷⁾ *The Raisby* (1885) 10 P. D. 114.

⁸⁾ I. e. usually, by an average bond.

⁹⁾ I. e. in respect of salvage services in the United Kingdom where the amount does not exceed £200.

¹⁰⁾ I. e. where the amount does not exceed £300, a County Court having admiralty jurisdiction, or the Admiralty Division.

¹¹⁾ M. S. A. 1894 ss. 555, 556.

Apportionment between ship and crew. As between shipowner and master and crew the Court will consider what were the chief means that earned the salvage, and these may be the vessel or the exertions of the master or crew or some of them. Where the salving vessel is a steamer, she usually is the principal factor, and her value becomes more important; if she also has a valuable cargo, the shipowner's share will be increased. Where the energy and exertions of the master and crew were the chief means of salvage, a larger proportion will be allotted to them. There cannot be said to be any fixed rule as to the shares given to the steamer and the master and crew, and the Court refused to admit a practice (which however very nearly represents the normal apportionment) of giving about three fourths to the shipowner, one twelfth to the master and two twelfths to the rest of the crew. The steamship owner's share is practically about two thirds or three fourths¹), and as the size and value of steamers have increased it has become larger than formerly.

Apportionment between master and crew. As between master and crew, the master who incurs all the responsibility is rewarded accordingly by a large share, and the residue is distributed among the officers and crew according to their ratings: but members of the crew not concerned with navigation — such as surgeon, purser, cook, steward — may only be allowed to rank at a reduced rating²), while navigating officers will rank with engineer officers although the latter may be carried at higher rating³). Special rewards, such as a double share, may be given to any person who has incurred extra danger or labour, but apart from special directions the rule always is that all share alike according to their ratings, even though some take part in the active operations of salvage, as by manning a vessel in distress or derelict, while the others continue to navigate their own vessel only. Where passengers or apprentices or other persons on board are held to be entitled to participate, it is usual to specify at what rating they shall rank.

Apportionment between different sets of salvors. Where there are distinct sets of salvors, there must be an apportionment of the total amount of salvage between them; the share of each set will depend upon the value of their services, but the Court leans in favour of the earlier services, and of services which save life and not property only, and of persons who assume the burden of directing the salvage operations⁴).

Apportionment of salvage awarded to a foreign vessel. Where an award of a specific sum for salvage has been made in favour of a foreign vessel, and there is a dispute within British jurisdiction⁵) as to its apportionment, it is to be apportioned (i.e. in England by the receiver of wreck, County Court, or High Court) in accordance with the law of the country to which the vessel belongs⁶). The law of the country is *prima facie* the law of the flag, but it may not necessarily be so, if the vessel is shown to belong to some other country; and where the same flag covers vessels subject to different laws varying with the part of the country to which she really belongs (as in the case of a vessel belonging to one of the States of the United States of North America) the law of that state will presumably be applied⁷).

Enforcement of apportionment agreements. Salvors may enter into agreements as to the mode in which salvage shall be apportioned, either before any salvage services are performed, e.g. at the beginning of a voyage, or when a prospect of salvage services is at hand, or after the services have been rendered, and such agreements will be upheld where they have been made by parties acting freely and honestly; but where there is any concealment or dishonesty the Court may disregard the agreement. A seaman⁸) is expressly debarred from depriving himself of a right to salvage which has accrued or may accrue⁹), but this does not prevent him from making a fair¹⁰)

¹) *The Gipsy Queen* [1895] P. 176.

²) Cf. *The Minneapolis* [1902] P. 30.

³) *The Birnam* (1907) 96 L. T. 792.

⁴) Cf. *The August Korff* [1903] P. 166 (a case of five sets of salvors).

⁵) Excluding courts of the self-governing Dominions; Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), s. 9 (1).

⁶) *Ibid.* s. 7.

⁷) Cf. Dicey, *Conflict of Laws*, 2nd ed., Rule 156.

⁸) Other than a seaman engaging on a ship to be employed in salvage services, *M. S. A.* 1894, s. 156 (2).

⁹) *M. S. A.* 1894, s. 156 (1), s. 212.

¹⁰) *The Afrika* (1880) 5 P. D. 192.

agreement or apportionment of earned or future¹⁾ salvage. Although a seaman may not be bound by an inequitable apportionment agreement, he, like the owners, is bound by any valid agreement as to the total amount made by the master for salvage yet to be earned. Where the apportionment agreement affects a foreign vessel, a British Court can only enforce it if the agreement is enforceable by the law of the country to which the ship belongs²⁾.

Salvage Agreements.

Nature of salvage agreements. A salvage agreement is an agreement whereby the amount of salvage is fixed or made ascertainable; such an agreement is necessarily made in most cases by the masters or agents of the shipowners, in the absence of their employers and of means of useful communication with them. Notwithstanding the making of a salvage agreement, it will give no right to salvage, unless such services as would earn salvage apart from any agreement are rendered so as to save some of the property³⁾. These agreements must be considered with reference:

1. To the owners and crew of the salving ship,
2. The owners of the ship saved, and
3. The owners of cargo on the ship saved.

Salvage agreements as to past services, and as to future services. No agreement with regard to services already rendered can, if made by owners or master, prejudicially affect the rights of salvors already acquired, but with regard to future services, the owners of the vessels concerned are probably able to bind the master and crew of the salving vessel even by an agreement of which they have no knowledge and to which they are in no way privy⁴⁾. Similarly, the master has *ex necessitate* power, in the absence of the owner and where he cannot reasonably communicate with him, to make an agreement as to future salvage which will bind both owner and crew as to amount, but in ordinary cases he cannot make a bargain as to past services which will affect the amount of reward, unless those whose vested right to salvage has accrued consent⁵⁾. Thus, where salvage services occupy some length of time, the Court will consider whether they are continuous or discontinuous; if it can be said at any time that a right to salvage has accrued, no bargain made thereafter will be allowed to prejudice the salvors in respect of salvage already earned; but if, at a time during the operations before any salvage is earned, a bargain is made in respect of the whole series of operations it may be allowed to stand⁶⁾.

Agreements to render salvage services. Salvors being under no obligation to save property are naturally free to make a bargain as to their reward; and the master of a vessel who finds another vessel in distress has, unless he has been expressly prohibited from saving property, power to make salvage agreements which will bind his owner⁷⁾; "it is the duty of all ships to give succour to others in distress; none but a freebooter would withhold it"⁸⁾. The master of a vessel in distress has authority to enter into such an agreement, and thereby to bind his owners⁹⁾, if it is made under necessity and also for the benefit of the shipowner¹⁰⁾. It is doubtful whether he could bind his owner by an agreement for life salvage only¹¹⁾, either of passengers or crew, unless the preservation of lives is of pecuniary benefit to the shipowner. It is also doubtful whether the master of either vessel can bind his owner by an agreement that salvage shall be assessed by arbitration¹²⁾.

Proof of salvage agreement. When a salvage agreement is relied upon, the party seeking to enforce it must prove the making and the performance; it does not require any special form, and it will be enforced unless the Court is satisfied by other evidence that it is inequitable or unenforceable. Such an agreement may be shown to be

¹⁾ *The Afrika*, (1880) 5 P. D. 192; *The Wilhelm Tell* [1892] P. 337.

²⁾ Maritime Conventions Act, 1911, 1 & 2 Geo. 5, c. 57, s. 7.

³⁾ *The Hestia* [1895] P. 193, 199; *The Kilmahoe* (1899) 16 T. L. R. 155.

⁴⁾ *The Friesland* [1904] P. p. 351.

⁵⁾ *The Inchmaree* [1899] P. 111.

⁶⁾ *Ibid.* p. 116.

⁷⁾ *The Thetis* (1869) L. R. 2 A. & E. 365.

⁸⁾ *The Waterloo* (1820) 2 Dods. p. 437, per Lord Stowell.

⁹⁾ *The Prinz Heinrich* (1888) 13 P. D. p. 34.

¹⁰⁾ *The Renpor* (1883) 8 P. D. p. 118.

¹¹⁾ Cf. *The Mariposa* [1896] P. 273.

¹²⁾ *The Purissima Concepcion* (1848) 13 Jur. 545.

unfair either to the salvors or to the owners of property saved. With regard to salvors it may be inequitable because the reward to the salvor is not reasonably commensurate with the value of the services as contemplated by the parties when the agreement was made. "A contract deliberately entered into between perfectly competent parties" will not be allowed "to be set aside by either of them merely because the execution of it has turned out more difficult or more easy than was anticipated at the time of making the contract¹⁾"; but where the sum agreed to be accepted has been "utterly futile" by reason of its inadequacy²⁾ the Court has disregarded the agreement and awarded more. Where, moreover, the salvors in fact perform services which by reason of supervening circumstances are wholly different from those contemplated when the salvage agreement was made, and it has become impossible or imprudent to render or to attempt to render the services originally contemplated, the Court may treat the matter as if no salvage agreement had been made³⁾, and may award salvage accordingly for the services actually rendered; it follows also that although the services agreed to be performed have not been wholly performed, yet, as salvage claims are not dependent on contract, some salvage may be earned by the work done, although done under an indivisible contract, if it in fact conduces to ultimate preservation of the property⁴⁾.

Invalid salvage agreements. A salvage agreement may fail to bind the salvors because it was tainted in its inception by dishonesty or fraud of the other party, or by his misrepresenting or concealing or failing to disclose material⁵⁾ matters which would influence the salvors in making their bargain, such as the true condition of the vessel, the state of her machinery, the ill health of the crew, the value of the cargo. The fact that the agreed sum is excessive or very inadequate in comparison with the services is some indication of unfair dealing on the one side or the other⁶⁾.

Agreements to receive salvage services. Those in need of salvage services are not usually in a position of complete freedom in bargaining with a possible salvor, and salvage agreements may be set aside in their favour for reasons similar to those on which salvors may rely, but the Court is more ready to discern duress or excessive demands on the part of salvors, and therefore to disregard salvage agreements as inequitable to the party assisted. It is no ground for relief that the services in fact were easier to render than the parties thought them likely to be; what the Court looks at is the adequacy of the agreed sum as compared with the contemplated circumstances. Salvors take the risk that if their services are unsuccessful they will get nothing, so their reward is high⁷⁾, and if they stipulate for some remuneration to be paid in any event, this is a reason for reducing the amount of the reward if they are successful⁸⁾; if, however, they are found to have demanded an excessive sum as the price of their services, that is evidence, where the parties were not contracting on equal terms, of duress⁹⁾.

Duress in salvage agreements. The degree of pressure or duress which will induce an Admiralty Court to disregard a salvage agreement is less than is required in common law Courts. The probable helplessness of those in need of aid does not prove duress in all cases of salvage agreements, but where there is also an agreement to pay an excessive amount, there is strong evidence of unfairness¹⁰⁾, whether it be by duress or by corrupt bargaining between those who make the agreement¹¹⁾. There is no presumption that an agreement proved to have been made is unjust; it rests on those who allege it to be so to prove it; apart from proof the salvors must be content with the sum agreed and those assisted must pay that and need pay no more¹²⁾.

1) *The Waverley* (1871) L. R. 3 A. & E. pp. 380, 381.

2) Cf. *The Phantom* (1866) L. R. 1 A. & E. p. 61.

3) *The Westbourne* (1889) 14 P. D. 132.

4) Cf. *The Hestia* [1895] P. p. 199.

5) *The Canova* (1866) L. R. 1 A. & E. p. 56.

6) Cf. *The Medina* (1876) 2 P. D. p. 7.

7) Cf. *The Mark Lane* (1890) 15 P. D. p. 137.

8) *The Edenmore* [1893] P. p. 83.

9) *The Mark Lane*, *ubi supra*.

10) *The Rialto* [1891] P. 175.

11) *The Theodore* (1858) Swa. 351.

12) *The Waverley* (1871) L. R. 3 A. & E. 369.

Practice in Salvage Actions.

Form of action for salvage. It is not within the scope of this article to enter at any length into questions of practice, but it may be useful to point out some peculiarities of salvage actions. The proceedings are usually *in rem* by virtue of the maritime lien which attaches as soon as salvage services are rendered, as procedure *in rem* is in most cases more beneficial to a claimant : but where the *res*, either cargo or vessel, is never within the jurisdiction or is kept out of the way of arrest, only proceedings *in personam* are available, unless the defendants agree to give security as if the property could have been proceeded against here. Unless some property has been saved, no proceedings at all are available.

Consolidation of suits. Where there are several claimants, the Court may, whether the claimants desire it or not¹), consolidate the claims and give the conduct of the action to the apparent principal salvor. The salvors are usually allowed to file separate claims, and, where the salvage services are denied, to be separately represented²).

Proof of values. The material question of values of the respective vessels and their cargoes is normally settled by affidavits of values or by agreement. An affidavit of value is conclusive unless it is disputed; if it is disputed and the parties cannot agree, a party can always obtain a commission of appraisal, if the property is within the jurisdiction. If the property is beyond the jurisdiction, an order may be obtained giving leave to adduce oral evidence of the real value at the hearing; but this has been held to apply only to the value of a vessel and not of her cargo. An appraisal is carried out under the direction of the Marshal of the Court, and is conclusive as to the value of the property appraised. If the appraised value differs substantially from the value as sworn, the party obtaining the appraisal will *prima facie* be entitled to the costs of the appraisal.

Tender, in salvage suits. A party may always tender a sum of money in satisfaction of a salvage claim before action or at any time during the proceedings; if he wishes to do so after action brought, and not with his defence when delivered, he must give notice of his tender, but after action brought a tender is only effective if the sum tendered is paid into court³), with or without a denial of liability. The sum tendered is not deemed to include the costs up to the date of tender, unless it is expressed to do so. A claimant is allowed a reasonable time within which to accept or reject a tender; if he rejects it he must give notice of rejection. If it is accepted, the claim in respect of which the tender is made is then satisfied, and the plaintiff can take the sum and also get his costs; if it is rejected and at the hearing the plaintiff recovers no more than was tendered, the defendant will probably have to pay costs up to the date of tender, the plaintiff the costs incurred after tender⁴). The Court is very unwilling to order a reference to assess the amount to be given in a salvage action unless there are only insufficient materials before the Court itself; but where a reference is ordered and a tender is subsequently made, a claimant will only get the actual amount found due, and not the amount tendered⁵), if that is the greater.

Hearing of salvage suits with assessors. On the hearing of a salvage case the Court is now as a matter of course assisted by two Trinity Masters⁶), who advise the Court on all matters of nautical skill and practice; evidence, therefore, of such matters, or as to the inferences to be drawn from the facts proved, is excluded. Their functions are purely advisory and it is for the judge to decide upon the credibility of evidence⁷) and on the evidence given to arrive at his own decision after giving full weight to the advice tendered by the Trinity Masters as to nautical points⁸), but ultimately forming his own judgment on all the materials before him.

¹) R. S. C., Order XLIX, r. 8.

²) *The Pollaloch* (1906) 94 L. T. 556.

³) *The Nasmyth* (1885) 10 P. D. 41. Payment into Court is regulated by R. S. C. Order XXII, rr. 19—21, and Supreme Court Funds Rules 1905. If liability is denied where the payment in is made the plaintiff may either accept the sum in satisfaction and go no further, or proceed with the action and try to recover more. R. S. C. Ord. XXII.

⁴) *The William Symington* (1884) 10 P. D. 1. But the plaintiff may recover costs of issues on which he succeeds after tender; *The Blanche* [1908] P. 259.

⁵) Cf. *The Mona* [1894] P. 265.

⁶) I. e. by their full title 'Elder Brethren of the guild fraternity or brotherhood of the most glorious and undivided Trinity and of Saint Clement in the parish of Deptford Strond in the County of Kent'.

⁷) Cf. *The Koning Willem II* [1908] P. 125.

⁸) Cf. *The Gannet* [1900] A. C. 234.

Costs in salvage suits. The costs of salvage actions are in the discretion¹⁾ of the Court, which is always unwilling to condemn salvors in costs. Where the claim could have been heard summarily²⁾, a claimant will get no costs of action in the High Court unless a special order is made. If a tender is upheld, the Court can deprive the plaintiff of costs, or order him to pay costs, or where the tender is "sufficient but not liberal³⁾" make no order as to costs. A usual course is to give the plaintiff costs up to the date of payment in and the costs of issues on which he succeeds at the hearing⁴⁾. The plaintiff will be allowed the costs of an appraisal if it was reasonable to procure one, which will be inferred where there is a substantial increase in the value when appraised⁵⁾. If the plaintiffs have demanded and procured excessive bail, they may be condemned to pay the expenses of giving bail in excess of the sum deemed reasonable by the Court.

Interest on salvage awards. Interest, usually at 4 per centum, is allowed on the salvage awarded from the date of judgment; and on costs from the date of the order or judgment under which they become payable, unless a special order is made, until the respective sums are paid.

Security for costs in salvage suits. A plaintiff, or a defendant who puts himself in the position of a plaintiff by bringing a counterclaim arising out of different facts or a cross action, may be ordered to find security for the costs of the action⁶⁾. The usual ground for such an order is the residence of the plaintiff, or of all of several plaintiffs abroad; mere temporary residence here does not alter the rule that in such cases security may be ordered. If a plaintiff has substantial property here, which clearly will be available to pay costs, no order for security need be made. Poverty or insolvency is not *per se* a ground for ordering security to be given; but a limited liability company of small resources or in liquidation may be ordered to give security. In salvage cases the amount is usually fixed at £ 250. If it is desired to obtain security the party should first be asked to give it, and then if he fails to do so a summons may be taken out⁷⁾.

The security only extends to costs in the court in which it is ordered; further security therefore may be required from an appellant, but is only allowed in special circumstances⁸⁾. Application should first be made to the party to give it; in the Court of Appeal poverty or insolvency is a further ground for ordering security⁹⁾; in the case of an appellant foreign company, insufficient assets in England to meet the costs of appeal would be a good ground¹⁰⁾.

Appeals in salvage suits. An appeal lies to the Court of Appeal from any judgment or order of the Admiralty Division¹¹⁾, except when that Division has acted as an appellate tribunal¹²⁾ or as a Prize Court¹³⁾ or the order is interlocutory and does not determine liability¹⁴⁾, and leave has not been given to appeal. In salvage cases there can rarely be any ground for appeal except on questions whether the services did or did not amount to salvage, or whether the amount awarded is excessive or inadequate: in either case the appeal cannot fail to be one as to amount. As the amount that may be given is discretionary, the Court of Appeal is very loth to vary the sum awarded. In the case of costs, where a judicial discretion is to be exercised, the only admissible ground for appeal is not that it has been wrongly exercised although the right principles have been applied, but that it has been wrongly exercised because the Court has followed a wrong principle: in the case of salvage a somewhat similar result is attained, as the question decided is usually whether the amount awarded is so unreasonable that the lower tribunal must have applied a wrong principle

1) R. S. C. Order LXV, r. 1.

2) M. S. A. 1894, s. 547 (2); i. e. in a County Court, *ibid.* s. 547 (4) (a).

3) *The Lotus* (1882) 7 P. D. 199.

4) *The Blanche* [1908] P. 259.

5) *The Paul* (1866) L. R. 1 A. & E. 59.

6) R. S. C., Ord. LXV, rr. 6—8.

7) Cf. *The Ship Constantine* (1879) 4 P. D. 156.

8) *The Victoria* (1876) 1 P. D. 280.

9) *In re Ivory* (1878) 10 Ch. D. p. 377.

10) See R. S. C., Ord. LVIII, r. 15.

11) Judicature Act, 1873, ss. 18 (3), 19.

12) Judicature Act, 1873, s. 45: but leave to appeal may be given.

13) Judicature Act, 1891, s. 4 (3).

14) Judicature Act, 1894, s. 1 (I) (b).

or have mistaken the true effect of the evidence¹). An award will not be reduced unless it is so exorbitant or so manifestly excessive that it would be unjust to affirm it²), or increased unless a wrong principle has been applied or the lower tribunal must have misapprehended the evidence so that it has been induced to award a sum unjust to the salvors³).

Costs of appeal in salvage. Where an appellant succeeds in reducing the amount of an award substantially, he will now be allowed the costs of the appeal⁴); the costs of the hearing of the original action will *prima facie* be paid by the party directed by the Court below to pay them.

Appeal to the House of Lords. An appeal lies from the Court of Appeal to the House of Lords, in its judicial capacity, in all Admiralty cases in which the Court of Appeal can entertain an appeal. As the principles applied in deciding such appeals are the same as ought to be applied in the Court of Appeal, it is not necessary to discuss them further here.

Limitation of actions for salvage services. No action in respect of any salvage services, i.e. whether to life or property, and wherever rendered, and whether rendered by or to a British or a foreign vessel, is maintainable unless the proceedings to enforce the claim are begun within two years from the date when the salvage services were rendered⁵); this date, it is submitted, must be taken to be the date on which the salvage services terminate, not the date when the services begin, nor yet necessarily the date when the property saved reaches a port or another destination⁶). Where, however, a court having jurisdiction to deal with a salvage claim⁷) is satisfied that there was not during such two years a reasonable opportunity of arresting the defendant vessel⁸):

1. Within the jurisdiction of the Court, or
2. Within the territorial waters of the country to which the plaintiff's ship belongs, or
3. Within the territorial waters of the country in which the plaintiff resides or has his principal place of business⁹),

the Court may extend the period of two years to an extent sufficient to give a reasonable opportunity. The power of extension is to be exercised in accordance with the rules of Court¹⁰), but it seems that such rules should provide for the exercise of the power *ex post facto* after the ship has actually been arrested, if the provision is to have any useful effect. The limitation of two years subject to extension will in effect make little or no change, as it perhaps even extends the period which was formerly controlled only by the doctrine of laches¹¹).

XXIV. Towage.

Nature of towage. Towage services may be described as the employment of one vessel to expedite the voyage of another when nothing more is required than accelerating her progress¹²). A towage contract may or may not fix the remuneration for the services: in the case of towage of a sound vessel, where the amount is not fixed, the Court would award a reasonable sum for the mere ordinary towage; where the vessel towed is disabled and a bargain is made which fixes the reward, this may be called extraordinary towage, and the towing vessel will (subject to the possibility that the services may be found to be salvage services) be bound by her contract, although unforeseen difficulties may arise¹³), to perform the services for the agreed reward.

¹) *The Accomac* [1891] P. 349; *The Port Hunter* [1910] P. 343.

²) *The Glengyle* [1898] A. C. 519.

³) *The Port Hunter*, *ubi supra*.

⁴) *The Toscana* [1905] P. 148.

⁵) Maritime Conventions Act, 1911, (1 & 2 Geo. 5, c. 57), s. 8.

⁶) Cf. *Jørgensen v. Neptune Co.* (1902), 4 F. 992.

⁷) In effect any court having admiralty jurisdiction under the Merchant Shipping Acts and the County Court (Admiralty Jurisdiction) Acts, except courts of the self-governing Dominions; Maritime Conventions Act, 1911 (1 & 2 Geo. 5, c. 57), s. 9 (1).

⁸) The position of cargo and freight is not mentioned.

⁹) This seems to meet the case of a plaintiff corporation.

¹⁰) Which will apparently now require to be made.

¹¹) Cf. *The Kong Magnus* [1891] P. 223.

¹²) *The Princess Alice* (1848) 3 W. Rob. p. 140.

¹³) *The Kingalock* (1854) 1 Spks. Adm. 263.

A contract of towage from one place to another is normally indivisible¹⁾, so that no remuneration is earned unless the service is completed²⁾; but it may be made for reward *pro rata itineris peracti*³⁾. Where the performance has been prevented, the tug may become a salvor⁴⁾. It may be oral or reduced to writing⁵⁾, and its terms may be all express or almost all implied. The negligence of those in charge may be expressly excepted⁶⁾, and the owners of the tow may undertake to be liable for such negligence⁶⁾. A towage contract, however, is not necessarily a contract to tow to a particular place; a contract may be "to attempt to tow", and will be performed if the attempt is made⁷⁾.

The rendering of towage services confers no maritime lien⁸⁾, but gives a right to sue *in rem*.

Express and implied terms of contract. The express terms of a towage contract must be construed when ascertained; the implied terms have had frequent judicial exposition. The owners of the tug must be taken to have contracted that the tug shall be efficient, that her crew, tackle and equipment shall be equal to the work to be accomplished in weather and circumstances reasonably to be expected, and that reasonable skill, energy and diligence shall be exercised in the accomplishment of the work; but they do not warrant that the work shall be done in all circumstances and at all hazards; performance is excused by *vis major* or accidents not contemplated by the parties when the contract is made and rendering performance impossible⁹⁾. The implied warranty of fitness and efficiency for the service is not displaced by express exceptions, such as exceptions of perils of the sea or negligence, which only refer to the circumstances after the commencement of the towage¹⁰⁾, unless they are expressly made to limit the implied warranty. It is implied in any contract of towage that each vessel shall be managed with a due degree of skill and diligence and shall not by neglect or misconduct create any unnecessary risk to the other or enhance any inherent risk of the adventure¹¹⁾.

Relations of tug and tow. Collisions. In ordinary circumstances the tug is under the control and direction of the tow¹²⁾, and is bound to conform to the orders of her master, or of her pilot; it follows that in such cases the tow is answerable for the wrongful acts of the tug, unless they are so sudden that there is no opportunity of controlling them. For some purposes the relation of tug and tow is so intimate that the two vessels are treated as one¹³⁾, but such a phrase is apt to mislead. The control is one and not dual, and liability depends principally on control. If the tow has control it will be answerable for such events as a collision between the tug or the tow with a third vessel; but no general rule can be laid down as to the liability of the tow for the negligence of the tug; it is always a question on the facts of each case whether those on the tug were servants of the tow¹⁴⁾: in the absence of evidence the tow would very probably be deemed to have control.

Where both tow and tug are to blame the liability is *prima facie* that of joint tort-feasors, and each is liable for the damage sustained by a third vessel by collision with tow or tug, or, where the third vessel also is to blame, for the difference between half the damage of the third vessel, and half the damage of the tow or the tug respectively¹⁵⁾; but as joint tort-feasors the tow and tug have no right of contribution the one from the other. Where, however, the negligence of the tow is a different act from the negligence of the tug, or where there are separate judgments against

1) *The Madras* [1898] P. 90.

2) *The Dart* (1899) 8 Asp. 481.

3) Cf. *The John Bull* [1911] 1 K. B. 243.

4) See pp. 472, 486.

5) *The United Service* (1883) 9 P. D. 3.

6) *The Millwall* [1905] P. 155 (but such a stipulation does not affect the owners of cargo on the tow).

7) *The Benlarig* (1888) 14 P. D. 3.

8) *Westrup v. Great Yarmouth S. C. Co.* (1889) 43 Ch. D. 241.

9) *The Maréchal Suchet* [1911] P. 1.

10) *The West Cock* [1911] P. 208.

11) Cf. *The Altair* [1897] P. p. 111.

12) *The Niobe* (1888) 13 P. D. 55.

13) *The Niobe* [1891] A. C. 40.

14) *The Quickstep* (1890) 15 P. D. 196; *The Devonshire* [1912] A. C. 634.

15) *The Englishman & The Australia* [1895] P. 212.

tow and tug, then the third vessel may be able to recover more than half her loss so long as she does not recover from tug and tow more than her whole loss¹⁾.

Duties of tug under the contract. The duty of the tug after entering upon the contract is to carry it out in accordance with its terms, and in so doing she must (where the tow has control) obey the specific orders of the tow²⁾ while using discretion as to the manoeuvres to be adopted³⁾, so that in crowded waters the tug may be expected to execute necessary evolutions without waiting for explicit orders⁴⁾; in case of need the tug must cast off the tow and having done so she must as soon as possible pick up the tow again⁵⁾; her look-out must be good, since she may see what the tow cannot; she must preserve a safe course, if no course is prescribed by the tow⁶⁾; where she provides appliances, e.g. a tow-rope, they must be fit for the purpose⁷⁾; and besides complying with her original warranty of seaworthiness she must perform her obligations with reasonable care, skill and diligence, whether it be in her own actions or in warning the tow of difficulties or dangers.

A tug which fails by reason of negligence to perform her contract loses any towage reward, and cannot claim as a salvor of the tow⁸⁾. She may on the other hand become liable to pay damages to the tow, e.g. for collision caused by the tug's negligence, unless the liability is extinguished by appropriate exceptions⁹⁾ in the contract of towage.

Duties of tow. The duty of the tow is to exercise reasonable care, skill and diligence in navigation and management; she must conform in her movements to those of the tug, keep a good look-out, warn the tug of apprehended danger¹⁰⁾, be ready to cast off in localities where this may become advisable, and generally, where she has control at all, direct and manage the towage as to the incidents of navigation and as to its continuance in existing circumstances¹¹⁾.

Where the tow has control she is liable for the wrongful acts of the tug unless they are so sudden that no control could be exercised¹²⁾. Where the tow ought in prudence to have suspended the towage and failed to do so the tow may not recover damage due to taking the ground¹³⁾.

Liabilities of tug, tow and third vessels for negligence. The liabilities of tug, tow, and of a third vessel (X) according to the various circumstances which may arise from the negligence of one of them only, or of two, or of all three are illustrated in the following cases:

1. Tug collides with X through negligence of the tug: here the tug owner is liable for the negligence of his servants¹⁴⁾ even if the tow was in charge of a compulsory pilot whose orders it was the duty of the tug to obey. On general principles the tow also will probably be liable, in the absence of special circumstances¹⁵⁾, as the crew of the tug are the tow's servants *pro tempore*¹⁶⁾.
2. Tug collides with X through the negligence of tow: here the tow is liable either for negligence in the orders given or for negligence in giving no orders¹⁷⁾; or for negligence in any manner. Tug also may be held liable because the crew of the tug are the general servants of the tug-owner, and have injured X in the course of their employment.
3. Tow collides with X through the negligence of the tug: the tug is liable for her negligence; and the tow is *prima facie* liable for the negligence of her

1) *The Morgengry & The Blackcock* [1900] P. 1.

2) Cf. *The Robert Dickson* (1879) 5 P. D. 54.

3) *The Isca* (1886) 12 P. D. 34.

4) *The Siquasi* (1880) 5 P. D. 241.

5) Cf. *The W. H. No 1*. [1910] P. 199; [1911] A. C. 30.

6) *The Altair* [1897] P. 105, p. 115.

7) Cf. *The West Cock* [1911] P. 23, 208.

8) *The Adam W. Spies* (1901) 70 L. J., P. 25.

9) *The Tasmania* (1888) 13 P. D. 110.

10) *The Niobe* (1888) 13 P. D. 55.

11) *The Altair* [1897] P. 105.

12) *The Niobe*, *ubi supra*.

13) *The Altair*, *ubi supra*.

14) *The Mary* (1879) 5 P. D. 14.

15) Cf. *The American* (1874) L. R. 6 P. C. 127.

16) *The Niobe* (1888) 13 P. D. 55.

17) *The Energy*, (1870) L. R. 3 A. & E. 48.

servant the tug, but may not be liable if the crew of the tug were not in fact servants of the tow¹).

4. Tow collides with X through negligence of tow: here the liability of the tow is obvious, and the tug is on general principles not liable.
5. Where both tug and tow are in fact negligent, each is clearly liable to X, and the X can recover her damage from either²); or where the X also is to blame the rule of division of loss will apply³), where there is one judgment against the tow and the tug; where there are separate judgments or distinct acts of negligence, X may be able to recover more than half her loss although herself also to blame⁴).
6. The cases where both tug and tow collide with X do not differ in principle from cases 1—4; if the collision is due to the negligence of the tow she is clearly liable and on principle the tug is not liable; if it is due solely to the negligence of the tug, the tow will also be liable in the absence of exceptional circumstances⁵).
7. Where the tug collides with X by reason of negligence of both the tug and X, a case of “both to blame” arises: the tug is clearly liable, but *prima facie* the tow also is liable for the acts of the tug⁶); where the tug collides with X by reason of the negligence of the tow, *prima facie* the tug is liable, and in any case the tow is liable.
8. Where the tow collides with X by reason of negligence of both tow and X, the tow is clearly liable, and there is no ground for making the tug liable unless the tug in fact had control.

Towage in relation to salvage. Circumstances may occur in respect to a contract of towage which will entitle the towing vessel to claim salvage in lieu of towage, but “whether the circumstances in each particular case are sufficient to turn towage into salvage must often be a matter of great doubt⁷)”. Where there is a concealment of a material fact which seriously affects the value and nature of the services the Court will readily treat the whole service as salvage⁸); but where the claim for a larger remuneration is based on a supervening change of circumstances, it may be impossible to formulate a general principle as to the nature of such a change, yet the Court may have no difficulty in deciding whether the tug had a right to abandon the towage contract⁹): “it is equally the duty of the Court to see, where a towing contract has been made, that a little departure from the exact mode in which that contract is to be performed is not magnified, so as to convert towage into salvage services¹⁰)”. To release the tug from her duty under a contract of towage she must show that she has ceased to be legally bound to carry it out; and to show this she must prove that circumstances not within the contemplation of the parties when they contracted, and introducing an element of danger, have supervened¹¹); the Court may then treat the original contract as at an end and give such reward as the actual services deserve¹²): but such a change is not lightly allowed, as parties are competent to allow for difficulties and dangers in the terms of the contract to tow¹³) when fixing a price.

Not only is towage not lightly convertible to salvage, but when the necessity of salvage has arisen from the negligence or incapacity of those on board the towing vessel, she cannot become a salvor¹⁴), and may become liable to indemnify the tow for losses caused by such negligence or incapacity¹⁵), unless the tow has been guilty

¹) *The Quickstep* (1890) 15 P. D. 196.

²) I. e. her whole damage: *The Devonshire* [1912] A. C. 634.

³) *The Englishman & The Australia* [1894] P. 239.

⁴) *The Morgengry & The Blackcock* [1900] P. 1.

⁵) *The American* (1874) L. R. 6 P. C. 127.

⁶) Cf. *The Quickstep* (1890) 15 P. D. 196; but see *The Devonshire*, *supra*.

⁷) *The Minnehaha* (1861) Lush. 335.

⁸) *The Kingalock* (1854) 1 Spks. Adm. 265 (state of ship); *The Canova* (1866) L. R. 1 A. & E. 54 (state of crew).

⁹) *The White Star* (1866) L. R. 1 A. & E. p. 70.

¹⁰) *The Liverpool* [1893] P. p. 164.

¹¹) *The Minnehaha* (1861) Lush. 335.

¹²) *The Westbourne* (1889) 14 P. D. 132.

¹³) *Five Steel Barges* (1890) 15 P. D. 142.

¹⁴) Cf. *The Minnehaha* (1861) Lush. 335.

¹⁵) *The Robert Dixon* (1879) 5 P. D. 54.

of contributory negligence¹). Moreover, where the supervening circumstances are such that the contract of towage is terminated, the tug is nevertheless under a duty to render such assistance as may be possible: she may not wholly abandon the tow if it is still possible to render services, although for what she does she may earn salvage in lieu of the towage remuneration which it has become impossible to earn.

Limitation of liability. Where a collision occurs between a tug and a third vessel the tug may in cases of improper navigation²) limit her liability³), but if both tow and tug are to blame the remedy of the third vessel is not confined to the value of the tug as limited⁴). The tow also is entitled to limit her liability if the proper steps are taken. As between tug and tow, where injury is caused to the one by the act of the other in the course of towage, then although the act may be a breach of the contract of towage, yet if it is also an act of improper navigation the vessel improperly navigated may limit her liability⁵).

XXV. Necessaries.

What are necessaries. In *Webster v. Seekamp*⁶) Lord Tenterden⁷), in considering the meaning of "necessaries", said "The general rule is that the master may bind his owners for necessary repairs done or supplies provided for the ship. It was contended at the trial that this liability of the owners was confined to what was absolutely necessary. I think that rule too narrow, for it would be extremely difficult to decide, and often impossible, in many cases, what is *absolutely* necessary. If however the jury is to inquire only what is necessary, there is no better rule to ascertain that than by considering what a prudent owner, if present, would do under circumstances in which the agent, in his absence, is called upon to act. I am of opinion that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term "necessaries" as applied to those repairs done or things provided for the ship by order of the master, for which the owner is liable". Thus the term includes not only "anchors, cables, rigging and matters of that description⁸)" but matters which are necessary for the voyage in which the ship is engaged or about to be engaged; not only what is needed to enable the ship to navigate but also what is needed to enable her to carry out her adventure. What these supplies may be it is easier to illustrate than to enumerate; they include coals for a steamship⁹), advances to pay canal dues¹⁰) or premiums of insurance on freight¹¹) or pilotage, light, tonnage, or harbour dues¹²) or dock dues¹³), meat¹⁴) or clothing¹⁵) for the crew, advances to pay a shipwright's bills to procure the release of the ship¹⁶), coppering a foreign ship for a particular voyage¹⁷), a new screw propeller for a passenger-ship (the old propeller being still fairly serviceable)¹⁸).

On the other hand, premiums of insurance¹⁹), brokerage on procuring a charter-

¹) *The Altair* [1897] P. p. 116.

²) See p. 465, *ante*.

³) *The Morgengry & The Blackcock* [1900] P. 1.

⁴) *The Englishman & The Australia* [1894] P. p. 246.

⁵) *Wahlberg v. Young* (1876) 45 L. J., C. P. 783.

⁶) (1821) 4 B. & Ald. 352.

⁷) Charles Abbott, 1762—1832, first Lord Tenterden, Lord Chief Justice of the King's Bench, 1818—1832. His principal work 'Law relative to Merchant Ships and Seamen' (1802) was the first in England in which the basic principles of commercial law were made the foundation of a legal text-book. Its successive editions are still of great authority.

⁸) *The Sophie* (1842) 1 W. Rob. 368.

⁹) *The Mecca* [1895] P. 95.

¹⁰) *Ibid.*

¹¹) *The Riga* (1872) L. R. 3 A. & E. 516; *sed quaere*, see *The Heinrich Björn* (1883 8 P. D. 151).

¹²) *The Riga*, *ubi supra*.

¹³) *The St. Lawrence* (1880) 5 P. D. 250.

¹⁴) *The N. R. Gosfabrick* (1858) Swa. 344.

¹⁵) *The W. F. Safford* (1860) Lush. 69.

¹⁶) *The Albert Crosby* (1870) L. R. 3 A. & E. 37.

¹⁷) *The Turliani* (1875) 2 Asp. 603.

¹⁸) *The Flecha* (1854) 1 Spinks, Adm. 438.

¹⁹) *The Heinrich Björn* (1883) 8 P. D. 151.

party¹⁾, travelling expenses of a person assisting the master in a collision action²⁾, expenses of an unjustified defence by a master to an action on a bill of exchange³⁾, money advanced to pay averages⁴⁾, have been held not to be necessities. It may be observed that the Court will treat advances made for the prospective purchase of present necessities to be within the equitable construction of the statutes giving jurisdiction⁵⁾, and the advance may take the form of a bill of exchange⁶⁾ accepted by the master.

Whether the article supplied is a necessary, i.e. is reasonably necessary for the adventure, is a question of fact, to be proved by the claimant, who in respect of necessities supplied is sometimes called the "material" man⁷⁾.

Liability for necessities. As the foundation of an action for necessities, there must be a contract for the supply of the necessities made by a person who has authority to make the shipowner answerable for them; the liability of the shipowner does not arise because he is owner of the ship to which necessities are supplied, but because his authorised agent has contracted on his behalf⁸⁾. The agent is almost invariably the master⁹⁾, who as master either has express (or actual) authority to bind his owner or else has ostensible authority to do so by reason of his position as master. This may be stated in other terms, that the liability of the shipowner is determined by the same common law principles as the liability of any principal for the acts of an agent, but, subject to the terms of the statutes as to jurisdiction, an additional remedy *in rem* is given in Admiralty¹⁰⁾ to a material man who has supplied necessities, even though he may have looked to the personal credit of the master, or looked to the vessel rather than to the credit of the shipowner for repayment. The Court will not allow an action *in rem* for necessities to be made the means of enforcing the payment of a general balance of an account between a shipowner and his agent or correspondent, but so far as the account contains claims for necessities supplied, there is no reason why the sums representing necessities should not be the basis of a necessities action.

Jurisdiction in suits concerning necessities. The existing jurisdiction in Admiralty in suits concerning necessities is wholly statutory, except in the case (which can very rarely happen) of the necessities being actually supplied on the high seas¹¹⁾. In 1840 provision was made¹²⁾ for giving a remedy *in rem* against a foreign sea-going vessel to which necessities had been supplied either in the body of a county¹³⁾ or on the high seas¹⁴⁾. The policy of the statute was to give an effective remedy to a creditor where the person who would have been liable in a common law action for goods supplied was presumably out of the jurisdiction and might never come within it. This provision only extends to foreign vessels, so that British vessels, whether English or Colonial, are excluded, and, moreover, only extends to foreign vessels to to which necessities have been supplied within the jurisdiction or on the high seas. In 1861¹⁵⁾ the jurisdiction was greatly amplified by legislation applied to all vessels, whatever their nationality, provided that no owner is domiciled¹⁶⁾ here when the suit is begun, and that the necessities were not supplied in the port to which the vessel

¹⁾ *The Marianne* [1891] P. 180.

²⁾ *The Bonne Amelie* (1865) L. R. 1 A. & E. 19.

³⁾ *The Elmsville* (No. 2) [1904] P. 422.

⁴⁾ *The Aaltje Willemina* (1866) L. R. 1 A. & E. 107.

⁵⁾ *The Anna* (1876) 1 P. D. p. 257.

⁶⁾ *Ibid.*; cf. *The Onni* (1860) Lush. 154.

⁷⁾ A term which strictly applies to the man who supplies materials for repair or does repairs to a vessel; cf. *The Riga* (1872) L. R. 3 A. & E. p. 520.

⁸⁾ *The Wellgunde* (1902) 18 T. L. R. 719.

⁹⁾ But this agent may be anyone who has actual authority from the owner, or who has been held out as having authority, so that even where there is a demise the true owner as well as the charterer may be exposed to an action *in rem*; cf. *The Ripon City* [1897] P. 226.

¹⁰⁾ *The Great Eastern* (1868) L. R. 2 A. & E. 88.

¹¹⁾ Cf. *The Mecca* [1895] P. 95.

¹²⁾ A. C. A., 1840, s. 6.

¹³⁾ I. e. practically waters which are not part of, but can be reached from, the high seas in England or Wales.

¹⁴⁾ Including foreign ports which are in fact on the high seas; *The Mecca*, *ubi supra*.

¹⁵⁾ Admiralty Court Act, 1861, s. 5.

¹⁶⁾ 'Domiciled' is used in a strict sense: the place where an owner has his permanent home with no intention of changing it, or, if he has no permanent home, his domicile of origin or last acquired domicile of choice.

belongs. These restrictions were introduced because in cases where they apply the necessities man either has an effective remedy here *in personam* or has a remedy under the local law which, unlike English law, often gives a maritime lien for necessities. A somewhat similar statutory right *in rem* has also been given to stevedores and coal trimmers¹⁾. The effect of the statutes of 1840 and 1861 may be summarised thus:

1. As to foreign vessels an action for necessities supplied may be brought in England:
 - a) if they were supplied in England or in a port within the British Dominions or Colonies²⁾;
 - b) if they were supplied on the high seas³⁾;
 - c) under the act of 1861, wherever they were supplied (unless it was in the port to which the vessel belongs⁴⁾), provided that no owner or part-owner is domiciled in England or Wales at the time when the suit is instituted.
2. As to British vessels an action for necessities supplied may be brought in England, wherever they were supplied, unless it was in the port to which the vessel belongs⁵⁾, provided that no owner or part-owner is domiciled in England or Wales at the time when the suit is instituted.

Whether a vessel is a foreign vessel or not is a matter of evidence; her register is good evidence of her nationality, but is not conclusive⁶⁾. It will usually be advisable, where possible, to proceed against a foreign vessel simply as such, under the Act of 1840, rather than in reliance on the Act of 1861, as no difficulty as to the owner's domicile can then arise. It has been held that if a vessel was foreign-owned at the time when the necessities were supplied but has either before⁷⁾ or after⁸⁾ the institution of a necessities cause been transferred to British ownership, the fact that the new owner is domiciled in England will not be allowed to defeat the claim *in rem*; it is however impossible to reconcile the former case (and perhaps the latter case also) with later cases⁹⁾, as the earlier decision seems to recognise a maritime lien for necessities which does not exist in this country. The domicile of an owner or part-owner is a material question of fact, and if it is intended to rely on an English domicile as a defence, the fact should be pleaded and must be proved at the hearing, as it cannot be relied upon unless it is so proved¹⁰⁾.

Priorities. As no maritime lien for necessities is given by English law, the claimant's right *in rem* only attaches when his suit is begun, and therefore his right is subject to pre-existing rights, which may arise from maritime or possessory liens, or from any mortgage made before the institution of the suit¹¹⁾; and a purchaser who has bought the vessel after the necessities were supplied, but before the commencement of any suit, is unaffected by the claims of the necessities man¹²⁾, although he may have had notice of the claim. A mortgagee will only be postponed to the claim for necessities if the necessities were ordered by his agent, i. e. if he has authorised the master or other agent to procure them on his credit, or if he takes his mortgage not only after the necessities have been supplied but also after a suit *in rem* for the price has been instituted¹³⁾.

Contracts by master for necessities. The master of a British ship is a general agent of the owner, with powers that cannot be limited by any private restrictions, to make contracts for the supply of anything that is reasonably necessary, in the absence of the owner himself; if the master contracts in his own name, the owner may nevertheless be sued as undisclosed principal, if he is in fact the principal (but some other person, such as a charterer or a mortgagee, may be the real principal) or the

¹⁾ M. S. A. (Stevedores and Trimmers) Act, 1911 (1 & 2 Geo. 5, c. 41); see p. 491.

²⁾ *The Anna* (1876) 1 P. D. 253.

³⁾ See *The Mecca*, *supra*.

⁴⁾ *Prima facie* the port or place in which she is registered, when her national law requires registration.

⁵⁾ Cf. M. S. A. 1894, ss. 13, 742.

⁶⁾ *The Princess Charlotte* (1863) Br. & L. 75.

⁷⁾ *The Ella A. Clarke* (1864) 32 L. J., Adm. 211.

⁸⁾ *The Princess Charlotte*, *ubi supra*.

⁹⁾ E. g. *The Henrich Björn* (1886) 11 App. Cas. 270.

¹⁰⁾ *Ex p. Michael* (1872) L. R. 7 Q. B. 658.

¹¹⁾ Cf. *El Argentino* [1909] P. 236, and cases there cited.

¹²⁾ *The Aneroid* (1877) 2 P. D. 189.

¹³⁾ Cf. *The Scio* (1867) L. R. 1 A. & E. 353.

master may be sued on the contract he has made. If the contract imposes on the master a liability properly incurred on account of the ship¹⁾, the master has by statute a maritime lien for the amount of his liability. On this maritime lien is based the common practice of material men whereby in respect of the supply of necessities they rely rather on the direct maritime lien of the master, by taking an assignment of his right to sue for disbursements and to enforce his maritime lien²⁾, or on an undertaking by the master to institute and prosecute such a suit for the benefit of the material man³⁾. In this manner the material man has not only his statutory right *in rem*, but he practically has the benefit of a maritime lien, which is not liable to be defeated because the necessities were supplied elsewhere than on the high seas or in the body of a county, or because they were (under the Act of 1861) supplied in the vessel's port of registry or to a vessel with an owner domiciled in England or Wales⁴⁾.

Concurrent claims for necessities. Where there are or may probably be several material men claiming *in rem*, either against the vessel herself, or, if she has been sold and the proceeds are in Court, against the proceeds in Court, the ordinary practice is to make a conditional decree so that claims prosecuted without undue delay may, where they are of equal rank, be satisfied *pari passu* out of the proceeds⁵⁾; and so long as any proceeds remain in Court, even an unconditional decree in favour of an earlier claimant would probably be modified so as to let in any similar claim presented without undue delay. The applicant who procures the arrest will, however, be preferred as to the costs up to the time of arrest.

Material men. Claimants in respect of work done to a ship, as for building, equipping or repairing her, and not for necessities supplied to her, have by statute⁶⁾ a right of suit in Admiralty where at the time of the institution of the cause the ship⁷⁾ or the proceeds thereof, if she has been sold, are under the arrest of the Court. This right therefore is contingent on the ship having been already arrested in some other process in Admiralty, and the benefit to the claimant is that a right *in rem* is given from the time when he institutes his suit, so that it will not be defeated by subsequent events, on the principle that the same results are to be attained as if judgment had been given immediately after the arrest by the Court; thus where a ship was under arrest in an action of wages and a shipwright instituted a cause of repairs, and subsequently the company which owned the ship was ordered to be wound up, the claim of the shipwright was preferred to that of the official liquidator⁸⁾.

Possessory lien. A more valuable right of shipwrights and ship-repairers is that which arises from the common law or possessory lien which is given to them by the fact of their having expended skill or labour on a vessel which is in fact in their possession. Such a common law lien does not give any right of action, but merely a right to retain possession until the claim is satisfied; it is however preferred to any claims arising after the lien has once attached, whether they arise under a maritime lien⁹⁾ or a mortgage¹⁰⁾ or other contractual obligation¹¹⁾. The right under a possessory lien is only co-extensive with the interest of the shipowner when the vessel comes into the shipwright's hands, and he therefore takes possession subject to the accrued claims of third persons. The statute¹²⁾ operates to give the shipwright an opportunity of enforcing his lien by action, where the vessel is arrested at the suit of some other claimant *in rem*. In such a case the duty of the shipwright is to surrender the ship to the officer of the Court, so that she may be removed and sold, if necessary; the duty of the Court is to see that the interest of the shipwright in respect of his lien is protected so that he shall be in a position as advantageous as if he had not surrendered possession¹³⁾.

¹⁾ M. S. A. 1894, s. 167 (2).

²⁾ As the right is given expressly to the master it may be that this practice is unwarranted.

³⁾ The master is clearly entitled to assign the benefit of his lien.

⁴⁾ *The Ripon City* [1897] P. p. 231.

⁵⁾ *The Africano* [1894] P. 141.

⁶⁾ A. C. A. 1861, s. 4.

⁷⁾ Defined, A. C. A. 1861, s. 2.

⁸⁾ *The Cella* (1888) 13 P. D. 82.

⁹⁾ E. g. for wages or disbursements, *The Tergeste* [1903] P. 26.

¹⁰⁾ Cf. *The Scio* (1867) L. R. 1 A. & E. 353 (where the material man had not in fact possession).

¹¹⁾ Such as a claim for necessities.

¹²⁾ A. C. A. 1861, s. 4.

¹³⁾ *The Tergeste* [1903] P. 26.

Claims for stowing or discharging cargo. A jurisdiction in cases somewhat similar to the supply of necessities or the doing of work to a ship has been given to the Admiralty Court where stevedores have done work for the ship in stowing cargo on board or discharging cargo from a ship, and where coal-trimmers have trimmed coal on board a ship¹). Where a person²) alleges that a sum is due to him from the owners of a ship (or from a charterer by demise under a charterparty still current³)) for work done at any place in the United Kingdom by himself in connexion with the stowing or discharging of cargoes on board or from that ship, or the trimming of coal on board that ship, he has two courses of action open to him under the Act⁴). First, he may procure the arrest of the ship, until satisfaction made or security given, if she is found at any place within England or Ireland or within 3 miles of the coast, upon applying to a judge in due form and satisfying him that the claim is *prima facie* good and that no owner of the ship resides in the United Kingdom⁵); or, alternatively, if he has a claim to which the Act applies, he may proceed as in an action for necessities in Admiralty⁶). The Act is somewhat loosely drawn and its interpretation may cause some difficulties. It clearly applies to British and to foreign vessels, and is probably meant only to apply where no owner is resident here; that appears to be certain where the procedure of preliminary arrest by order of a judge is utilised; but to found jurisdiction in Admiralty all that need be shown is that there is a claim to which the Act applies, i.e. a claim by a stevedore or coal-trimmer for work on a ship: under section 3 a good claim may exist apart from any question of residence of owners, which is a supplementary matter, with the result that section 3 can bear any one of three meanings:

1. That a statutory right *in rem* is given wherever a claim under section 1 could be made, irrespective of the residence of the owners.
2. That the right is subject to a residential test, or
3. That the right is in all respects similar to any claim for necessities supplied and therefore subject to questions of nationality under the act of 1840 or domicile under the act of 1861.

It is submitted that the second interpretation suggested is the least consistent with the phraseology of the statute even though it may be the most consistent with its objects. If residence is a test in any case of the right of action, a person may be said to reside at any place or number of places to which he can resort as a dwelling place, and his residence need not be prolonged or continuous; he may have residences elsewhere than in the country in which he is domiciled. If domicile becomes a test under section 3, the domicile of a person is in the country in which he has his permanent home with no intention of changing it, or, if he has no permanent home, it is either his domicile of origin or the last place in which he acquired a domicile of choice; in the case of a corporation it is the place where its principal administrative business is carried on; a corporation may reside in other places as well as where its administrative affairs are conducted⁷).

XXVI. Wages.

In considering the law applicable to the recovery of wages and of disbursements some distinction must be taken between the claims of seamen and of a master, and between claims in respect of British and of foreign vessels. The British statute law contains many provisions⁸) for the protection of seamen on British ships which can have but little interest to the courts of other countries; the seaman on a British ship occupies a position fully as favoured as does the married woman in respect of her property.

The term wages includes emoluments⁹), such as a bonus earned by a master under an agreement with his employer¹⁰), and by a benevolent interpretation in favour

¹) Merchant Shipping (Stevedores and Trimmers) Act, 1911 (1 & 2 Geo. 5, c. 41).

²) I. e. an individual or a corporation.

³) M. S. A. (Stevedores &c.) 1911, s. 2.

⁴) Besides the common law action for work and labour done; cf. s. 4.

⁵) S. 1 (1) of the Act; and cf. s. 1 (6).

⁶) S. 3 of the Act.

⁷) *De Beers Co. v. Howe* [1906] A. C. 455.

⁸) M. S. A. 1894—1907.

⁹) M. S. A. 1894, s. 742.

¹⁰) *The Elmville*, No. 2 [1904] P. 422.

of seamen, has long been held¹⁾ to include compensation for wages or other sums as compensation for some default of the employer; at common law these might be recoverable as damages for wrongful dismissal, but not as wages; such sums may include the expense of repatriation or the expenses of the journey home and of subsistence during that period, as a viaticum²⁾. This benevolence has extended to the inclusion of compensation for hardships suffered by reason of breach of contract before the dissolution of the contract³⁾. It may be material to observe that all these were cases in which the Court of Admiralty had original inherent jurisdiction; its statutory jurisdiction only extends to "wages earned on board the ship"⁴⁾.

A right to wages accrues as soon as a seaman begins to work or at the time when under the contract he is to begin to work, whichever is the earlier⁵⁾. The seaman cannot⁶⁾ in any way contract to waive his lien and remedies for wages⁷⁾ or agree that his payment shall be dependent on the earning of freight⁸⁾. A creditor cannot procure the attachment of such wages, nor can an assignee prevent the employer from paying them to the seaman himself. No assignment of wages yet to accrue due binds the seaman, and any power of attorney he may give to authorise another to receive them is revocable, however it may be expressed⁹⁾.

Discharge of seamen. A seaman of a British foreign-going ship must, and a seaman of any home-trade ship may, be discharged in the presence of a superintendent¹⁰⁾, and any seaman so discharged must be paid through or in the presence of the superintendent¹¹⁾. Whenever a seaman is paid off or discharged the master must furnish an account in due form¹²⁾ and no deductions from wages are allowed unless the deductions appear in the account¹³⁾. In the case of foreign-going ships [unless the seaman is remunerated wholly by a share of profits¹⁴⁾] the seaman is entitled to two pounds or one fourth of the wages due (whichever is the less) on leaving the ship at the end of his engagement¹⁵⁾, and to the balance within two days, otherwise the wages may run on until final settlement¹⁶⁾; in home-trade ships he must be paid on discharge or within two days of the end of the agreement, whichever first occurs, otherwise he may recover double pay for each day's delay up to ten¹⁷⁾ days.

The duration of a voyage of a British foreign-going ship and the place of its termination so that a seaman shall become entitled to his discharge have proved to be difficult questions. His agreement may be for "a voyage"¹⁸⁾ or, where her voyages average less than six months in duration, for a succession of voyages¹⁹⁾ extending to the next 30 June or 31 December or the ship's first arrival in the United Kingdom thereafter. Under an agreement for a voyage, there is an agreement for one adventure, but it may be an adventure in relation to cargo or in relation to the vessel herself²⁰⁾. The answer depends on the construction of the agreement. If the voyage has in fact come to an end the seaman is entitled to his discharge; but the fact that the ship is in a home port and has taken bunker coal for a future voyage is not proof that the voyage for which the seaman engaged has come to an end²¹⁾.

¹⁾ *The Ferret* (1883) 8 App. Cas. 329.

²⁾ *The Immacolata Concezione* (1883) 9 P. D. 37; see also M. S. A. 1894, s. 158, and p. 493 post (as to termination of service).

³⁾ *The Justitia* (1887) 12 P. D. 145.

⁴⁾ See A. C. A. 1861, s. 10.

⁵⁾ M. S. A. 1894, s. 159.

⁶⁾ But a master may; cf. *The Wilhelm Tell* [1892] P. 337.

⁷⁾ Ibid. s. 156 (1).

⁸⁾ Ibid. s. 157 (1).

⁹⁾ M. S. A. 1894, s. 163; but he may validly allot a portion of his wages; ibid. ss. 141—144; M. S. A. 1906, s. 63.

¹⁰⁾ M. S. A. 1894, s. 127.

¹¹⁾ Ibid. s. 131.

¹²⁾ Ibid. s. 132.

¹³⁾ As to deductions see Scrutton on The Merchant Shipping Act, 1894, notes to s. 133.

¹⁴⁾ As may happen in the fishing or whaling trades.

¹⁵⁾ Whether it ends by performance of its terms or by breach.

¹⁶⁾ M. S. A. 1894, s. 134.

¹⁷⁾ Ibid. s. 135.

¹⁸⁾ This may be of any length, as no limit is prescribed; M. S. A. 1894, s. 115 (5). Cf. ibid. s. 114 (2) (a).

¹⁹⁾ Such an agreement is called a 'running agreement', M. S. A. 1894, s. 115 (5).

²⁰⁾ *The Scarsdale* [1907] A. C. 373.

²¹⁾ *Haylett v. Thompson* [1911] 1 K. B. 311.

A seaman's services may end before the date contemplated by the agreement, either by wreck or loss of the ship; or by his being left ashore as unfit or unable to proceed¹⁾; or by agreement; or by the default of either party in fulfilling the agreement. Wreck here would include any case where by reason of perils of the sea the ship is so injured that she cannot proceed; whether loss is a term which includes loss of possession by the shipowner by reason of his own default, as well as loss of the vessel by reason of her ceasing to exist physically, is a question of some complexity. Where the loss was due to the fact that the shipowners without the knowledge of the crew carried contraband of war for a belligerent and she was captured by the other²⁾, it was held that the services of the seaman, though they could no longer be performed, were not terminated by the capture, as the real cause was the fault of the owners in so acting as to make it impossible that they should be rendered³⁾; where, however, after capture the vessel was physically destroyed⁴⁾ [there being no evidence that she carried contraband of war, or of any default of the shipowner] the destruction was held to be a loss on which the right to wages ended. Where a crew discovers during the voyage that it is intended to carry contraband of war to the naval base of a belligerent power they are entitled to refuse to proceed, when their agreement was made for an ordinary commercial voyage, and they are entitled to wages until final settlement of their claim, and to damages for wrongful discharge (equivalent to the cost of maintenance less any sums they are proved to have earned as seamen during that time) for the same period, the ship being still in existence⁵⁾; but where the vessel is in fact lost after the crew have discovered that she is carrying contraband, they can only recover wages up to the date of the loss and no damages⁶⁾.

A seaman on a British ship may be discharged in the United Kingdom, or either at a port in the country in which he was in fact shipped or with the sanction of a competent authority⁷⁾; and if he is discharged abroad without his consent during the currency of the agreement, provision must be made for his repatriation, unless he is a foreign seaman engaged and discharged outside the United Kingdom⁸⁾. If any seaman, before the commencement of the voyage or before one month's wages have been earned, is discharged otherwise than in accordance with the agreement and without either consent or default on his part to justify the discharge, he may recover compensation not exceeding a month's wages, in addition to any wages actually earned⁹⁾.

Contracts for lump sum. A seaman's contract usually stipulates for wages to accrue monthly, but a contract for a voyage may cover any period or may be for a voyage not exceeding a named period, or the remuneration may be a lump sum, usually payable on completion of the adventure. A contract of the last kind is indivisible, so that the lump sum is not earned unless the seaman completes the voyage or is prevented from so doing by the conduct of the shipowner or his agents¹⁰⁾. If he is so prevented, e.g. by the shipowner declaring war, the seaman may leave the ship and claim the sum stipulated, although the voyage is not completed, and may also recover general damages¹¹⁾.

Suits for recovery of wages. A seaman serving on board ship under an ordinary contract of service¹²⁾ has always been admitted to have a maritime lien enforceable in Admiralty, wherever the contract was made and wherever the wages were earned. He has now¹³⁾ a right to sue in Admiralty, whatever the form and terms of the contract,

1) M. S. A. 1894, s. 158.

2) *Austin Friars S. S. Co. v. Strack* [1905] 2 K. B. 315, where wages up to the date of reaching London were allowed, and also damages.

3) Refusal to proceed, on a mere surmise that contraband of war is being carried, may be conduct justifying dismissal; *Ras v. Hutten S. S. Co.* [1907] 1 K. B. 834.

4) *Sivewright v. Allen* [1906] 2 K. B. 81.

5) *Palace S. S. Co. v. Caine* [1907] A. C. 386.

6) *Collins v. Simpson S. S. Co.* (1907) 24 T. L. R. 178; here the crew had not left the vessel as they had in the previous case: *Quaere* whether if they had left her their rights would not be the same as in that case.

7) M. S. A. 1906, ss. 30 (1), 49.

8) *Ibid.* ss. 32 (1) (3), 46.

9) M. S. A. 1894, s. 162.

10) *O'Neil v. Armstrong* [1895] 2 Q. B. 418.

11) S. C. [1895] 2 Q. B. 70.

12) I. e. a 'simple contract' of service without unusual terms or the formal character of a deed.

13) A. C. A. 1861, s. 10.

for wages earned on board the ship¹). For the purposes of the Merchant Shipping Acts the term "seaman" includes every person employed or engaged in any capacity on board any ship²), except masters³), pilots⁴), and apprentices duly indentured and registered; so that the engine-room staff, surgeons, pursers, cooks, and other non-navigating persons are comprised in it. Similar rights are given to the master by statute⁵). The right, however, to sue in the Admiralty Division of the High Court is further limited to cases where the claim exceeds £50⁶), unless:

1. The shipowner has been adjudged bankrupt, or
2. The ship is under the arrest of that Court or has been sold by its order (so that the proceeds are in the custody of the Court), or
3. The claim has been referred to it by a Court of summary jurisdiction, or
4. Neither owner nor master resides within 20 miles of the place of discharging the seaman or putting him ashore.

The jurisdiction is further affected by the provision of the County Courts (Admiralty Jurisdiction) Act, 1868⁷), giving such courts jurisdiction in suits for wages not exceeding £150⁸). The fact that an action may be brought in Admiralty either *in rem* or *in personam* does not in any way debar a claimant from bringing an ordinary common law action on the contract *in personam* against the owner or the master, but if he does so he waives his remedy *in rem* so long as the action *in personam* is pending: and he cannot proceed at common law in a County Court if his claim exceeds £100. There is some discrepancy between the statutes regulating the seaman's rights of suit for wages⁹), but the effect of the various provisions seems to be that he may sue:

1. In a court of summary jurisdiction¹⁰) in or near the place where his service terminated or where he was discharged or where the person against whom he claims resides, for sums not exceeding £50; he must sue in such a Court unless his case is within the exceptions of section 165.
2. In a County Court exercising common law jurisdiction, for any sum exceeding £50, up to £100.
3. In a County Court exercising Admiralty jurisdiction, for any sum exceeding £50, up to £150.
4. For any sum exceeding £100 in the High Court (properly in the King's Bench Division¹¹)).
5. a) For any sum exceeding £50, in the Admiralty Division¹²), but unless he recovers more than £150 the Court may exercise its discretion as to costs against him;
- b) For any sum exceeding £50, in the Admiralty Division¹³).

Whenever he can sue in Admiralty he can sue either *in rem* or *in personam*; and all claims for wages in Admiralty must be made within 6 years of their becoming due¹⁴), and this is so also as regards common law claims¹⁵).

The Admiralty process *in rem*, being here process to enforce a maritime lien, is available against the ship notwithstanding a change of ownership after the wages have become due; and the right continues although the seaman may have recovered

¹) This cannot be taken too literally, and must mean 'under a contract to serve on board the ship'.

²) M. S. A. 1894, s. 742.

³) Ibid.; 'persons having the command or charge of any ship'.

⁴) Ibid.; 'persons having the conduct of a ship but not belonging to her'.

⁵) Ibid. s. 167 (1).

⁶) Ibid. s. 165.

⁷) 31 & 32 Vict. c. 71, s. 3 (2).

⁸) Since in cases where not more than £150 is recovered the claimant may get no costs or only County Court costs; *The Zeta* [1893] A. C. 468.

⁹) M. S. A. 1894, s. 165, and A. C. A. 1861, s. 10.

¹⁰) M. S. A. 1894, s. 164; i. e. a justice, or justices, of the peace, or other magistrate: Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 18 (11).

¹¹) But if he recovers less than £150 the Court might exercise a discretion as to costs, against him, as he could have sued in a County Court in Admiralty; cf. *The Asia* [1891] P. 121.

¹²) A. C. A. 1861, s. 10.

¹³) M. S. A. 1894, s. 165, with County Court (Adm. Jur.) Act, 1868, s. 3 (2).

¹⁴) 4 & 5 Ann. (1705) c. 3, ss. 17—19.

¹⁵) Limitation Act, 1623 (21 Jac. 1, c. 16).

a judgment *in personam*, so long as that judgment has not been satisfied¹⁾, or although he may have waived his right *in personam*. The lien does not extend to cargo, but does extend to freight, including freight due from a sub-charterer to a charterer, and no arrangement between owners, charterers, and sub-charterers can deprive a seaman of his lien²⁾. Where a seaman resorts to the remedy *in personam* he may sue either the owner, i.e. the owner *de facto*, such as a charterer by demise, not necessarily the registered owner³⁾, or the master⁴⁾: where he has signed articles (which must be the case on British foreign-going ships which in fact carry seamen to sea) he has made a contract with the master on which either the master or his principal, the shipowner, can be sued; but if he elects to sue one of the two to judgment, his remedy against the other *in personam* is lost (though the judgment be not satisfied), although he still has a remedy *in rem* if the vessel is found within the jurisdiction.

Where the seaman's engagement is for a voyage or adventure which is to terminate in the United Kingdom, he may not sue in any Court abroad for his wages, unless he has been duly discharged with the written consent of the master, or proves that his life would have been endangered by ill usage if he had remained on board⁵⁾; and where the shipowner is insolvent and process *in rem* is not available he may be required to make his claim in the bankruptcy or liquidation proceedings.

Wages and disbursements of master. As far as possible a master has the same rights, liens and remedies for the recovery of his wages, as a seaman has; and the master or any person who has lawfully acted as master has the same rights in respect of disbursements⁶⁾ or liabilities properly made or incurred on account of the ship as the master has for his wages⁷⁾. The claim of a master is however postponed to that of a seaman where the fund available is not sufficient to satisfy both claims⁸⁾; and his statutory right is only given in respect of the mode of recovery, not in respect of the accruing of the right to wages⁹⁾. His rights in respect of disbursements are given where the disbursements are for the account of the owners, being such as the owners would be bound to pay because the master made them with the authority of the owners, whether with actual authority or ostensible authority¹⁰⁾, and not for disbursements for which other persons than the owners¹¹⁾ are bound to pay; there is no maritime lien unless the master had authority to pledge the credit of the shipowner, and there is no such authority when the shipowner himself is present or so near that there is no necessity for the master to make himself personally liable as master¹²⁾.

Preferential claim in bankruptcy. A seaman¹³⁾ and a mate¹⁴⁾ are preferential creditors in the bankruptcy of a shipowner, and there seems to be no good reason to doubt that a master also is in the same position.

Foreign ships; claims for wages. The Admiralty Court Act¹⁵⁾ is general in its terms and applies to claims by seaman on board any ship, and therefore the jurisdiction extends to claims by British or by foreign seamen employed on board a British or a foreign ship; the Merchant Shipping Acts contain clauses of three kinds:

1. Those which apply only to British ships.
2. Those which apply only to foreign ships.
3. Those which are general.

¹⁾ *Nelson v. Couch* (1863) 15 C. B., N. S. 99.

²⁾ *The Andalina* (1886) 12 P. D. 1.

³⁾ *Meikleroid v. West* (1876) 1 Q. B. D. 423.

⁴⁾ *The Salacia* (1862) 32 L. J., Adm. 41.

⁵⁾ M. S. A. 1894, s. 166.

⁶⁾ I. e. all proper expenditure by a master, as master, on a ship; usually co-extensive with necessities, but may be wider; *The James Seddon* (1866) L. R. 1 A. & E. 62.

⁷⁾ M. S. A. 1894, s. 167.

⁸⁾ *The Salacia* (1862) 9 Jur. N. S. 27.

⁹⁾ So that he would have no claim to compensation under M. S. A. 1894, s. 162, or to double wages (s. 135 [2]), or wages until date of payment (s. 134 [c]); but he may have a right to damages under M. S. A. 1906, s. 57.

¹⁰⁾ *The Ripon City* [1897] P. 226.

¹¹⁾ E. g. charterers; *The Castlegate* [1893] A. C. 38.

¹²⁾ *The Orienta* [1895] P. 49.

¹³⁾ *In re Dawson* (1851) Fonb. 229.

¹⁴⁾ *Ex p. Homborg* (1842) 2 M. D. & D. 642.

¹⁵⁾ 1861, s. 10.

Where the clause is in general terms and deals with a matter which does not give rise to a conflict of laws it will apply to both British and foreign ships; where it does give rise to a conflict of laws in the case of a foreign ship, if the Act contains an express provision, that provision will be enforced, but if there is no express provision the case will be governed by the law of the port where the ship is registered¹⁾. The effect of the statutes has been held, in respect of wages, to be that the master or crew of a foreign ship may sue in England and enjoy the same remedies as the master or crew of a British ship²⁾ as these are part of the *lex fori*, but that the right to wages may be governed by the *lex loci contractus*³⁾ or the law of the flag. The right to recover such wages as may be due cannot be wholly waived, even by express stipulation⁴⁾, or by an agreement to resort to some tribunal other than an English Court⁵⁾, but the Admiralty Court has a discretion whether it will entertain a claim for wages by a seaman, British or foreign, of a foreign ship.

Where a claim *in rem* is made for wages by the master or a seaman of a foreign ship the practice of the Court is to require that notice of the suit shall be given to a representative of the State to which the ship belongs⁶⁾. The representative may assent to the entertaining of the suit by the Court or may take no action at all, in which case his assent will be presumed; or he may object to the exercise of the jurisdiction, and appear before the Court and protest⁷⁾. The Court is not bound to give effect to such a protest, but it will consider the objections advanced as a ground for the exercise of its judicial discretion to stay the suit⁸⁾, and may require the claimant to answer such objections. This practice applies to all claims for wages against a foreign ship, whether by a British or by a foreign seaman; and the Court is at liberty to give effect to a contract that the right to wages or the mode of recovery shall be governed by foreign law⁹⁾. The right to sue must usually arise where the voyage of the foreign ship ends at an English port; but the Court may, in addition to wages, allow a foreign seaman a viaticum or the expenses of his repatriation, if he has been improperly discharged. On the other hand, in the same way as seamen engaged here for a voyage to terminate in the United Kingdom are debarred from suing for wages abroad¹⁰⁾, except when properly discharged there or after leaving the ship by reason of ill-usage, so a seaman on a foreign ship may be debarred from suing except in the foreign country⁸⁾. In any case where the claim is against a foreign ship the Court before arrest requires evidence that notice of the commencement of the action has been served on the consul of the foreign State, if there is one resident in London¹¹⁾, otherwise it may dismiss the suit: but arrest may¹²⁾ be allowed although such notice has not been served or where the evidence of service is insufficient. A foreign suitor suing a foreign ship may be required to give security for costs¹³⁾.

Defences to claim for wages. The defences to a claim of wages (which it is not proposed to discuss here at length) may be statutory or under maritime law. By statute desertion causes a forfeiture¹⁴⁾ of all wages earned and effects (and if the desertion is abroad, of all wages earned until the deserter's return to England), and entails a liability to 12 weeks' imprisonment. Neglect or refusal to join may be justifiable, or may amount to and be treated as desertion¹⁵⁾ with all its consequences, or may be treated as absence without leave¹⁶⁾. Various offences against discipline are dealt with by s. 225 of the Act; forfeitures for such offences enure *prima facie*

¹⁾ *Regina v. Stewart* [1899] 1 Q. B. p. 970; M. S. A. 1894, s. 264.

²⁾ The Acts distinguish British and foreign ships, not British and foreign masters or crews.

³⁾ *The Tagus* [1903] P. 44.

⁴⁾ M. S. A. 1894, s. 156.

⁵⁾ *The Leon XIII* (1883) 8 P. D. 121.

⁶⁾ Usually a consul.

⁷⁾ *The Leon XIII* (1883) 8 P. D. 121.

⁸⁾ *The Nina* (1868) L. R. 2 P. C. 38.

⁹⁾ *The Leon XIII*, *The Nina*, *ubi supra*.

¹⁰⁾ M. S. A. 1894, s. 166 (1).

¹¹⁾ R. C. S. Order V, r. 16 (b).

¹²⁾ *Ibid.* r. 17.

¹³⁾ *Ibid.* Ord. 65, r. 6 A.

¹⁴⁾ M. S. A. 1894, s. 221; it enures first for the reimbursement of the expenses due to the desertion (s. 232).

¹⁵⁾ *Ibid.* s. 221 (b).

¹⁶⁾ The consequences are stated in s. 221 (b).

for the benefit of the ship¹). Fines incurred by a seaman are payable to the proper official authority and do not enure for the benefit of the ship²), although they may be imposed by the terms of the seaman's agreement.

By maritime law as administered in England misconduct of various kinds works a forfeiture of wages, such as habitual or frequent intemperance³), gross negligence⁴), inciting to insubordination, general neglect of duty or particular neglect of duty leading to loss or damage⁵).

Reference to determine amount of wages. Where the Admiralty Court has decided that a liability to pay wages or disbursements has been made out, the amount payable is, in case of dispute, ascertained by a reference to the registrar and merchants, who ascertain the amount and report to the Court accordingly⁶). If the amount in dispute is very small the Court will, if it thinks fit, deal with it without a reference.

XXVII. Bottomry and Respondentia.

Definitions. Essential features of bottomry contracts. A contract of bottomry is one whereby in consideration of money advanced for the necessities of the ship to enable her to proceed on her voyage the keel or bottom of the ship, *pars pro toto*⁷), is made liable for the repayment of the loan if the ship arrives at her destination. A contract of *respondentia* is a similar contract in respect of the cargo on the ship, for the necessities of the cargo⁸). Such contracts differ from mortgages in that no property in the security passes to the lender, and from pledges in that possession remains in the borrower. The essential features are that the lender undertakes a maritime risk, and will receive neither principal nor interest if the property does not reach its destination, and that the borrower has no other means of raising money; but if the property does reach its destination the lender has a maritime lien upon it, and the loan becomes repayable with interest as stipulated.

Form of contract. Bottomry bonds. A contract of this kind is usually termed a bottomry bond⁹) [although it need not be technically a bond¹⁰)] and must be in writing and contain either expressly or by necessary implication from its terms, evidence that whatever the transaction may be called it is in fact one of bottomry with all the incidents necessary to a valid contract of bottomry¹¹). The document must show the fact that the lender assumes a maritime risk, and the voyage in respect of which he assumes it; it is highly advisable that it should also show the interest to be received by the lender, and that it is maritime interest; and it should ordinarily show on what vessel the loan is made, the parties to the transaction, the amount of the loan, and the property (ship, freight or cargo) which is made the security for the loan.

What circumstances justify borrowing on bottomry. The question whether an occasion exists which justifies the procuring of a loan on bottomry is a question of fact: if circumstances are such that there is no reasonable prospect of completing the adventure without loss, unless money is raised by borrowing¹²), in such a case there is a necessity of borrowing, and if there is no other way of borrowing or raising money save by bottomry the necessity of bottomry is also satisfied. The necessity to borrow exists where funds are required for repairs or supplies for the ship, or for the crew or passengers on board her, or to discharge expenses relating to ship or crew at the port where the bond is given, for which the owner or master would be liable; but the necessity must exist with regard to the current adventure and in respect of the vessel or her cargo. The particular necessities will vary with the incidents of each adventure; where funds are required to free the vessel from a

¹) M. S. A. 1894, s. 232 (3); cf. ss. 157, 159, 161, and M. S. A. 1867, s. 8.

²) Cf. M. S. A. 1894, s. 227; M. S. A. 1906, s. 44.

³) *The Macleod* (1880) 5 P. D. 254.

⁴) *The New Phoenix* (1823) 1 Hagg. Adm. 198.

⁵) *The Duchess of Kent* (1841) 1 W. Rob. 283 (neglect by a mate causing loss of cargo).

⁶) Interest is allowed, on the sum so ascertained, from the date of the report.

⁷) Freight to be earned on the voyage may be included.

⁸) *The Atlas* (1827) 2 Hagg. Adm. p. 53.

⁹) Respondentia is so much less common than bottomry that it is convenient to treat bottomry as including respondentia, since the principles applicable are the same.

¹⁰) I. e. a contract by deed sealed and delivered, and (probably) signed.

¹¹) *The Haabet* [1899] P. 295.

¹²) Cf. *The Karnak* (1869) L. R. 2 P. C. p. 512.

maritime lien¹), or from a debt of the owner in respect of the adventure enforceable by arrest of the ship²), or to pay off a previous bottomry bond in respect of the current voyage³), or in respect of repairs effected or advances made in contemplation of a bottomry bond to be thereafter given⁴), or to pay a material man for necessities supplied on personal credit⁵), a necessity to borrow will exist; but there must be shown to be a necessity of the ship, and that does not exist where personal credit has been given or will be accepted, so that a material man who has supplied necessities on credit, cannot acquire a maritime lien by taking a bottomry bond. One who lends funds to discharge debts incurred on a previous voyage, or to pay premiums of insurance⁶), or to pay charges for which a consignee but not the shipowner is liable⁷), or to pay a private debt of the master, or to pay general average contributions⁸), cannot take a valid bottomry bond in respect of the loan.

A bottomry loan can only be supported if there was no other way in which the necessary funds could be procured⁹); it is a vital principle that such bonds can only be given where the shipowner has no credit¹⁰), and the master must ascertain that he cannot procure funds on the owner's credit¹¹), as if funds are procurable on credit, the bond may be invalid even in the absence of proof that the lender knew of the possibility¹²). If a debtor to the shipowner makes an advance on bottomry it is, at any rate up to the amount of the debt, invalid¹³); if at the place there is an agent of the shipowner who is willing¹²) or bound by his agreement to make advances there is no necessity for bottomry, but an agent who is not bound to make advances, may lend on bottomry¹⁴) unless he has so acted as to make it improper¹⁵) for him to do so.

Duties of lender. One who lends on bottomry is bound to satisfy himself, for his own protection, that the two cardinal necessities, the need of funds and the absence of personal credit, exist. He is expected to take such steps as are reasonably possible to see that these conditions are satisfied; he must therefore make inquiries as to the necessity¹⁶), as the absence of reasonable inquiries (e.g. as to communication with the owner where the law of the flag requires communication) is evidence of the absence of bona fides, without which the bond cannot be upheld. He must satisfy himself that the ship is in distress, that advances on credit are unprocurable, and that the amount is required for necessary purposes¹⁷). Where he has done this the bond will, so far as his acts affect it, be valid, but it does not follow that all the items forming his claim will be allowed to be good¹⁶).

A lender on bottomry (not being the agent of the ship) who has satisfied himself of the necessity of the loan, is not bound to consider whether he himself, if in the position of the shipowner, would deem it expedient to continue the adventure¹⁸); nor is he bound to see to the application of the money or that it is devoted to the purpose for which it was necessary¹⁹), unless the circumstances are such that he ought to guard against fraud.

Insurance by lender. Collateral securities. The lender has an insurable interest in the ship or cargo to the extent to which he has made an advance on the security thereof²⁰), and it has been held that he may stipulate in the bond itself that the borrow-

¹) *The Sultan* (1859) Swa. 504 (respondentia bond, to release cargo arrested for salvage).

²) *The Osmanli* (1849) 3 W. Rob. 198.

³) *The Toivo* (1853) 1 Spks. 185.

⁴) *The Karnak*, (1869) L. R. 2 P. C., p. 513.

⁵) S. C. (1868) L. R. 2 A. & E. p. 303 (but the loan must be made by some other person).

⁶) *The Heinrich Björn* (1883) 8 P. D. 151.

⁷) *The Edmond* (1861) Lush. 211.

⁸) *The North Star* (1861) Lush. 45 (unless the vessel is liable to arrest at the place where the loan on bottomry is procured).

⁹) *Lyall v. Hicks* (1859) 27 Beav. 616.

¹⁰) Per Lord Stowell, in *The Nelson* (1823) 1 Hagg. Adm. p. 175.

¹¹) *The Eliza* (1836) 3 Moo. P. C. 5.

¹²) *The Prince of Saxe-Cobourg* (1838) 3 Moo. P. C. 1.

¹³) *The Hebe* (1843) 2 W. Rob. 146; S. C. (1846) ib. 412.

¹⁴) *The Staffordshire* (1872) L. R. 4 P. C. 194.

¹⁵) Cf. *The Wave* (1852) 15 Jur. 518; *The Empire of Peace* (1869) 39 L. J., Adm. 12.

¹⁶) *The Pontida* (1884) 9 P. D. 177.

¹⁷) *The Mary Ann* (1865) L. R. 1 A. & E. 13.

¹⁸) *The Vibilia* (1838) 1 W. Rob. p. 10.

¹⁹) *The Orelia* (1833) 3 Hagg. Adm. 75.

²⁰) *The Boddington's* (1832) 2 Hagg. Adm. 422.

er shall repay the premium¹⁾ to the lender; the premium however cannot be treated as a part of the advance on bottomry in such a case. The lender may take more than one security in respect of his loan, such as a bill of exchange and a bottomry bond²⁾. In such a case the bond is probably the primary security, but the bill of exchange will be put in force before any attempt is made to enforce the bond; no difficulty should arise so long as both documents are in the same hands, but if the bill were negotiated without a concurrent assignment of the bond it would be more difficult to adjust the rights of parties. The intention where concurrent securities are given usually is that the bill shall be met, and that if it is met no action shall be taken on the bond³⁾. It is essential, where concurrent securities are given, that the circumstances requisite to give the bond validity shall be present⁴⁾.

Authority of master to borrow on bottomry. The lack of personal credit being a necessary element in bottomry, either the owner or the master may borrow the necessary funds on bottomry. If the owner borrows, it must be shown that he had no credit or means of credit at the place where the vessel is⁵⁾. If both owner and vessel are in England the owner presumably might raise funds by mortgage of the vessel or otherwise on his own credit. However, it will almost invariably happen that the necessity will arise in a foreign port in the absence of the owner; in that event the master [or anyone lawfully performing the functions of master⁶⁾] has ostensible authority to borrow on bottomry where it is necessary in respect of the current adventure, but not, as the owner might do, in respect of a fresh adventure⁷⁾ from a foreign port.

Duty of master to communicate with owner. It is a settled rule of English law that before the master borrows on bottomry or respondentia, he must communicate with the owner of the interest which is to form the security if reasonable means of communication exist⁸⁾. This applies to all British ships, but English maritime law will consider what the law of the ship's flag is, and the rule as to communication will not be applied where the law of the flag does not require it⁹⁾. Whether reasonable means of communication exist and whether they have been properly utilised are questions of fact; it might happen that a master can give a good bottomry bond, although the vessel is in the country in which the owner himself is¹⁰⁾, without communicating with the owner; but if communication is reasonably possible the bond cannot be valid¹¹⁾, unless communication would have been futile, as where the owners had been adjudicated bankrupt¹²⁾. The reason for requiring notice of the intention to give a bottomry bond is that the owner, on whom the expense will fall, will presumably resort to any possible means of raising funds in preference to the most expensive, and that if he does allow the master to give a bottomry bond it is cogent evidence of the necessity, while the failure to communicate is evidence against the necessity. The communication must be sufficient to warn the owner that it is intended to have recourse to bottomry¹³⁾. The necessity of communication is perhaps even more rigorous in the case of *respondentia*¹⁴⁾ or, indeed, in any case when cargo is hypothecated¹⁵⁾. The shipowner may make himself personally liable on a bottomry bond¹⁶⁾, but the master has no authority to pledge the owner's personal credit.

¹⁾ *The Indomitable* (1859) Swa. 446.

²⁾ Cf. *The Staffordshire* (1872) L. R. 4 P. C. 194.

³⁾ *The Onward* (1873) L. R. 4 A. & E. 38.

⁴⁾ *Ibid.*

⁵⁾ But in the case of an English ship the owner and the ship must not both be in England.

⁶⁾ Even if appointed to do so by some person other than the owner, e. g. by a Naval Court; cf. *M. S. A.* 1894, s. 472; or a mate in the permanent absence of the master, *Parmeter v. Todhunter* (1808) 1 Camp. 541.

⁷⁾ *The Royal Arch* (1857) Swa. 269.

⁸⁾ *The Onward* (1873) L. R. 4 A. & E. 38.

⁹⁾ *The Gaetano and Maria* (1882) 7 P. D. 137.

¹⁰⁾ *La Ysabel* (1812) 1 Dods. 273 (but this is now highly improbable).

¹¹⁾ *The Oriental* (1851) 7 Moo. P. C. 298.

¹²⁾ Cf. *The Panama* (1870) L. R. 3 P. C. 199; in such a case the communication should be to the trustee in bankruptcy.

¹³⁾ *The Onward* (1873) L. R. 4 A. & E. 38.

¹⁴⁾ Cf. *The Lizzie* (1868) L. R. 2 A. & E. 254.

¹⁵⁾ *The Pontida* (1884) 9 P. D. 177.

¹⁶⁾ *Willis v. Palmer* (1859) 7 C. B. N. S. p. 360.

Where by bond the master has bound the ship and freight¹⁾ he may also bind himself personally, thus in effect assuming the position of a surety for the owner's debt²⁾.

Maritime risk essential. Repayment of the loan must be made to depend on the arrival of the vessel at her destination or such other place as may be stipulated³⁾; if the loan is repayable in all events there is no maritime risk and it is not a contract of bottomry⁴⁾. Arrival means arrival *in specie*⁵⁾ and there is no doctrine of constructive total loss in the case of bottomry⁶⁾, as the condition of defeasance is absolute total loss.

Deviation. Maritime interest. Bottomry is so much like a contract of insurance for a particular voyage that the lender (although if the voyage is never begun he can only recover the loan with ordinary interest, no maritime risk having ever attached) can recover the loan and maritime interest if the vessel deviates unjustifiably⁷⁾ from the voyage contemplated⁸⁾ or if the voyage is abandoned after it has been begun⁹⁾. Maritime interest, which is interest at an unusually high rate in recompense of the risk undertaken by the lender, may in theory be at any agreed rate, but as the Admiralty Court is governed by equitable as well as by purely legal principles it has always exercised jurisdiction to reduce the rate of interest where the interest and the risk are wholly incommensurate¹⁰⁾. It is always advisable that the maritime interest to be paid should be specified in the bond, as the statement of an unusual rate of interest is some evidence that the lender did in fact assume a maritime risk, and the absence of maritime risk is evidence that the true nature of the transaction is an advance on personal credit, so that the bond will be invalid¹¹⁾ as a bottomry bond. Whatever the rate of interest in the bond the practice is to allow interest at the rate of 4% from the due date until payment¹²⁾.

Bond may be good in part only. A bond may be good in part and void as to the residue, as where a bond on cargo included some goods which were not exposed to maritime risk¹³⁾, or a bond was given to include advances to procure the master's discharge from arrest as well as advances for necessary disbursements¹⁴⁾, or to hypothecate not only the ship but also freight to be earned on a subsequent voyage¹⁵⁾, the Court exercised a discretion to treat the bond as void *pro tanto* as a bottomry bond.

Hypothecation of cargo. In most cases it will be found that the bond is secured on ship, freight and cargo; even if the bond omitted any mention of ship and freight, and made the cargo alone immediately liable, the ship and freight¹⁶⁾ are still, as between shipowner and cargo-owner, the primary fund¹⁷⁾. As between lender and cargo-owner the master may have effected a valid hypothecation, but if the cargo is made the security the shipowner must indemnify the cargo-owner¹⁸⁾; it is between shipowner and cargo-owner not material whether the bond is expressed to cover ship, freight and cargo, or ship and cargo, or cargo only (i.e. true *respondentia*). *Respondentia* is a contract whereby cargo actually on board¹⁹⁾ is hypothecated to procure funds to carry on the adventure for which it was shipped, so that it is a dealing with the goods of the cargo-owner for the benefit of the shipowner, to enable him to earn freight: it must also be for the benefit of the cargo-owner, as the only authority

¹⁾ *Stainbank v. Shepard* (1853) 13 C. B. 418.

²⁾ *The Eugénie* (1873) L. R. 4 A. & E. 123.

³⁾ E. g. a port of refuge *en route*; *The Haabet* [1899] P. 295.

⁴⁾ *The Indomitable* (1859) Swa. 446.

⁵⁾ *Joyce v. Williamson* (1782) 3 Dougl. 164.

⁶⁾ *Broomfield v. Southern Insurance Co.* (1870) L. R. 5 Ex. 192.

⁷⁾ But not if the deviation is justified, e. g. by the necessity for repairs, or to save life.

⁸⁾ *London & Midland Bank v. Neilson* (1895) 1 Com. Cas. 18.

⁹⁾ *The Helgoland* (1859) Swa. 491.

¹⁰⁾ *The Pontida* (1884) 9 P. D. 102, 177.

¹¹⁾ Cf. *The Haabet* [1899] P. 295.

¹²⁾ *The Cecilie* (1879) 4 P. D. 210.

¹³⁾ *The Sultan* (1859) Swa. 504, where some of the goods, or their proceeds, were in custody of a court.

¹⁴⁾ *The Prince George* (1842) 4 Moo. P. C. 21.

¹⁵⁾ *The Staffordshire* (1872) L. R. 4 P. C. 194.

¹⁶⁾ *The Dowthorpe* (1843) 2 W. Rob. 73.

¹⁷⁾ *The Gratitude* (1801) 3 C. Rob. 240.

¹⁸⁾ *Duncan v. Benson* (1847) 1 Exch. 537; S. C. (1847) 3 Exch. 644.

¹⁹⁾ *The Jonathan Goodhue* (1858) Swa. 355.

of the master to hypothecate cargo arises from the necessities of the cargo¹⁾ as determined by the law of the ship's flag²⁾). The master's authority to hypothecate cargo closely resembles his authority to sell part of it for the benefit of the rest; each process is a method of borrowing from the cargo-owner for the common benefit of shipowner and cargo-owner, whereby the shipowner becomes liable to indemnify the cargo-owner, and unless in either case there is a necessity, the master cannot give a good title to the lender or purchaser³⁾). To justify hypothecation of cargo on a British ship the duty of communicating with the cargo-owner is imperative, if it is possible; and the nature of the cargo may then be very material⁴⁾; if however it is not possible to communicate, no effort to do so need be made. In the case of foreign ships the law of the ship's flag is *prima facie* the law applicable⁵⁾, so that the nature of the necessity and the duty of communication may be different from the case of British ships.

Successive bonds. Priorities. Where successive bonds have been given in respect of the same adventure, the rule is that the latest bond must be satisfied first, as having provided the means of saving the security for all interested. Where, however, the successive bonds really all form part of one transaction, it may be that for the protection of the earlier bondholder they will be payable *pari passu*. Where ship and freight belong to different persons, they should contribute rateably⁶⁾. Except where cargo has been charged, freight is only liable if specially charged; and cargo will only contribute where it is expressly hypothecated: it is always entitled to be exonerated by ship and freight whatever the terms of the bond⁷⁾. On principle, where successive bonds charge ship, ship and freight, and ship, freight and cargo, and the proceeds of ship and freight would satisfy the two latter bonds but not the first, there is no fund left to satisfy the earliest bond⁸⁾; if the order of the bonds is on ship, on ship, freight and cargo, and on ship, the second bondholder alone has any claim on freight and cargo, and he is required to exhaust the proceeds of ship and freight before resorting to cargo, so that nothing may be left for the first bond. Where a master has a claim for wages and disbursements, but has made himself personally liable on the bond, he will only be allowed to be paid in priority to the bondholder if the security is sufficient to pay both; if it is sufficient, it is no prejudice⁹⁾ to the bondholder (though it is to the cargo-owner) to pay the master first¹⁰⁾. Where cargo is hypothecated and only a portion arrives at its destination, the arrived portion is only liable for the same proportion of the loan as the arrived cargo bears to the whole cargo hypothecated.

Jurisdiction in bottomry claims. Except in cases where by reason of bankruptcy or liquidation it is proper to enforce a claim under a bond in the bankruptcy or liquidation proceedings¹¹⁾, the jurisdiction in cases of bottomry is exclusively in the High Court of Justice, and, in practice, in the Admiralty Division, although in former days the Court of Chancery was equally competent to give relief in respect of a bottomry bond. Any question of account, such as the amount recoverable or the proper rate of interest to be allowed, is usually referred to the registrar and merchants.

XXVIII. Priorities of Claims.

In general. With respect to the precedence of claims, maritime liens arising *ex delicto* (for damage) take priority to all existing contractual or quasi-contractual liens (wages, salvage, bottomry); in liens of the latter kind the holder of the lien has become "so to speak a part-owner in interest with owners of the vessel¹²⁾" so as to be jointly interested in the *res* and its preservation, and as between liens of the same

¹⁾ *The Onward* (1873) L. R. 4 A. & E. 38.

²⁾ *The Karnak* (1869) L. R. 2 P. C. 505; unless the parties have agreed to substitute some other code.

³⁾ *Duncan v. Benson*, (1847) 1 Exch. 537, 3 Exch. 644.

⁴⁾ *The Onward* (1873) L. R. 4 A. & E. 38.

⁵⁾ In the absence of stipulations to the contrary; cf. *The Industrie* [1894] P. 58.

⁶⁾ *The Dowthorpe* (1843) 2 W. Rob. 73.

⁷⁾ *La Constanca* (1845) 2 W. Rob. 404, 460.

⁸⁾ *The Priscilla* (1859) Lush. 1.

⁹⁾ I. e. because the bondholder can be satisfied out of cargo.

¹⁰⁾ *The Eugénie* (1873) L. R. 4. A. & E. 123.

¹¹⁾ See p. 439.

¹²⁾ *The Veritas* [1901] P. p. 313.

species the rule is that they rank, and so obtain priority, in the inverse order of the dates of their attaching to the *res*. The order resulting from these rules (so far as it is not affected by laches) is, so far as it has been worked out, as follows:

Damage claims. Damage claims in actions *in rem* rank *inter se* in the order in which the decrees declaring liability have been obtained, but at any rate so long as the *res* or its proceeds are in Court, the Court would probably hold the proceeds not only for the first claimant who obtains a decree, but also for all other claimants who have claims of the same kind and come to the Court before effect has been given to an unconditional decree in favour of a claimant¹⁾. With regard to contractual claims, a damage claim has priority over an earlier salvage²⁾; over a claim for wages earned before the damage³⁾ or after the damage⁴⁾; over a bottomry bond given before the damage⁵⁾ or after the damage, except so far as the value of the vessel has been increased after the damage, out of the proceeds of the subsequent loan⁶⁾; over any claim by a mortgagee whether registered or not, or by a material man, or for towage or pilotage, or under a later possessory lien. Such a claim may possibly be postponed to a similar claim in which a decree has been obtained⁷⁾, and is probably postponed to subsequent salvage⁸⁾ and to wages of master or seamen where the employer is insolvent⁹⁾.

Salvage. Salvage services, when not concurrent in point of time, rank in accordance with principle in the inverse order of date: they should however in theory precede claims *in rem* for damage prior to the salvage¹⁰⁾; they do precede claims for wages earned before the salvage¹¹⁾ on the current or any previous voyage, and claims under bottomry bonds given before the salvage¹²⁾, and any statutory right *in rem*, or claim by a mortgagee, or under a later possessory lien; they follow subsequent damage¹³⁾, subsequent salvage, and wages subsequently earned¹⁴⁾, or subsequent bottomry. Life salvage is payable before any other salvage¹⁵⁾.

Wages. Claims for wages possibly, where the employer is insolvent, precede earlier damage claims¹⁶⁾, and are probably preferred to claims by prior salvors; and precede claims under any bottomry bond in respect of the current voyage¹⁷⁾; the right to full wages usually accrues only at the end of the adventure, so that it should in theory be preferred to claims of salvors and bondholders. A wages claim precedes any claim not carrying a maritime lien, but is postponed to a possessory lien so far as they were earned after the lien attached¹⁸⁾, and to damage liens, to subsequent salvage, and to a claim on a bottomry bond if the wages were earned on a previous voyage.

Claims for wages by seamen are preferred to claims by a master for wages or disbursements; and such claims by a master may be further postponed:

1. Where on hypothecation he has bound himself personally¹⁹⁾.
2. Where as a part-owner he made himself personally responsible for a mortgage debt or part of it²⁰⁾.

1) Cf. *The Africano* [1894] P. 141.

2) *The Veritas* [1901] P. 304.

3) *The W. J. Safford* (1860) Lush. 69.

4) *The Elin* (1883) 8 P. D. 129.

5) *The Aline* (1839) 1 W. Rob. 111.

6) *The Halley* (1867) L. R. 2 A. & E. p. 21.

7) See note 1) *supra*.

8) *Cargo ex Galam* (1863) Br. & L. 167, p. 181.

9) Preferential Payments in Bankruptcy Acts, 1882—1897; up the limits of £50 and £25.

10) Cf. *The Veritas* [1901] P. pp. 313—315.

11) *The Sabina (or Selina)* (1842) 7 Jur. 182; 4 Notes of Cases, 18.

12) *Cargo ex Galam* (1863) Br. & L. p. 181.

13) *The Veritas* [1901] P. 304.

14) See note 11) *supra*; it was unnecessary to decide the contrary in *The Gustaf* (1862) 1 Asp., O. S. 230.

15) M. S. A. 1894, s. 544 (2).

16) But, it is submitted, only to the extent to which master or crew are preferential creditors; cf. *The Elin* (1883) 8 P. D. 129.

17) *The Union* (1806) Lush. 128.

18) *The Tergeste* [1903] P. 26.

19) Cf. *The Edward Oliver* (1867) L. R. 1 A. & E. 379.

20) *The Bangor Castle* (1896) 8 Asp. 156. The similar postponement to a material man [*The Jenny Lind* (1872) L. R. 3 A. & E. 529] could not now be supported on the grounds enunciated.

Bondholders. The position of a bottomry bondholder can be seen from the foregoing discussion; briefly, therefore, he is preferred to an earlier bottomry bond, probably to earlier salvage, to a later possessory lien, and to a master's claim to wages if it is to the prejudice of the bondholder; he is postponed to damage-claims (save as to excess of value, due to expenditure on the ship out of the loan, over the value after the damage), to subsequent salvage, to claims for wages, and, so far as is necessary to protect the subsequent bondholder, to later bottomry. He has also¹⁾ been postponed to claims for subsequent towage and pilotage, but on principle this could only be on the ground that the se claims really amounted to master's disbursements.

Mortgagees, material men and shipwrights. Outside the region of maritime liens important questions as to priorities have arisen between mortgagees, material men, and shipwrights with a possessory lien. A shipwright with a possessory lien, which implies *de facto* possession, has a right *in rem*, inferior indeed to any right *in rem* which has already attached²⁾, but preferred to any maritime lien which attaches after he has got possession, and *a fortiori* to any right *in rem* which attaches not only after he has *de facto* possession but merely on the institution of a suit³⁾. He therefore obtains priority not only to material men but also to mortgagees, registered or unregistered, where he has lawfully obtained possession from a mortgagor in possession⁴⁾.

A mortgagee has a claim *in rem* from the time of his mortgage, and he therefore obtains priority over any claim by a material man, unless the necessities were supplied on the mortgagee's credit and with his authority⁵⁾; it is immaterial that the mortgage may have been effected after the supply of necessities, or that the mortgagee had notice that they had been supplied, or that he takes possession while the necessities are being consumed⁶⁾; what is material is the date of the mortgage, as if a cause of necessities has already been instituted and the ship arrested, it may well be that he then does take subject to an equity, viz., the claim for necessities, just as a purchaser of the vessel would be affected or not by a similar equity according to the date of purchase before or after the arrest⁷⁾. Mere notice of the claim *in personam* that arises when the necessities are supplied does not affect his priority.

The position of the material man accordingly is that he obtains priority over the claim of a mortgagee on whose behalf and with whose authority necessities have been ordered, but there is no legal implication that they were so ordered from the fact that the mortgagee has taken possession⁸⁾; if the decision in *The Jenny Lind*⁹⁾ can be supported, he also gets priority over the claim of a master who, being a part-owner and having ordered necessities, claims for wages and disbursements. He may also be entitled to preference over or equally with a mortgagee or purchaser who acquires his title after the arrest of the ship in a necessities suit.

Marshalling. The doctrine of marshalling, so far as it exists in Admiralty, must be understood to refer to the marshalling of securities in accordance with the equitable principle that where there is one debtor with two or more creditors, and one creditor has a claim against two or more funds and another has a claim against some or one only of such funds and not against all, then the former will be required to resort to such funds primarily as are not available to satisfy the latter claimant. Where in Admiralty such competing claims exist against different properties of the debtor, the doctrine of marshalling will not be allowed either to disturb the preferential right of one creditor to be satisfied before another, or to work to the prejudice of a third person. These two provisos so limit the scope of the doctrine that, notwithstanding some early cases, it can rarely be applied. It is usually sought to apply it where claims under a bottomry bond, claims for necessities, and claims for wages (or any two of them) conflict: and it will be found in almost any case that when the rules that:

1) *The St. Lawrence* (1880) 5 P. D. 250.

2) *The Tergeste* [1903] P. 26.

3) *The Scio* (1867) L. R. 1 A. & E. 353.

4) *Williams v. Alsop* (1861) 10 C. B. N. S. 417.

5) *The Pacific* (1864) Br. & L. 243; *The Troubadour* (1866) L. R. 1 A. & E. p. 304.

6) *El Argentino* [1909] P. 236.

7) *The Aneroid* (1877) 2 P. D. 189.

8) *The Troubadour* (1866) L. R. 1 A. & E. 302.

9) (1872) L. R. 3 A. & E. 529.

1. A cargo-owner is not to be made liable where his cargo is hypothecated until ship and freight are exhausted (so that he is really in the position of a third party whose rights are not to be prejudiced); and
2. That Admiralty law recognizes certain priorities among claimants, are applied, there is little, if any, opportunity of marshalling.

So where claims by bondholders (under a bottomry bond on ship, freight and cargo) and by material men competed¹⁾, the latter had no possible claim on cargo, but equally the bondholders had none until the fund against which the material men could claim was exhausted; there were not two available funds belonging to the debtor, as the cargo-owner would be prejudiced²⁾, and the priority of the bondholder had to be recognized. So, where the master has a claim for wages and has given a bond on ship, freight and cargo which binds himself also³⁾, the bond must be for the benefit of the cargo if the cargo is bound at all, and it is therefore no prejudice to the cargo-owner if the master is allowed to enforce his lien against the cargo-owner, as he has waived it in favour of the bondholder for the benefit of the cargo, and if he had not done so the burden would nevertheless have fallen on the cargo. Such a waiver is in favour of the bondholder (and in truth of the cargo-owner) and cannot be relied on by a cargo-owner against the master⁴⁾. A case such as *The Constanca*⁵⁾ is anomalous, as there were three successive bonds A on ship, B on cargo, C on ship, and the Court ordered C and A to be satisfied out of the ship, and B out of freight so far as it would go, and then out of cargo: this seems to disregard the fact that the cargo-owner was really a stranger until the proceeds of ship and freight had been exhausted to satisfy C and B.

XXIX. Limitation of Actions.

In English law there are no limits to the period within which an action for breach of contract or for a wrong suffered must be brought, unless such a period is prescribed by statute: the right to bring such personal actions is, however, in nearly all cases now limited by various statutes; and even at law a presumption that a debt has been paid may arise after the lapse of a considerable time; and where a remedy other than damages is sought, such as injunction or specific performance, the doctrines of equity refuse to assist those who allow their legal or equitable claims to become stale by lapse of time. With reference to Admiralty matters it is convenient to separate cases where there is a maritime lien from the other causes of action.

Limitation of actions to give effect to a maritime lien. A maritime lien is not indelible and may be lost by negligence or delay where the rights of third persons may be compromised, but where reasonable diligence is used and the proceedings are had in good faith, the lien travels with the thing into whatsoever possession it may come. What constitutes reasonable diligence must depend upon the particular circumstances of each case⁶⁾. In order, therefore, to defeat a claim to enforce a maritime lien, a defendant must show unreasonable delay, absence of good faith, and prejudice to the equitable right of third persons. Thus in one case⁷⁾ a claim for damages for collision was made against a vessel eleven years after the collision, and although the ownership of the vessel had changed during the period and although there had been many occasions on which by the use of extraordinary diligence the vessel might have been arrested, the right to sue was upheld, in spite of the changes of ownership, the increased difficulty of procuring rebutting evidence, and the intervention of the rights of third persons, because there had been no unreasonable delay in the circumstances. So too a master who had given bills of exchange for coal and had been sued on them to judgment was allowed after the judgment, and 18 months after giving the bills, to assert his lien for disbursements⁸⁾ against one who

¹⁾ *The Chioggia* [1898] P. 1.

²⁾ I. e. by being made liable for necessities which are no concern of his.

³⁾ *The Eugénie* (1873) L. R. 4 A. & E. 123.

⁴⁾ See *The Edward Oliver* (1867) L. R. 1 A. & E. 379, explained in *The Chioggia* [1898] P. p. 6.

⁵⁾ (1845) 2 W. Rob. 405.

⁶⁾ *The Fairport* (1882) 8 P. D. p. 54 (Sir R. Phillimore).

⁷⁾ *The Kong Magnus* [1891] P. 223.

⁸⁾ Which as a subsequent case showed he had not then got.

had purchased the ship after the judgment¹⁾, because there had been no unreasonable delay.

Statutory periods of limitation in certain cases where there is a maritime lien. By the Maritime Conventions Act²⁾, in cases of salvage and certain cases of damage a restriction has now been imposed on the time within which such actions may be brought, whether *in rem* or *in personam*, to enforce any claim or lien against a vessel or her owners, subject to a discretion to extend the period.

1. Salvage. No action is maintainable to enforce any lien or claim in respect of salvage services against a vessel or her owners³⁾ unless proceedings are begun within two years from the date when the salvage services were rendered⁴⁾.

2. Damage. No action is maintainable to enforce any claim or lien against a vessel or her owners in respect of damage or loss to another vessel, or her cargo, or freight, or any property on board her, due to fault of the vessel sued, unless proceedings are commenced within two years from the date when the damage or loss was caused⁵⁾.

3. Loss of life or personal injury. No action is maintainable to enforce a claim or lien against a vessel or her owners in respect of loss of life or personal injury suffered by a person on board one vessel by the fault of the vessel sued, unless it is brought within two years of the date of the loss or injury⁶⁾; and where the owner sued has in respect of his several liability⁶⁾ had damages recovered against him in a sum exceeding his proportion of the joint liability, any action to recover a contribution from a fellow wrongdoer must be begun within one year from the date of the payment by him of the damages for which judgment was recovered⁷⁾.

Discretion to extend the above periods. Where the Court is satisfied that there has not been any reasonable opportunity of arresting the vessel alleged to be in fault, either within the jurisdiction of the English Courts or within the jurisdiction of the Courts of the country to which the claimant's ship belongs⁸⁾, or of the Courts of the country in which the claimant resides⁹⁾ or has his principal place of business¹⁰⁾, the Court in England may, subject to procedure established by rules of Court¹¹⁾ and on such conditions as it thinks fit, extend the periods of two years or one year to an extent to give a reasonable opportunity of arrest¹²⁾.

Wages; disbursements and liabilities of master. A seaman has a maritime lien for his wages, but it must be enforced within six years¹³⁾; a master has the same rights, liens and remedies, for his wages as a seaman has¹⁴⁾, and for his disbursements or liabilities properly made or incurred as he has for wages: so that a master also must sue for wages, disbursements or liabilities within six years.

All other cases of maritime liens. There is no statutory period of limitation for enforcing any other maritime lien than for salvage, damage or wages, so that they can only be extinguished by satisfaction, release, waiver, acceptance of bail or security, or sentence, e.g. ordering sale, in an action *in rem* by a court of competent authority¹⁵⁾, or by the unreasonable delay or lack of diligence — the laches — of the person in whose favour it existed. Therefore in cases of bottomry, respondentia, and damage to docks or harbours, the old rule applies; but from their nature it is obvious that such rights are usually followed by immediate action.

¹⁾ *The Fairport* (1882) 8 P. D. 48.

²⁾ 1911, s. 8.

³⁾ If construed strictly this seems not to have the effect of imposing a period of limitation in favour of cargo owners, or owners of freight, not being owners of the ship.

⁴⁾ I. e. the termination of the services.

⁵⁾ Damage done by a vessel but not to a vessel is not touched by this provision; e. g. damage to a dock or harbour.

⁶⁾ M. C. A. 1911, ss. 2 and 8; *The Caliph* [1912] P. 213.

⁷⁾ Ibid. s. 3.

⁸⁾ Cf. pp. 458, 459; and *The Cambric* (1912) 29 T. L. R. 69.

⁹⁾ Cf. p. 483.

¹⁰⁾ Cf. pp. 458, 483, 491.

¹¹⁾ No special rules yet made (January 1913).

¹²⁾ M. C. A. 1911, s. 8, proviso. The proviso speaks of a "plaintiff" and a "defendant vessel": it probably means persons or vessels who would occupy such positions if an action had been begun, but it may require the issue of a writ within the period prescribed, and its renewal if necessary.

¹³⁾ 4 Ann. c. 16 (or 4 & 5 Ann. c. 3).

¹⁴⁾ M. S. A. 1894, s. 167 (1).

¹⁵⁾ Cf. Dicey, Conflict of Laws, Rule 105; *Castrique v. Imrie* (1870) L. R. 4 H. L. 414.

Limitation of actions where there is no maritime lien. The general rule with regard to personal actions is that where the action is based on contract the period is six years; where it is founded on tort six years, except in the case of trespass to the person, when it is four years¹). The fact that a remedy *in rem* may be given concurrently with a remedy *in personam* [which existed at common law in any case where the cause of action arose on the high seas or in the body of a county] does not alter the nature of the action, although it makes process in Admiralty available alternatively with process at common law: the result therefore is that in claims for necessities or towage or possession or co-ownership, *prima facie* all claims must be made within six years from the time when the cause of action arose; but in claims for personal injuries due to the fault of a vessel, the period is now two years²). If the claim is a claim *in personam*³) against a public authority for a wrong alleged to be caused by it in the execution of a statutory or public duty or authority, the action must be brought within 6 months⁴).

Particular statutes fixing a period of limitation. Actions under the Fatal Accidents Act must be brought within 2 years of the death of the person injured⁵) or, if against a public authority, within 6 months⁴). Claims under the Workmen's Compensation Act must be made within six months⁶), but if the failure to make the claim within six months is due to mistake, absence from the United Kingdom, or other reasonable excuse, the period may be longer. Claims by mortgagees by deed are not barred until the expiration of 20 years⁷) from the time when the right of action either accrued or was last admitted in writing or by payment on account of the mortgage⁸), and where the claim is not for a debt, but is to enforce the security, there is no period of limitation at all, as there is no statute applicable: the doctrine of laches, however, might be applied⁹).

Effect of statutes of limitation. It may be observed that since ships are chattels, although in some respects chattels of a peculiar character, periods of limitation prescribed by statute only bar the particular remedy by action, and do not affect liens or rights other than rights of action; and in the same way, any personal right of action in contract or tort is barred, but no other right, such as lien. Moreover, a right to enforce contractual liability may be revived by a written acknowledgment from which a promise to pay can be inferred or by part payment of interest or principal. Where, however, the right to the principal debt is barred, the right to interest also is barred.

¹) 21 Jac. 1, c. 16 (The Limitation Act, 1623); 4 Ann. c. 16 (or 4 & 5 Ann. c. 3), (1705); 19 & 20 Vict. c. 97 (Mercantile Law Amendment Act, 1856).

²) M. C. A. 1911, s. 8; *The Caliph* [1912] P. 213.

³) *The Burns* [1907] P. 137.

⁴) Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61).

⁵) *The Caliph*, *supra*; the M. C. A. modifies the provision of the Fatal Accidents Act 1864.

⁶) Workmen's Compensation Act, 1906, s. 2.

⁷) Civil Procedure Act, 1833, (3 & 4 Wm. IV, c. 42) s. 3.

⁸) 3 & 4 Wm. IV, c. 42, s. 5.

⁹) Cf. *London & Midland Bank v. Mitchell* [1899] 2 Ch. 161.

Title XI. Marine Insurance.

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I. Introduction.

History. The history of English commerce does not record how or when the business of marine insurance first began. It is commonly said that it was introduced into England by the Lombards, but there seems to be no real authority for the statement. The earliest form of policy¹⁾ that has survived is dated 1555, and is worded in terms very similar to those of the venerable form of Lloyd's policy²⁾ which is still in use.

Primitive business is usually transacted in a market or other place of open meeting, or in the taverns. The ancient form of the Lloyd's policy²⁾ suggests that at first marine insurance business was transacted in Lombard street or in the Royal Exchange. But towards the end of the 17th century it came to be carried on chiefly at the famous coffee house of Mr. Edward Lloyd. This is first heard of in 1688 in Tower Street, and in 1692 was moved to Lombard Street³⁾. In 1696 Lloyd started a newspaper of shipping and other intelligence, which was stopped in 1697, but from 1726 until today has continued to flourish as "Lloyd's List". Out of these origins has grown the great corporation of "Lloyd's," in whose rooms at the Royal Exchange its underwriting members transact their business. The underwriters⁴⁾ there still sit in enlarged replicas of the old coffee-house "boxes," every underwriter still speaks of his table and seat as "my box," and the attendants in the room are still called "waiters". And — by a rare stroke of fate — is there any name of the 17th or 18th century more widely used throughout the world than that of Lloyd the Lombard Street Coffee-house keeper?

In 1720, during the excitement of the South Sea Bubble, two companies were founded, "The Royal Exchange Corporation" and "The London Assurance."⁵⁾ These were the first companies formed to transact marine insurance business, though there were earlier fire insurance companies. These two companies, and many others that have since been started, together with the underwriters of Lloyd's, transact the great bulk of the business effected in England⁶⁾.

The first case⁷⁾ in the English law reports in which a marine insurance policy is mentioned is in 1589, but reported cases are rare⁸⁾ until the time of Lord Mansfield, who became Chief Justice of the King's Bench in 1756. This may be partly due to the fact that by an Act⁹⁾ of 1601 there was established a special Court called the "Policies of Assurance Court" which was to sit in the City of London and deal with questions arising between insurers and insured. The preamble of the Act recites that the business of marine insurance has existed "time out of mind", and indicates that the bulk of such business at the date of the Act was considerable. The tribunal established by the Act was in the nature of a Court of commercial arbitration — the judges included "eight grave and discreet merchants" — rather than of a Court

1) Marsden, "Select Pleas in the Court of Admiralty" (Selden Society) Vol. 2, p. 49.

2) M. Ins. Act 1906, Schedule 1.

3) Addison in "The Spectator" of 23 April 1711 describes a visit to Lloyd's Coffee-house.

4) It is perhaps unnecessary to explain that insurers are called "underwriters" because they "subscribe", or write their names and the amount they insure at the bottom of a policy.

5) See also under *Mutual Insurance*, *infra*, p. 563.

6) The Companies are chiefly in London and Liverpool. There are a few individual underwriters in London who are not members of Lloyd's, and a good many in Liverpool. Lloyd's as a Corporation transacts its world-wide business in connexion with Lloyd's signal stations, Lloyd's agents, etc. The insurance business is done, not by Lloyd's as a corporation, but by its members as individuals. Lloyd's Registry, with its army of surveyors and its Register Book, is a separate Corporation, distinct from, though in close alliance with, Lloyd's.

7) In *Dowdale's Case*, 6 Coke Rep. p. 47 b.

8) Park, in the Introduction to his treatise on Marine Insurance (1st Edition, London 1786), says that before 1756 there are probably less than 60 reported cases "upon matters of insurance".

9) 43 Eliz. c. 12.

of Law. There are no records which show how far this Court was a success, but any success it might have had was seriously threatened by the refusal of the judges of the regular Law Courts to recognize its decisions as legally binding¹). It is said to have fallen into disuse about 1720.

Lord Mansfield, perhaps the greatest judge who has ever adorned the English bench, was Chief Justice of the King's Bench from 1756 to 1788, and in that period he may be said to have created the science of English commercial law. His task was to ascertain the usages and customs of merchants and traders, to examine and define them in careful terms, to test their consistency with existing rules of law, and to clothe with the force of law such of them as by this process he approved as most certain and reasonable²). In this task he was greatly assisted by a body of special jurors, whom he selected and trained, and from whom he chiefly sought information as to commercial usage and practice³). The process by which a rule that has hitherto only been a matter of custom among commercial men is declared by a Judge to be henceforth a rule of law is still operative in the English Courts, though of course only rarely⁴).

Authorities for the Law. The English Law of Marine Insurance is part of the Law of Contracts. Indeed to a very large extent it is in reality the law as to the rules of construction to be applied in ascertaining the meaning of the Lloyd's Insurance Policy.

This Law of Marine Insurance was until 1906 to be found in the various reported cases in the books of Reports, in a few Acts of Parliament dealing with some special points, and in the treatises of various legal writers. Chief among the last is the work of Sir Joseph Arnould, whose first edition was published in 1848. Arnould, who was subsequently a judge in India, died in 1886, but his work has been often re-edited. The 8th edition, published in 1909, contains over 1600 pages and references to about 2000 reported cases.

In 1906 the Marine Insurance Act of that year became law. This is a Code embodying the principles of the law as laid down in the sources mentioned above. The infinite variety of circumstances to which those principles have in practice to be applied makes it inevitable that the Act, which necessarily speaks only in general terms, must be illuminated by reference to the decided cases. But it provides an admirable guide to the main outlines of the law, and in the following dissertation, the scheme of arrangement of the Act has been followed.

Business methods in Marine Insurance. Some insurances on goods are effected by merchants direct with the Insurance Companies. But with this exception all insurances are procured through the medium of Insurance Brokers. A broker is in all cases the agent of the assured and not of the underwriters⁵). This fact, owing to the close business relations between brokers and underwriters and the supposed analogy of the agents of Fire and other Insurance Companies, is often not properly realized.

A broker who is instructed by a client to effect an insurance does so by presenting to an underwriter a small sheet of paper called a "slip" containing, in an abbreviated or even a hieroglyphic form, the particulars of the policy required. The underwriter, whether of a Company or at Lloyd's, initials this "slip" for the amount he is prepared to accept. When the slip is so initialled the contract is in honour concluded, and for some purposes, as will be seen, the law recognises this as an effective contract⁶). But the underwriter or his company is not legally liable to pay any loss upon a contract of insurance until the honour contract in the slip has been translated into a policy. The policy is procured by the broker in a manner which varies according as he is dealing with a company or an individual underwriter. In the case of a company the broker writes out on another form, called a "long slip", the details contained in the "slip", and leaves this at the company's office; from this "long slip" the company's clerks prepare the policy, which is delivered signed to the broker. In the case of a Lloyd's or other individual underwriter the broker himself writes out the

¹) *Came v. Moy* (1658) 2 Sid. 121.

²) See the report of *Lewis v. Rucker* (1761) 2 Burr. 1167, for an example of his methods.

³) Campbell, *Lives of the Lord Chief Justices* (1849) Vol. 2, p. 407.

⁴) See, for an example, *Balmoral SS. Co. v. Marten* (1900) 5 Com. Cas. 416. And cf. M. I. Act, sect. 87 (1) as to "usage".

⁵) Cf. *Empress Co. v. Bowring* (1905) 11 Com. Cas. 107.

⁶) M. Ins. Act, sect. 21.

policy from the details contained in the slip, presents it with the slip to the underwriter for his signature, and gets it signed by him. By the custom of the business, long recognized as law, the broker alone is the debtor of the company or of the underwriter for the premium, and he alone, and not the assured, can be sued for it¹).

II. Nature of the Contract.²)

The fundamental rule is that marine insurance is a contract of indemnity³), i.e. that the assured shall be paid by the underwriters as much as, but no more than, he has in fact lost. There are, however, by law some exceptions to this rule: thus a shipowner can insure, and in case of loss recover, his gross freight⁴) without any deduction for the cost of earning it, which in most cases gives him more than an indemnity; on the other hand the owner of goods is by law only entitled to recover the prime cost of his goods at the port of shipment and the cost of shipping them⁵), which fails to give him the full value the goods would have at their destination. But the law also provides that, in the absence of fraud, the valuation of anything insured, if inserted in the policy, is binding⁶). In practice the vast majority of policies do contain a valuation, and in practice these valuations, especially of ships and steamers, are in excess of the actual value that the law in the absence of valuation allows to be recovered. In practice therefore on the happening of most total losses the assured in fact obtains more than an indemnity.

A policy of marine insurance may by its terms include transit by land as well as by sea⁷). In most insurances on goods there is, by the addition of special clauses⁸), such an extension, so that goods may be covered from the moment they leave the manufacturer's factory in the country of export until they reach the consignee's warehouse in the country of import.

There must be some property or interest at risk on the insured voyage, and the adventure of the assured must be a lawful one⁹). Any sort of interest, however, if aptly described, may be insured, e.g. the interest of a shareholder in a cable telegraph company in the successful laying of the cable¹⁰).

III. Insurable Interest.¹¹)

For a valid contract of insurance it is essential that the assured has an insurable interest. If he has no insurable interest, his insurance is a mere wager. Any insurance policy made as a wager is void¹²). Moreover any policy which on the face of it bears any statement that it is made as a wager (e.g. the common form "Policy Proof of Interest," by abbreviation "P.P.I.") is void¹²), even if the assured has an interest in fact. This is the law. In fact, by the practice of business, very many policies are effected with this provision¹³) (i.e. are done as "P.P.I. policies"), and by the under-

¹) See also under *Execution of the Policy*, *infra*, p. 519, and *The Premium*, *infra*, p. 530.

²) M. Ins. Act 1906, sects. 1 to 3.

³) Cf. Brett L. J. *Castellain v. Preston* (1883) 11 Q. B. D. 380 at p. 386.

⁴) M. Ins. Act 1906, sect. 16 (2). See also *United States Co. v. Empress Co.* [1907] 1 K. B. 259. And see below, p. 512, under *Insurable Value*.

⁵) M. Ins. Act 1906, sect. 16 (3). See below under *Insurable Value*, p. 512.

⁶) M. Ins. Act 1906, sect. 27 (3).

⁷) M. Ins. Act 1906, sect. 2.

⁸) This type of clause is usually called "The warehouse to warehouse clause". Cf. *Marten v. Nippon Co.* (1898) 3 Com. Cas. 164. In the case of insurances on hull and freight the additional clauses to be inserted in policies have been to a large extent standardized in what are called "The Institute Clauses" (i. e. those approved by the Institute of London Underwriters). In regard to insurances on goods competition is such as to prevent any such standardization. Every broker, and many a merchant, has his own clauses in varying and not very lucid terms. Litigation in regard to policies on goods largely arises from the obscurity of such clauses. For an example of this sort of obscurity see *Schloss v. Stevens* [1906] 2 K. B. 665.

⁹) M. Ins. Act 1906, sect. 3.

¹⁰) *Wilson v. Jones* (1867) L. R. 2 Ex. 139.

¹¹) M. Ins. Act 1906, sect. 4—15.

¹²) M. Ins. Act 1906, sect. 4. The Act reproduces, in regard to the P. P. I. clause, the provisions of an old Act, 19 Geo. II c. 37. A more recent attempt to suppress gambling policies is *The Marine Insurance (Gambling Policies) Act 1909*, (9 Edw. VII c. 12).

¹³) The clause runs thus: — "In the event of claim this policy to be deemed a sufficient proof of interest". The sentence, "Full interest admitted" is sometimes added.

standing of the underwriters they are to pay, and in almost every case they do pay, any loss upon them in accordance with that undertaking. In case a *bona fide* dispute may arise upon some point in regard to the policy not affecting the question of the assured's interest (e.g. whether the loss claimed happened during the insured period or voyage) the P.P.I. clause is added to the policy by a printed slip of paper attached only by its margin, so that if the policy has to be brought before a Court, which if it saw the clause would be bound to treat the policy as void¹), the slip of paper is torn off and the Court remains ignorant of the invalidity. Thousands of pounds are thus paid, and even recovered in Court, upon policies on which, if the underwriters chose, they could refuse to pay a penny.

A person has an insurable interest in any marine adventure when by reason of any legal right in regard to property at risk he will be prejudiced by its loss or damage²). The phrase "legal right" is used widely, and only as distinguished from something which may possibly be called an "interest," but is so only morally. Thus, in one sense, a man whose wife is a passenger on a ship has an interest in its safety, but he has no insurable interest in the ship.

Time when interest must exist. The assured need only have an interest at the time of the loss, he need not have had an interest at the time the policy was effected³). The commonest example of this is the case of a merchant, who buying goods on c.i.f. terms takes an assignment of the policy effected by the vendor. On the other hand he can only recover if he has an interest at the time of the loss, and, if he has not, it will avail nothing that he had an interest at an earlier date; nor can he acquire an interest by any act or election after he knows of the loss. Thus if A. on 1st June effects a policy on goods which are his property, and if he on 15th June sells the goods to B. without assigning the policy, and if on the 30th June the goods are lost — A. cannot recover on the policy, nor can B. do so, nor can B. do so by purporting to take an assignment of the policy, after the loss, from A.⁴).

Re-insurance. An underwriter who re-insures has an insurable interest⁵). His interest is his liability under the original policy, and is exactly co-extensive with that liability⁶). If he is liable to pay a loss on his own policy he may recover on the re-insurance policy before he has actually paid his own assured⁷). The two contracts, of insurance and re-insurance, are separate and distinct. Therefore the original assured has no claim at all in regard to his underwriter's re-insurance⁸). For example if A insures £100 with B, and B re-insures his £100 liability with C, and if B becomes bankrupt and can only pay 6d in the £, then for a total loss B's trustee will recover £100 from C, while A gets £2—10—0 from B's estate.

Bottomry. The lender of money on bottomry or respondentia has an insurable interest in the amount of his loan, seeing that his repayment depends on the safe arrival of the ship or cargo⁹). In truth his insurable interest is analogous to that of the underwriter who re-insures, in that a loan on bottomry is very similar to an insurance on a ship, the loss being payable before the voyage and repayable in case of safe arrival. In the speeches of Demosthenes or attributed to him (e.g. *Πρὸς Ἀδριανόν*) will be found examples of the only method of Marine Insurance apparently known to the Greeks, by a species of respondentia bond.

Crew's Wages. Before 1906 the crew of a ship were not allowed to insure their wages, as it was supposed that it would tempt them to be careless in the earning of freight from which the wages had to be paid¹⁰). Both master and crew have now an insurable interest in their wages¹¹).

¹) *Gedge v. Royal Exchange* [1900] 2 Q. B. 214.

²) M. Ins. Act, sect. 5 (2).

³) M. Ins. Act, sect. 6. Note the proviso as to "lost or not lost".

⁴) *North of England Co. v. Archangel Ins. Co.* (1875) L. R. 10 Q. B. 249. See also under *Assignment of Policy infra*, p. 529.

⁵) M. Ins. Act, sect. 9 (1).

⁶) He may of course reinsure only part of his interest. Thus, having insured for £200, he has an insurable interest for £200, but he may reinsure only £100; or having insured against all risks he may reinsure against total loss only.

⁷) *In re Eddystone Co.* [1892] 2 Ch. 423.

⁸) M. Ins. Act, sect. 9 (2).

⁹) M. Ins. Act, sect. 10.

¹⁰) *The Lady Durham* (1835) 3 Hagg. at p. 201.

¹¹) M. Ins. Act, sect. 11.

Freight. Where freight is payable on the delivery of goods the shipowner, who stands to lose it if the goods are lost, has an insurable interest in freight. But where freight is payable on shipment, called "advance freight", it is not repayable if the goods are lost, and the goods-owner who pays it has therefore an insurable interest in advance freight¹). An insurable interest of the same nature is that of the shipowner who carries goods on his own ship, the increased value of the goods by being carried freight free being equivalent to advance freight²). Advance freight is not repayable in case of loss of the goods; a payment on shipment of the goods which is so repayable is only a loan, is not advance freight, and does not give the lender any insurable interest³).

Premiums. Any assured has an insurable interest in the premium he has to pay; i.e. may add that to the amount he insures⁴). Logically, of course, he has an insurable interest on the premium on this extra amount, and again on that premium, and so *ad infinitum*.

In practice a shipowner who insures his ship and freight by time policies for 12 months sometimes insures the premiums on those policies by a separate policy on premiums. This can be done by what is called a "Premiums reducing policy". Under this the total of the premiums is insured for the 12 months with a provision that at the expiration of every month the amount insured is to be deemed to be reduced by one twelfth of the whole. For obvious reasons this may involve some economy in premium.

Mortgagor and Mortgagee. Where property at sea (e.g. a ship) is mortgaged the mortgagor has an insurable interest in it to its full value, and the mortgagee has also an insurable interest to the extent of his debt or security⁵). It was mentioned above that a loan to a shipowner gives the lender no insurable interest in the ship. A mortgagee lends money, but his insurable interest arises not by reason of the loan, but by reason of the security he has in the ship for its repayment. So a consignee of goods, not their owner, may have an insurable interest in the goods to the extent to which he has a charge upon the goods for his expenses. A man may insure as trustee for another, and therefore a mortgagee or consignee, insuring in respect of his own insurable interest, may by the same policy insure on behalf of, and in respect of the insurable interest of, the mortgagor or the owner⁶). If both mortgagor and mortgagee effect insurances they will not be allowed to recover more than an indemnity, i.e. the whole value of the property insured according to their respective interests in it⁷).

The fact that an assured has by some other contract a right of indemnity against insurable losses does not prevent him having an insurable interest in an insurance policy⁸). Thus a shipowner who has let his ship to a charterer on the terms that the charterer shall be responsible for its loss by sea perils may insure the ship⁹). If he recovered a loss on the policy the underwriters would be subrogated¹⁰) to his right of action against the charterer.

Other forms of interest. There are other forms of insurable interest akin to those above specified. Thus the liability to indemnify a third party from the risks of sea perils may be insured against¹¹), the interest being akin to that of an underwriter who reinsures. So a carrier who is liable for loss of or damage to goods may insure against that liability¹²). By the English practice shipowners mostly insure this liability by being members of Mutual Associations¹³), called Protection and Indemnity

¹) M. Ins. Act, sect. 12.

²) *Flint v. Fleming* (1830) 1 B. & Ad. 45. See also M. Ins. Act, sect. 90, and No. 16 of the Rules of Construction [M. Ins. Act, Sched. 1].

³) *Manfield v. Maitland* (1821) 4 B. & Ald. 582 at p. 585.

⁴) M. Ins. Act, sects. 13 and 16.

⁵) M. Ins. Act, sect. 14 (1).

⁶) M. Ins. Act, sect. 14 (2). See also *Irving v. Richardson* (1831) 2 B. & Ad. 193; *Waters v. Monarch Co.* (1856) 5 E. & B. 870.

⁷) See *Godin v. London Assurance* (1758) 1 Burr. 489.

⁸) M. Ins. Act, sect. 14 (3).

⁹) *Hobbs v. Hannam* (1811) 3 Camp. 93.

¹⁰) See M. Ins. Act, sect. 79 and cf. *Liverpool and Globe v. North Brit. and Merc. Co.* (1877) 5 Ch. D. 579.

¹¹) See under *Liabilities to Third Parties*, *infra*, p. 552.

¹²) Cf. *Crowley v. Cohen* (1832) 3 B. & Ad. 478.

¹³) See M. Ins. Act, sect. 85, and *Mutual Insurance*, *infra*, p. 564.

Clubs. So also a shipowner can insure his liability for damages by collision, and does so by a special clause in his policy called the Running Down Clause, by abbreviation R.D.C.

It has been seen that if an assured sells or parts with his interest before a loss happens, he cannot recover¹⁾. Nor will the benefit of his policy pass to the purchaser or assignee of his interest unless it is assigned to him²⁾. But of course the executor or the trustee in bankruptcy of an assured can recover on his policy³⁾.

IV. Insurable Value.⁴⁾

The values that may be insured upon ships, freight, and goods are set out in sect. 16 of the M. Ins. Act⁵⁾. In the case of a total loss upon an unvalued policy these are the amounts that can be recovered⁶⁾. In practice, however, nearly all policies in modern times contain an agreed and binding⁷⁾ valuation, and this makes the question of insurable value an unimportant one.

Freight. In regard to freight the insurable value by law, and the amount in practice insured under a valued policy, is the gross freight without any deduction for the expense of earning it⁸⁾. This obviously gives the assured, who recovers a total loss, in most cases more than an indemnity. The extent to which it does so will vary according to the stage in the voyage at which the loss happens, *i.e.* according to the extent to which the expense of earning the freight has been in fact incurred. If the loss happens just as the ship is leaving the port of loading, when little expense has been incurred, the advantage to the shipowner will be large. If, on the other hand, the loss happens at the port of discharge just before the goods are delivered, and when nearly all the expenses of the voyage have been incurred, his advantage will be small. It is the possibility of a loss of freight, as in the latter case, involving practically a loss of the gross freight, that doubtless gave rise to the rule that the gross freight may be insured.

Goods. While, in regard to freight, the law thus allows the shipowner to insure more than the maximum amount he is ever likely to lose, in regard to goods it allows the merchant to insure less than the minimum, which, by any damage to his goods, he must lose. For in respect of goods the insurable value recognised by law is only the prime cost of the goods and the charges for putting them on board ship⁹⁾. If a merchant's business is to be profitable, imported goods must be worth something more than the prime cost in the country of export and the freight for carrying them to the country of import. The value of goods to the merchant on arrival therefore includes: a) prime cost and shipping charges, b) freight, c) the profit, or excess of value above the two former items. If goods are totally lost on the voyage the merchant does not have to pay freight to the shipowner, and he therefore loses a) and c), while the law only allows him to recover a) on his policy. If the goods arrive badly damaged but still existing *in specie*, the merchant does have to pay freight. If his goods all arrive *in specie* but are on arrival worth only 10 per cent. of the value they would have if undamaged, the merchant in fact loses 90 per cent. of a), b) and c), whereas the law only allows him to recover 90 per cent. of a) on his policy¹⁰⁾. The law thus gives him less than an indemnity in every case, and less in case of a partial than in case of a total loss. The merchant who insures his goods in fact corrects these deficiencies in his protection by means of valued policies. He can do this best by insuring *first* a value that covers a) and c) against all risks, and *secondly* and separately the value of b), the freight, against the loss he will sustain in case of partial loss, which is called an insurance on "freight contingency." For this latter purpose the value of the freight is insured subject to the following clause: "On increased value on arrival by payment of freight and/or

¹⁾ Cf. *Powles v. Innes* (1843) 11 M. & W. 10.

²⁾ M. Ins. Act, sect. 15. Cf. *North of England Co. v. Archangel Co.* (1875) L. R. 10 Q. B. 249. See also under *Assignment of Policy*, *infra*, p. 529.

³⁾ M. Ins. Act, sect. 15, proviso.

⁴⁾ M. Ins. Act, sect. 16.

⁵⁾ See also Rules 15, 16, 17 of Rules for Construction of the policy, M. I. Act, Schedule 1.

⁶⁾ M. Ins. Act, sect. 28.

⁷⁾ M. Ins. Act, sect. 27 (3).

⁸⁾ M. Ins. Act, sect. 16 (2).

⁹⁾ M. Ins. Act, sect. 16 (3).

¹⁰⁾ M. Ins. Act, sect. 71 (3).

charges: being against the risk of depreciation by perils insured against only. Total loss and/or loss of part to be deemed an arrival¹⁾; but to include all risks of craft and/or raft etc., at destination, and the risk of loss of the whole or part after the freight may have become due²⁾.

Disbursements. In addition to insurances on ship and on freight, a shipowner commonly effects a policy on "Disbursements", either by a voyage policy or a time policy, according as his policies on hull and freight are effected in the one or the other manner. An insurance on Disbursements might properly cover such things as the expenses of outfit of the ship, provisions and stores, seamen's wages etc., if these are not already covered, as they may be, and usually are, under the policy on the hull²⁾, or expenses of earning the freight, if these are not already covered, as they may be³⁾ and always are, under the policy on freight. In fact it is almost always impossible to say what an insurance on Disbursements does cover, and in fact it is almost always not a genuine insurance of any interest really at risk, but a mere wager on the part of the shipowner. Underwriters know or should know this perfectly well, but they readily accept such wager insurances. Accordingly a time policy on Disbursements is usually effected in terms as a wager policy by the insertion of clauses to this effect; "Policy proof of interest. Full interest admitted. Warranted free from all average, but to pay in the event of the total and/or constructive total loss of the vessel".

V. Disclosure and Representations.⁴⁾

The contract of insurance is a contract *uberrimae fidei*; any failure by either party to use the utmost good faith entitles the other to avoid the policy⁵⁾.

When the contract is effected the assured, or his broker or agent, must disclose to the underwriter every material fact which is known either to the assured or the broker, and every material fact which in the ordinary course of his business ought to be known by the assured⁶⁾. This rule is subject to the exception that, unless the underwriter makes enquiry upon them, there need be no disclosure⁷⁾ as to: i) any circumstance which diminishes the risk, ii) anything which the underwriter knows, or, as a prudent man of business, ought to know⁸⁾, iii) anything as to which the underwriter waives information, iv) anything of which, by reason of a warranty in the policy, disclosure is superfluous⁹⁾.

A material fact is one which would influence the judgment of a prudent underwriter in fixing the premium or determining whether he will take the risk¹⁰⁾. The criterion therefore is not the judgment of the individual underwriter concerned, for he may be an ignorant and imprudent one, but that of a hypothetical "prudent" underwriter¹¹⁾.

Whether any particular fact is or is not material in the above sense is a question of fact¹²⁾ to be determined by a jury: by the practice of the Courts brokers and underwriters can give evidence as experts on the question whether a prudent underwriter would or would not be influenced in the way above indicated. A fact, to be material, need not relate only to the nature of the risk, or the extent of hazard to which the insured property is likely to be exposed. Thus the fact that the assured has grossly overinsured or overvalued the thing insured, so that it is to his interest

¹⁾ I. e. no claim on this insurance in respect of any goods totally lost, because no freight will be payable and therefore the assured has lost nothing in respect of the value of the goods represented by payment of freight.

²⁾ M. Ins. Act, sect. 16 (1).

³⁾ M. Ins. Act, sect. 16 (2).

⁴⁾ M. Ins. Act, sect. 17—21.

⁵⁾ M. Ins. Act, sect. 17. Obviously it is the underwriter who usually can exercise the right of avoidance. But if, e. g., an underwriter took an insurance on a ship when he had private information that she had arrived in safety the assured could claim to avoid the policy.

⁶⁾ M. Ins. Act, sects. 18 (1), 19.

⁷⁾ M. Ins. Act, sect. 18 (3).

⁸⁾ Cf. e. g. *The Bedouin* [1894] P. 1.

⁹⁾ Thus facts as to the competence of the captain need not be disclosed, seeing that the warranty of seaworthiness includes the presence on board of a competent captain.

¹⁰⁾ M. Ins. Act, sect. 18 (3).

¹¹⁾ *Glasgow Co. v. Symondson* (1911) 16 Com. Cas. 109.

¹²⁾ M. Ins. Act, sect. 18 (4).

if it be lost, may be a material fact, concealment of which may entitle the underwriter to avoid the policy¹).

As with regard to the concealment of things which ought to be told, so it is with regard to the incorrect statement, even honestly made, of things that are told. If before the contract is effected the assured, or his broker, makes any representation to the underwriter which is material, and it proves to be untrue, the underwriter may avoid the policy²). The test and proof of materiality are the same as in regard to concealment³). A representation may be made either in writing or orally. A representation to be within this rule may be as to something which is to happen in the future as well as of an existing fact.

A representation as to a matter of fact is true if in the opinion of a prudent underwriter it is substantially correct⁴): a representation as to a matter of belief or expectation is true if it is made honestly⁵). It is a difficult and uncertain point of law whether every representation as to a fact which is to happen in the future is to be treated as a representation of belief or expectation within the latter of these rules: probably it is not to be so treated unless it is in some way expressed as an affirmation only of expectation or belief⁶).

The material time before which disclosure must be made, or misrepresentation be avoided, is the effecting of the contract. This is not the signature of the policy, but the initialling by the underwriter of the preliminary "slip"⁷) in the course of business described on p. 508. The underwriter is bound in honour to issue a policy in accordance with the slip, even though in the interval he has learned some fact which alters his views as to the risk. The assured therefore need not communicate to the underwriter any material fact which has only come to his knowledge during that interval⁸).

VI. The Policy.⁹)

The contract of insurance is in fact concluded by the "slip". But the law provides (chiefly with a view to the protection of the revenue in regard to the stamp duties on policies) that to be legally enforceable the contract must be embodied in a policy bearing its proper stamp duty. The statutes¹⁰) dealing with this by the varying use of the phrases "shall not be admissible in evidence" and "shall not be valid" leave the matter in some obscurity, especially on the question how far the "slip" may be tendered in evidence¹¹). Their general effect, however, is: i) an insurance by a shipowner only against his liability for damage to life or property on his own ship, or, by collision, upon another ship (*i.e.* chiefly the sort of insurance effected with the Protection and Indemnity Clubs) need not be effected by a policy¹²); ii) any other kind of marine insurance must, if it is to be enforceable in Court, be embodied in a policy. A policy must specify: 1. the name of the assured or his agent; 2. the subject matter or property insured and the risk insured against; 3. the voyage or period of time covered; 4. the sum or sums insured; 5. the name or names of the insurers¹³); and must be signed by or on behalf of the underwriters¹⁴). A "slip" by reason of its

¹) Cf. *Ionides v. Pender* (1874) L. R. 9 Q. B. 531 and *Thames and Mersey Co. v. Gunford Co.* 1911] A. C. 529.

²) M. Ins. Act, sect. 20 (1).

³) M. Ins. Act, sect. 20 (2) (7).

⁴) M. Ins. Act, sect. 20 (4). The effect of a representation thus differs from a warranty, the terms of which must be literally complied with.

⁵) M. Ins. Act, sect. 20 (5).

⁶) Contract, e.g., the statements "The ship is not to sail to any port in British North America after 1 October", and "In all probability the ship will not sail etc."

⁷) M. Ins. Act, sect. 21.

⁸) Of course if the fact is one which in the ordinary course of business the assured ought to have known before the slip was initialled the underwriter has his remedy. M. Ins. Act, sect. 18 (1).

⁹) M. Ins. Act, sects. 22—31.

¹⁰) M. Ins. Act, sects. 21, 22, 23, 89. Stamp Act, 1891 (54—55 Vict. c. 39), sects. 14 (4), 91, 92, 93.

¹¹) *Glasgow Co. v. Symondson* (1911) 16 Com. Cas. 122, 123.

¹²) Stamp Act, 1891, sect. 93 (1). Merchant Shipping Act, 1862, sects. 54 and 55, the latter being re-enacted by Merchant Shipping Act, 1894, sects. 503 and 506. [See Interpretation Act, 1889, sect. 38 (1)].

¹³) M. Ins. Act, sect. 23.

¹⁴) M. Ins. Act, sect. 24 (1).

not containing these particulars cannot, if the underwriters refuse to issue a policy, be stamped and treated as a policy¹). Indeed if the underwriter refuses to sign a policy in accordance with the slip there is no legal means of compelling him to do so.

Each company executes and issues its own separate policy. But with Lloyd's or other individual underwriters many of them sign one policy, the signature of each having prefixed to it his share of the total amount insured. The liability of such an underwriter is strictly limited to his own share, *i.e.* the contract is a several contract by each, and not a joint contract by all²).

There are two sorts of policies³): a "voyage" policy (*i.e.* one in which the limits of protection are defined by named places) and a "time" policy (*i.e.* one in which the limits are defined by named dates). The chief distinction in their legal incidents between a voyage and a time policy arises, as will be seen, in regard to the Warranty of Seaworthiness. A voyage policy may be effected for a voyage of any length⁴). A time policy (again for the protection of the revenue) must not be made for a longer period than twelve months⁵) plus the period covered by the common "continuation clause", which provides that if at the expiration of the specified 12 months the ship is at sea the insurance shall continue for the time, not exceeding 30 days, she takes to arrive at a port⁶).

Time policy. A time policy usually specifies in somewhat verbose language (largely unnecessary) the various situations in which the ship may be, and will be covered, during the period insured. The form usually runs thus: "Say for and during the space of twelve calendar months commencing at noon of 20 February⁷) 1911 and ending at noon of 20 February 1912, (beginning and ending with Greenwich Mean Time) as employment may offer, in port and at sea, in docks and graving docks, and on ways, gridirons, and pontoons, at all times, and in all places, and all occasions, services, and trades, whatever and wheresoever, under steam or sail; with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed, and to go on trial trips. With liberty to discharge, exchange, and take on board goods, specie, passengers, and stores, wherever the vessel may call at or proceed to, without being deemed a deviation, and with liberty to carry goods, live cattle etc. on deck or otherwise".

Voyage Policy. A voyage policy may refer to actual named ports, *e.g.* "At and from London to Hamburg," or to unnamed ports in a geographical area, *e.g.* "any port or ports in any order on the West Coast of South America, and while there and thence to any ports of call and/or discharge in the United Kingdom and/or on the Continent between Bordeaux and Hamburg, both inclusive". The commencement of the voyage is described as being either "from" or more commonly "at and from". When only "from" is used, the ship or goods are covered when the ship starts on her voyage from the named port. When "at and from" is used the ship is covered as soon as she is within the boundaries of the port, and goods are covered as soon as they are on board the ship in the port. But as regards goods the protection is usually made to start earlier, either on leaving the shore for the ship (under the clause "Including all risk of craft to and from the vessel"), or on leaving the warehouse to be carted to the shore (under the "warehouse to warehouse" clause referred to on p. 509 above).

The termination of the voyage under the old form of policy is differently described as regards ship and goods respectively, thus: 1. "upon the said ship etc., until she hath moored at anchor twenty-four hours in good safety", and 2, "upon the goods until the same be there discharged and safely landed". The limit of 24 hours after mooring in 1. is usually extended in modern policies by the addition, at the end of the description of the voyage, of the words "and for thirty days while in port after

1) *Home Ins. Co. v. Smith* [1898] 2 Q. B. 351.

2) *M. Ins. Act*, sect. 24 (2). Cf. *Tyser v. Shipowners Syndicate* [1896] 1 Q. B. 135.

3) *M. Ins. Act*, sect. 25 (1).

4) A voyage policy may include a period of 30 days in port at the termination of the voyage, but not more. If it covers more it must be stamped at the higher rate payable on a time policy. *Stamp Act*, 1891, sect. 94.

5) *M. Ins. Act*, sect. 25 (2).

6) *Finance Act 1901* (1 Edw. VII cap. 7) sect. 11.

7) By some historical accident most time policies in the latter part of the 19th Century were effected as from 20 February in each year. The practice is now abandoned.

arrival,"¹⁾ in which case the old words as to 24 hours should be deleted, or there may be a question if the result is not to give 31 days²⁾ after arrival. "Thirty days" in this clause means thirty periods of 24 hours beginning from the time when the vessel is anchored in the port³⁾. Under 2. the goods are covered until landed, *i.e.* put on the quay or otherwise off the sea, which includes landing by boat or craft, if that is the customary method of discharge. But again provision is usually made by a special clause to cover them in craft, or beyond actual landing to their destined warehouse.

Subject-matter. The subject-matter insured must be specified with reasonable exactness in the policy, but the nature of the assured's interest in it need not be stated⁴⁾. Thus *e.g.* an owner of cargo must insure "cargo", not the ship: but an underwriter who has insured cargo and reinsures may reinsure on "cargo" without stating that it is a reinsurance⁵⁾. If the description of the subject-matter is not sufficiently exact to apprise the underwriter of the nature of the risk, the underwriter may be protected from liability by the rule as to concealment of material facts. Thus *e.g.*, as deck cargo is subject to special risks, it should obviously be described as "deck cargo" or "on deck" and not merely as "cargo" or "goods"⁶⁾.

The Mar. Ins. Act provides that where the subject insured is described in general terms it shall be construed to apply to what the assured intended to insure⁷⁾. There may conceivably be difficulty in some cases in reconciling this with the rule that the assured need only be interested at the time of loss⁸⁾.

Valuation. A policy may be either unvalued⁹⁾ (*e.g.* £1000 on the ship A), or valued (*e.g.* £1000 on the ship A valued at £20 000)¹⁰⁾. The majority of policies in modern times are valued. If the valuation so inserted in the policy is fixed honestly it is conclusive in case of loss¹¹⁾. Thus in a case where a ship valued at £20 000 was insured against fire only, and she was stranded and badly damaged and was then destroyed by an accidental fire, the assured recovered £20 000 on their policies, even though at the time of the loss the ship had by other perils not insured against in fact lost nearly all her value¹²⁾.

The valuation is not conclusive in determining whether there is a constructive total loss¹³⁾, as to which see later.

Floating policy. Instead of having specific policies upon each shipment of their goods merchants may, and frequently do, effect "floating" insurances for a large round sum upon goods to be subsequently declared and valued. This is done in two ways, either: i) by a "slip" or open cover for a round sum, under which specific policies¹⁴⁾ are subsequently issued for each shipment as it occurs, or ii) by a "floating" policy for a round sum, upon which policy specific amounts and ships are subsequently indorsed, the policy remaining in force until the total of the indorsements makes up the insured amount¹⁵⁾.

When such a "floating policy" is exhausted by declarations it is usually followed by a fresh floating policy. There is, of course, nothing which compels the same underwriters to issue a fresh policy, but provision is commonly made for securing that the final declaration shall be completely covered by the insertion of the clause:

1) Thus the voyages specified above would commonly be written — "At and from London to Hamburg and for 30 days while in port after arrival", and — "At and from any port or ports etc. . . . Hamburg, both inclusive, and for thirty days while in port after final arrival". The words "while in port" are necessary in case before the 30 days elapse the ship starts on a new voyage, and might still be covered notwithstanding.

2) See footnote (4) on p. 515.

3) *Cornfoot v. Royal Exchange Co.* [1904] 1 K. B. 40.

4) M. Ins. Act, sect. 26 (1) (2) (4).

5) *Mackenzie v. Whitworth* (1875) 1 Ex. D. 36. So a carrier insuring his liability may do so by a policy on "goods" simpliciter. *Crowley v. Cohen* (1832) 3 B. & Ad. 478.

6) See also No. 17 of the Rules of Construction. M. Ins. Act, Sched. 1.

7) M. Ins. Act, sect. 26 (3).

8) M. Ins. Act, sect. 6 (1).

9) See *Insurable Value*, *supra*.

10) M. Ins. Act, sect. 27 (1) (2).

11) M. Ins. Act, sect. 27 (3).

12) *Woodside v. Globe Co.* [1896] 1 Q. B. 105.

13) M. Ins. Act, sect. 27 (4).

14) This may obviously be the more convenient method for the merchant who is likely to sell goods on c. i. f. terms.

15) M. Ins. Act, sect. 29 (1) (2).

"In the event of any shipment coming upon this policy the value of which is in excess of the sum then remaining available, it is mutually agreed that the underwriters shall grant a policy for such excess up to but not beyond the amount of this policy, and the assured shall pay the premium thereon at the same rate".

The assured is bound to declare or indorse on such an open cover or floating policy all shipments coming within its terms, *i.e.* he must not declare the bad risks and keep the good risks back; and he must declare them in their order as they come, *i.e.* he must not by postponing a declaration on which there is no loss get a later one on to a policy that is nearly exhausted¹). Honest mistakes in making declarations may however be rectified even after loss¹). A floating policy often provides the basis on which goods are to be valued (*e.g.* "Invoice cost plus charges plus — per cent"): if there is no such provision a declaration after loss must be made as if the policy were unvalued²).

Form of policy. The ordinary form of Lloyd's Policy is given in the 1st Schedule of the M. Ins. Act³). The language of this indicates its ancient origin. Except for the substitution of the words "Be it known that" for the less commercial phrase "In the name of God, Amen"⁴) (a substitution made in 1850) this form has not been altered since 1779. In practice, of course, the form is largely supplemented by the addition of clauses added upon its face. The forms of policy used by the companies are very similar to this form.

Construction of the Policy. Schedule I of the M. I. Act gives certain rules for the Construction of the Policy. In the following notes, on matters of construction not dealt with elsewhere, reference to "Rules" is to these rules in the Schedule⁵).

The name of the assured must be inserted after the words "*Be it known that*"; this may be either the name of the actual assured, or the name of the broker or other agent who effects the policy on his behalf. In practice the words "and/or as agents" are added after the name, so that the policy begins: "Be it known that A. B. & Co and/or as agents as well in their own name etc." *Lost or not lost*; See Rule 1; of course the loss must have occurred within the limits of the voyage or time covered by the policy. Rules 2, 3, 4, 5, see above under *Voyage Policy*, p.515. Rule 3 (b) must be read subject to the provision of sect. 42 of the Act, as to which see below under *Commencement of the Voyage*, p.525. *Whereof is Master under God, for this present voyage*; the blank for the name of the Master is in practice never filled in in modern policies. The two blanks after the phrases: "*aboard the said ship*" and "*shall be arrived at*" in practice have the words "as above" inserted; in the blank after the words "*upon the said ship etc.*" in practice nothing is inserted. "*To touch and stay at any ports or places whatsoever*". In the blank following these words the addition "and where-soever and for all purposes" is commonly made, and sometimes there is further added after that, "with leave to tow and be towed and to assist vessels in distress or otherwise, and to sail with or without pilots". See Rule 6, which means that the liberty to touch and stay must be read subject to sects. 46 to 49 of the Act as to deviation etc., which are discussed below under *The Voyage*, pp. 526—528. "*Are and shall be valued at*"; in the blank following these words the chief details as to the matter insured and its valuation are inserted, *e.g.*

"On hull and materials valued at	£ 20 000
"On machinery and boilers valued at	£ 10 000
	£ 30 000

Perils of the Seas; No one has ever succeeded in framing a perfect definition of Perils of the Seas, and Rule 7 does not pretend to give one. See below under *Loss and Abandonment*, p. 532 for some illustrative cases. "Perils of the Seas" includes the action of ice met at sea⁶). "*Fire*"; damage by the explosion of a boiler is not covered

¹) M. Ins. Act, sect. 29 (3).

²) M. Ins. Act, sect. 29 (4). and sect. 16. This is the rule of law. In business practice when a loss has occurred before declaration, and the assured is known and respectable, the underwriters often allow him to make the declaration on the same basis of valuation on which he has made his previous declarations.

³) M. Ins. Act, sect. 30 (1), Sched. 1.

⁴) One, at least, of the old London Companies still begins its policy with these words of piety.

⁵) As regards Rules 13 and 14 see under *Particular Average Warranties*, below, p. 533. As regards Rules 15, 16 and 17 see under *Insurable Interest* p. 509 and *Insurable Value*, p. 512.

⁶) *Popham v. St. Petersburg Co.* (1904) 10 Com. Cas. 31.

either under "fire" or the "general words"¹); see under "*Damage to Machinery*," below, p. 533. Perhaps damage done by an explosion of gunpowder, and probably damage done, *e.g.* to flour, by the smoke of a fire on board, would be recoverable. *Pirates*: probably the best definition of piracy is, "robbery and depredation on the sea or navigable rivers etc., or by descent from the sea upon the coast, by persons not holding a commission from an established civilized state"²). See also Rule 8. *Thieves*; see Rule 9; this covers robbery by violence (*latrocinium*) not secret theft (*furtum*). "*Arrests, Restraints or Detainments etc.*," See Rule 10. This refers to acts of State, which are not acts of hostility or warfare, but in the same way as "capture or seizure," deprive the assured of his property, or of his power of doing as he likes with it. They do not cover the ordinary results of legal proceedings (*e.g.* the arrest of a ship by a writ *in rem* in a collision suit), but they do include the acts of the executive government, in accordance with its constitutional or legal powers. *e.g.* as by a decree prohibiting the export or import of some particular goods³). *Barratry* means any sort of fraudulent or wrongful act done by the master or any of the crew for his or their own benefit and without regard to the interests of the employer; *i.e.* conscious misdoing, as contrasted with mere negligence however gross. See Rule 11. Thus it was barratry of the master, when for a payment to himself he secretly agreed with a man to take him on board and land him on a certain island, which involved a deviation from the ship's proper voyage and serious extra danger to the ship⁴). "*And of all other perils losses or misfortunes, etc.*" These words are called "the general words". There is a rule of English Law, applicable to the construction of all documents, and called the "Rule of *Ejusdem generis*", that general words following upon specific words are to be limited in their meaning by the class of things expressed in the specific words: hence Rule 12. Therefore these wide words serve to include among the insured perils only causes of loss of the same kind as the previously expressed perils. And accordingly they are rarely of importance. But they are sometimes useful: thus when a ship in a graving dock was blown over by a violent storm and damaged it was held to be a loss by a "peril" sufficiently akin to "perils of the seas" to be included⁵). *And in case of any loss or misfortune, etc.* This is the "Sue and Labour Clause", as to which see under that heading on p. 556. "*And it is especially declared and agreed etc.*" This is the "Waiver Clause", as to which see under *Notice of Abandonment* on p. 543. "*Confessing ourselves paid the consideration, etc.*" This is the receipt for the premium as to which see under "*The Premium*" at p. 530. "*N.B. Corn, fish, salt, fruit, etc.*" This is called "The Memorandum," as to which see under "*Particular Average Warranties*" on p. 553.

Writing and Print. It is a general rule of English law that, in the construction of documents which are partly printed and partly in writing, the written words are to be taken as of more importance than, and as controlling the meaning of, the printed words.

Owing to the inveterate practice by which the old form of policy is used for any marine insurance, whether it is in the least applicable to the particular insurance or not, and is more or less skillfully, or unskillfully, adapted to the particular purpose by added matter, two results follow: *first*, the added clauses even though printed and not written are in most cases of more importance than the old printed form, and control its meaning, and *secondly*, in some cases parts of the old printed form, though not deleted from the policy, must be held, by reason of the added matter, to be inapplicable altogether, and so to be negligible and meaningless⁶).

F. C. S. clause. Unless it is specially stipulated to the contrary in the slip, any policy at the present time effected in London contains as a matter of course the "Free of Capture and Seizure clause" (F. C. S.). This runs as follows: "Warranted free from capture, seizure, and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war".

Held covered. It is often provided by a clause in the policy that in the event of a deviation, or breach of some warranty, the assured shall be "held covered at a

¹) See below in this paragraph.

²) The New English Dictionary (Oxford) *sub voce*.

³) Cf. *Miller v. Law Accident Co.* [1903] 1 K. B. 712.

⁴) *Mentz Decker v. Maritime Co.* [1910] 1 K. B. 132.

⁵) *Phillips v. Barber* (1821) B. & Ald. 161.

⁶) So in *Cunard v. Marten* [1903] 2 K. B. 511 the "Sue and Labour clause", though left in the policy was held to have no effect whatever as part of the Contract.

premium to be arranged." In such a case, if the parties cannot agree on the proper premium, the Court has, as a question of fact, to decide what in the circumstances is a reasonable premium¹⁾. If the additional risk is a very hazardous one the Court may protect the underwriter by finding that the only reasonable premium for it would be equivalent to the loss sustained²⁾.

Execution of the policy. Each company issues its own policy for the amount it insures. A company's policy is sometimes issued under seal with the signature of a director and the secretary or some other official, or it may be only signed, and that, either by one or two directors and the secretary, or merely by one manager or other official. This variation is in accordance with the regulations of the particular company.

A Lloyd's policy is "subscribed" by or on behalf of any number of underwriters, whose individual subscriptions make up the total of the sum insured, which is inserted at the head of the policy. Underwriters at Lloyd's are not all actively engaged in carrying on business there. The active underwriters who do the business are in most cases themselves principals, and also agents for others, who may never come to Lloyd's at all. Each of the active underwriters thus represents a group, which may consist of himself and one, two, or any number of others, up to about twenty in the case of the largest groups. When one of the active underwriters initials a slip brought to him by a broker, he does so by putting down the total amount for which he intends to write for *all* his "names" (as members of his group are called), and puts his initials to it e.g. "£500 A.B."

When the broker brings the policy to the active underwriter to be executed³⁾ this engagement on the slip "£500 A. B". has to be translated into a set of separate subscriptions by each of the underwriter's "names" for their separate shares of the total. There are in practice two methods of doing this, a) the old method of setting out against each "name" the amount of his separate share of the total, and signing for all of them, or b) the modern method⁴⁾ of setting out against each name the fraction of the total which he undertakes, and signing for all of them. To effect this every active underwriter has a rubber stamp in an appropriate form. If Mr A. B. underwrites for himself and four other "names", he will execute the policy, in respect of his "£500 A. B." on the slip, in the first or the second of the following forms⁵⁾, according as it is his practice to use the old or the new method:

- a)
$$\left. \begin{array}{l} \text{£ } 100 \text{ A. B....} \\ \text{£ } 100 \text{ C. D....} \\ \text{£ } 100 \text{ E. F....} \\ \text{£ } 100 \text{ G. H....} \\ \text{£ } 100 \text{ J. K....} \end{array} \right\} \begin{array}{l} \text{Per A. B....}^6) \\ \text{One hundred pounds each,} \\ \text{1 January 1911.} \end{array}$$
- b)
$$\text{£ } 500 \left\{ \begin{array}{l} \text{A. B....} \\ \text{C. D....} \\ \text{E. F....} \\ \text{G. H....} \\ \text{J. K....} \end{array} \right. \begin{array}{l} \text{each one fifth} \\ \text{part of} \end{array} \left. \begin{array}{l} \text{Per A. B....}^6) \\ \text{Five hundred pounds} \\ \text{1 January 1911.} \end{array} \right\}$$

It is not the rule in every case that each member of the group takes the same share, as in the above example. In practice one or more members of a group take a larger share, and Mr. A. B's rubber stamp, if he uses the modern method, may well be in the following form:

$$\text{£} \left\{ \begin{array}{l} \text{A. B....two sevenths} \\ \text{C. D....one seventh} \\ \text{E. F....one seventh} \\ \text{G. H....two sevenths} \\ \text{J. K....one seventh} \end{array} \right\}$$

¹⁾ M. Ins Act, sects. 31, 88.

²⁾ *Greenock Co. v. Maritime Co.* [1903] 1 K. B. 367.

³⁾ See under *Business Methods*, *supra*, p. 508.

⁴⁾ This method a) facilitates book-keeping and b) enables an underwriter on behalf of his group to accept an amount in odd figures not easily divisible into exact shares. The old method is still used by many.

⁵⁾ Italics represent what is written, the rest the rubber stamp.

⁶⁾ The actual signature is usually not that of Mr. A. B. himself (who is too busy to do the work of signing policies) but of some clerk or assistant who sits by him. This clerk signs his own name, not A. B.'s.

VII. Double Insurance.¹⁾

There is nothing to prevent an assured effecting policies in excess of the value of his property, and he sometimes does so, either by accident, or because he doubts the solvency of the underwriters on some policy he has effected.

An example of double insurance arising by accident is the case where a shipowner, having insured his ship from A. to B., then insures her "at and from B. to C." If the ship coming from A enters the harbour at B., and, before she is moored, she sustains a loss by perils insured against, there is a double insurance. She is covered by the first policy, and she is also covered by the second as being "at B."²⁾ To prevent this overlapping a clause is often inserted in a policy either in the form, "Risk to Commence on expiry of previous policy," or "Risk not to attach before the expiry of previous policies".

When an excessive insurance is thus effected there is said to be Double Insurance³⁾. Two legal results follow: i) the assured can only recover his actual interest from the various underwriters, but he may do so from any of them in any order he likes⁴⁾; ii) the underwriters who pay the assured may claim contribution from the underwriters who have not paid him, so that they all bear the loss in their proper proportions⁵⁾. This is a result of the principle of subrogation⁶⁾. If from any of the underwriters the assured recovers more than the amount of his loss he is liable to hold the excess as trustee for, and to account for their proportions to, the underwriters who on this principle have paid more than they should⁷⁾.

Thus if an assured has two policies covering his ship at the same time, one for £10 000 and the other for £5000 upon the ship valued in each policy for £10 000 and if she is a total loss, he can either recover £10 000 on the £10 000 policy and nothing on the £5000 policy, or £5000 on each of the policies. Then the liabilities of the two sets of underwriters will be adjusted so that on the first policy $\frac{10}{15}$ and on the second policy $\frac{5}{15}$ of £10 000. is the ultimate burden. If the two policies were £10 000 on ship valued at £12 000 and £5000 on ship valued at £10 000 the assured will do best by claiming first on the latter policy, when he will recover £5000 on that and £7000 on the other policy⁸⁾, while the liabilities of the two sets of underwriters ought probably to be adjusted⁹⁾ so that those on the £5000 policy bear $\frac{5}{15}$ of £10 000 (£3333—6—8) and those on the £10 000 policy bear the balance (£8666—13—4) making up £12 000.

All these rules as to double insurance apply only in the case of two or more insurances upon the same subject-matter and upon the same insurable interest in that subject-matter¹⁰⁾. Thus if a merchant insures his goods in a warehouse, and the warehouseman insures the same goods in respect of his liability for them, there is no double insurance. The loss will be borne solely by the underwriters of that one of the two assured who if there were no insurances at all would be ultimately liable for the loss¹¹⁾.

VIII. Warranties.¹²⁾

In English legal literature there is a discreditable ambiguity as to the use and import of the word warranty. As applied to the contract of marine insurance a warranty is that which, in regard to other contracts, is more commonly called a condition, *i.e.* an affirmation or promise of the existence of some fact or facts upon the non-existence of which the contract ceases to exist. Under a warranty in a marine insurance policy the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or he affirms or negatives

¹⁾ M. Ins. Act, sect. 32.

²⁾ *Haughton v. Empire Co.* (1866) L. R. 1 Ex. 206.

³⁾ M. Ins. Act, sect. 32 (1).

⁴⁾ M. Ins. Act, sect. 32 (2) (a) (b) (c).

⁵⁾ M. Ins. Act, sect. 80.

⁶⁾ M. Ins. Act, sect. 79.

⁷⁾ M. Ins. Act, sect. 32 (2) (d).

⁸⁾ If he claimed and got £10 000 on the larger policy he could then recover nothing on the other.

⁹⁾ The point is doubtful and there is no authority upon it.

¹⁰⁾ M. Ins. Act, sect. 32 (1) "on the same adventure and interest", sects. 79 and 80.

¹¹⁾ *N. Brit. & Merc. Co. v. London Liverpool etc. Co.* (1876) 5 Ch. D. 569.

¹²⁾ M. Ins. Act, sects. 33—41.

the existence of a particular state of facts¹). A warranty of this kind must be exactly and precisely complied with, whether it affects the risk or not, and whether non-compliance causes a loss or not: if it is not complied with the underwriter is discharged from all liability as from the time of the breach of warranty²).

A warranty may be express or implied³). The implied warranties in a contract of marine insurance (if the word warranty is used in the strict sense defined above) are: i) the warranty of seaworthiness⁴), which is the most important of all; ii) a warranty as to the commencement of the voyage within a reasonable time⁵). The M. Ins. Act also speaks of implied conditions as to neutrality⁶), and an implied warranty of legality⁷). These, however, as will be seen, are of a different character. In the sense in which "condition" or "warranty" is used in regard to them it might be said that there is further an implied warranty that there shall be no change of voyage or deviation⁸).

Express warranties. An express warranty may be in any form of words from which the intention to warrant is to be inferred⁹). It is not necessary that the word "Warranted" or "Warranty" should be used. Indeed the word is often used as the preface to a clause in the policy which is not a "Warranty". Thus *e.g.*, the F. P. A. clause begins "Warranted free of particular average etc." If this were a "warranty" in the strict sense the occurrence of any particular average would avoid the policy; whereas the clause only means: "It is agreed that the underwriters shall not be liable for particular average etc." On the other hand "Warranted to sail before 1 October" would be a warranty, and if the ship sailed on or after 1 October the policy would be void. So the description in a policy: "the American ship —" was held a warranty that she was an American ship; "in port 20 July" a warranty that she was so in port; while on the other hand again "on the cargo being 1031 hogsheads of wine", was held not to be a warranty that this was the only cargo to be on board.

As an example of express warranties in a modern time policy the following, which are the Institute Warranties 1911¹⁰), may be given:

1. Warranted not to enter or sail from any port or ports place or places in British North America, except Halifax for purposes of coaling.
2. Warranted not to enter the Baltic beyond 13 deg. E. long., or sail from a loading port therein between 1st October and 1st April.
3. Warranted not to enter the White Sea, or sail from a loading port therein between 1st October and 1st April, and not to proceed East of Cape Kanin in the Arctic Ocean absolutely.
4. Warranted not to sail with Indian Coal as cargo between 1st March and 30th June.
5. Warranted not to proceed to any port or place in Siberia, Behring Sea, or Alaska.

On payment of an additional premium of . . . per cent. it is agreed to cancel Nos. 1, 2, and 3 of the above Warranties — except British North America between 1st September and 1st April and Cape Kanin Warranty.

If there is an express warranty in a policy that a ship is "safe" or "well" or "in port" on a particular day, it will be complied with if she is in fact in safety, or in port at any time during that day¹¹).

An express warranty may be written on the policy, or may be incorporated by reference to some other document if that reference is expressed in the policy¹²). Thus a policy issued by a Mutual Association¹³) may by reference to the Rules of the Association incorporate some express warranty contained in the Rules¹⁴).

¹) M. Ins. Act, sect. 33 (1).

²) M. Ins. Act, sect. 33 (3).

³) M. Ins. Act, sect. 33 (2).

⁴) M. Ins. Act, sect. 39.

⁵) M. Ins. Act, sect. 42.

⁶) M. Ins. Act, sect. 36.

⁷) M. Ins. Act, sect. 41.

⁸) M. Ins. Act, sects. 45 to 49.

⁹) M. Ins. Act, sect. 35 (1).

¹⁰) See foot-note (8) on p. 509.

¹¹) M. Ins. Act, sect. 38.

¹²) M. Ins. Act, sect. 35 (2).

¹³) M. Ins. Act, sect. 85.

¹⁴) *Colledge v. Harty* (1851) 6 Ex. 205.

An express warranty does not exclude an implied warranty unless it be inconsistent therewith¹⁾. This is because an implied warranty is attached by law to the contract. If the parties intend that legal implication to be negatived they must do so in clear terms. In accordance with this where a policy stated that the underwriters should not be liable for loss by "rottenness, inherent defects and other unseaworthiness" it was held that there was none the less a warranty of seaworthiness implied in the policy²⁾. In policies on goods it is not unusual to insert a clause: "Seaworthiness of ship admitted," in which case of course the implied warranty of seaworthiness is excluded.

Non-compliance with warranty.³⁾ If a warranty is not strictly complied with the underwriter is discharged, and it is no answer for the assured to say that the breach of warranty was remedied before any loss happened, or that the breach of warranty had no effect upon the risk or the loss³⁾. Thus a policy contained an express warranty: "Sailed from Liverpool with 50 hands"; the ship in fact sailed from Liverpool with only 46 hands, but she took 6 more on board at a Welsh port. Weeks or months later she was lost by capture. It was held that the underwriters were discharged by the breach of warranty⁴⁾.

Non-compliance with a warranty is excused in two cases only: i) when the circumstances to which the warranty obviously relate and which alone give it any sense cease to exist⁵⁾. Thus compliance with a warranty "to sail with convoy" would be excused if before the vessel sailed peace was made and all hostilities ended; ii) when by the terms of the warranty the assured undertakes to do something which by a subsequent change in the English law he is forbidden to do⁶⁾.

A breach of warranty may of course be waived by the underwriter⁶⁾, i.e. he may consent to treat the policy as still valid notwithstanding his right to treat it as void. This fact makes the distinction between a "void" and a "voidable" contract (it will be remembered that a policy is "voidable", if there has been concealment of a material fact⁷⁾, but is "void" if there is a breach of warranty⁸⁾, one of language rather than of substance.

It is often provided by a clause in policies that any breach of warranty shall be held covered at a premium to be arranged⁹⁾, as to which see above p. 518. This means that the underwriter is not to treat the policy as void, but is to be paid an extra premium commensurate with the risk or risks added by the breach of warranty. In effect the result is that there are no warranties at all in the policy, but it is to cover a variety of risks, for some of which the premium is fixed, for others of which it is to be fixed if or when they arise⁹⁾.

Warranty of Seaworthiness.¹⁰⁾ In every "voyage" policy, whether upon ship, freight, or goods, there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured¹¹⁾. There is no warranty of seaworthiness in a "time" policy¹²⁾. The reason for this distinction originally was that at the beginning of a time policy the ship might be at sea or in any part of the world, so that her condition might be beyond the control of the assured. But by a rigid extension of the rule it has been held that in a policy expressed to be for a period of time there is no such warranty,

¹⁾ M. Ins. Act, sect. 35 (3).

²⁾ *Quebec Mar. Ins. Co. v. Commercial Bank* (1870) L. R. 3 P. C. 234.

³⁾ Mar. Ins. Act, sects. 33 (3), 34 (2).

⁴⁾ *De Hahn v. Hartley* (1786) 1 T. R. 343. So if there was an express warranty in time of war "To sail with convoy", and the ship did not sail with a convoy, it would not avail the assured to say that there was in fact no convoy with whom she could sail and that the loss was solely by perils of the seas.

⁵⁾ M. Ins. Act, sect. 34 (1).

⁶⁾ M. Ins. Act, sect. 35 (3).

⁷⁾ M. Ins. Act, sect. 18 (1).

⁸⁾ M. Ins. Act, sect. 33 (3).

⁹⁾ Sometimes the extra premium to be paid in the event of the warranty being broken is fixed by the policy, as in the clauses quoted above on p. 521.

¹⁰⁾ Mar. Ins. Act, sect. 39.

¹¹⁾ Mar. Ins. Act, sect. 39 (1).

¹²⁾ Mar. Ins. Act, sect. 39 (4). As to the distinction between "voyage" and "time" policies see above p. 515. The time policies issued by Mutual Associations often provide that there shall be a warranty that the ship is seaworthy at the beginning of each voyage, by a special clause or by reference to their Rules.

even though the ship at the beginning of the period is either expressed to be, or is in fact, starting on a voyage, or lying in the port where the insurance is effected, or in the port where the assured lives, or in his own shipbuilding yard.

On the other hand there is an implied warranty of seaworthiness of the ship in every voyage policy, even in a policy on goods, in which case the condition of the ship is usually beyond the control of the assured.¹⁾ There is not, however, any implied warranty, in a policy on goods which includes the risk of craft to and from the ship, that the lighters shall be seaworthy or fit for their purpose²⁾.

A ship is seaworthy within the obligation of this warranty when she is reasonably fit in all respects to encounter the ordinary perils of the sea upon the insured adventure³⁾. There is no absolute standard of seaworthiness. The degree and nature of seaworthiness required is relative to the nature of the ship, or the subject matter of the insurance if it is not a ship, to the nature of the voyage and its particular stages, and to the nature of the perils she is likely to be exposed to. Thus if the insurance is expressed to be on a stern-wheel steamer intended for use on an African river, and insured on a voyage out from England to Africa, she need not be (because she cannot be) made as seaworthy as a Union-Castle Liner, but she must be made as seaworthy as her inherent nature permits⁴⁾: the warranty is thus relative to the nature of the ship. If there is an insurance on deck cargo by a ship she must be so stowed and equipped as to be fit for the carriage of the deck cargo, and it is not enough if the ship is merely in herself and so far as her own safety is concerned fit to meet all likely perils: the warranty is thus relative to the subject matter insured if it is other than a ship. The necessary degree of fitness or seaworthiness for a voyage in the summer from London to Hamburg would be less than that required for a winter voyage from London to North America: the warranty is thus relative to the actual voyage. So the degree of fitness on one and the same voyage would be less if it is to be performed in the height of summer than if in the depth of winter: the warranty is thus relative to the likely perils of the voyage.

As the degree of fitness required is relative to the nature of the voyage and its perils, so where the insured voyage includes passages of varying degree of peril the fitness may vary with each part or stage of the voyage. So in an insurance "at and from Manchester to Havre" there might be 3 "stages": *i.e.*: 1. in port at Manchester; 2. in the Manchester Ship Canal; 3. at sea.

The warranty is complied with if the ship is in the sense herein indicated seaworthy either at the commencement of the insured voyage, or, if the principle of stages applies, at the commencement of each stage. Thus if a ship is insured "at and from a port" the warranty is complied with if she is when in port fit to meet the dangers there, even if not fit to meet the dangers of the high seas, provided that before leaving the port she is made fit to meet those greater perils⁵⁾. And similarly as regards any insured voyage involving several "stages" as suggested above⁶⁾.

If the warranty is so complied with at the commencement of the voyage, or any stage in it, it does not matter if the ship afterwards becomes unseaworthy during the voyage, or the stage. It does not matter even if she becomes unseaworthy 24 hours, or even an hour, after this commencement, if in fact she was seaworthy at that moment⁷⁾. In other words there is said to be only an initial and not a continuing warranty of seaworthiness.

To be seaworthy, *i.e.* to be reasonably fit to meet the ordinary perils of the sea in all respects, does not refer merely to the structural sufficiency of the ship. The ship must be in proper repair, and the engines and boilers of a steamer must be in

¹⁾ By business practice the underwriters on a policy on goods usually do not raise the defence of unseaworthiness against the assured. They pay the assured and then exercise by subrogation his right to claim against the shipowner for loss of the goods caused by the unseaworthiness.

²⁾ *Lane v. Nixon* (1866) L. R. 1 C. P. 412.

³⁾ M. Ins. Act, sect. 39 (4).

⁴⁾ *Burges v. Wickham* (1863) 3 B. & S. 669. Of course, under the rules as to disclosure and concealment, there would have to be full explanation to the underwriter of the nature of the vessel, if he did not know that, when the slip for the policy was offered to him.

⁵⁾ M. Ins. Act, sect. 39 (1) (2).

⁶⁾ M. Ins. Act, sect. 39 (3).

⁷⁾ Of course if the ship becomes unseaworthy very soon, that may well be strong evidence that she was not in fact seaworthy at the required time. See below as to Evidence of Unseaworthiness. But this concerns questions of fact rather than the rule of law.

good condition. A steamer must have a sufficient supply of coal, a sailing ship must have proper sails, any vessel must have proper compasses, charts, anchors, cables, and the like equipment. Any vessel must have a competent captain, and a sufficient and competent crew. As the health of the crew is essential to their competence, a vessel must have medical necessities, and of course food for their sustenance. The vessel must also be fit as a vehicle for cargo; her stowage must be secure and she must not be overloaded.

The doctrine of "stages" above mentioned has in recent times been rather peculiarly applied to the provision of bunker coal as a necessity for a steamer if she is to be seaworthy. Upon a long Ocean voyage a steamer must coal at various ports, and it has been held that failure at such a port to take coal sufficient to carry her to the next coaling port is a breach of the warranty of seaworthiness. This applies the doctrine of stages to portions of the voyage limited only by the usual or the intended coaling ports, the physical conditions of such stages perhaps being in all cases the same.

Evidence of unseaworthiness. If the underwriter alleges a breach of the warranty it is for him to prove that the ship was unseaworthy. But if very shortly after leaving port, and without the occurrence of any bad weather, a ship leaks or founders the underwriter may say "*Res ipsa loquitur*," and as a matter of logic the assured may have to disprove the inference¹). There is hereby no shifting of the onus of proof; the underwriter discharges that onus by the facts he proves, and the assured must rebut them if he is to succeed.

Loss by unseaworthiness which is no breach of warranty. The Mar. Ins Act lays down in sect. 39 (5), as an addendum to the statement that in a time policy there is no warranty of seaworthiness, that where with the privity of the assured a ship is sent to sea in an unseaworthy state the insurer is not liable for any loss attributable to unseaworthiness. This is an illogical addition. The matter dealt with has nothing to do with the warranty of seaworthiness: it is in fact a particular application of the more general principle laid down in sect. 55 (2) (a), *viz.* that the assured cannot recover for any loss brought about by his own misconduct.

Policy on Goods. In a voyage policy on goods (and a time policy on goods is hardly possible) there is, as we have seen, an implied warranty that the ship that carries them is seaworthy. And this means not only a warranty that the ship is in herself fit to meet the ordinary perils, but that she is in respect of the cargo so equipped provided and stowed that she is reasonably fit to carry the cargo²). Thus in a policy on live cattle there is an implied warranty that the ship shall be properly ventilated for their carriage³).

But there is no warranty that the goods are seaworthy or fit to meet the ordinary perils of the voyage⁴). In this respect goods insured are very much in the same position as a ship under a time policy.

Nationality and Neutrality. There is no implied warranty as to the nationality of a ship⁵); there may of course be an express warranty, and as we have seen⁶), this may be created merely by a description in the policy, *e.g.* "The American ship." Nor is there any implied warranty that the nationality of a ship shall not be changed during the risk⁷).

There is no implied warranty that a ship or goods are the property of neutrals. But an assured, in time of actual or threatened war, may give an express warranty of neutrality. Many cases upon this arose in the great wars at the end of the 18th and beginning of the 19th centuries. If the assured so expressly warrants neutrality he is deemed to undertake that at the beginning of the risk or voyage the insured property shall in fact be neutral⁸). Breach of this, *i.e.* if it is not in fact so neutral, whether by the fault of the assured or by incidents beyond his power (*e.g.* through his country declaring war) will avoid the policy. He further undertakes that *so far as he can control the matter* the property shall remain neutral during the risk or voyage.

¹) See *Lindsay v. Klein* [1911] A. C. 194.

²) M. Ins. Act, sect. 40 (2).

³) *Sleigh v. Tyser* [1900] 2 Q. B. 333.

⁴) M. Ins. Act, sect. 40 (1).

⁵) M. Ins. Act, sect. 37.

⁶) See above under *Express Warranties*.

⁷) M. Ins. Act, sect. 37.

⁸) M. Ins. Act, sect. 36 (1).

The Marine Insurance Act¹⁾ speaks of "implied conditions" as to these matters: it would perhaps have been more satisfactory to say that an express warranty of neutrality is to be construed as an abbreviated method of making express undertakings to the above effect.

The Mar. Ins. Act further provides that if a ship is expressly warranted neutral the assured undertakes that she shall be possessed of the necessary documents showing neutrality, and shall not use false or simulated papers, and that *if any loss occurs through a breach of this undertaking*, the underwriter may avoid the policy²⁾. Here again is an undertaking different from a warranty as properly defined. Breach of warranty discharges the underwriter whether the breach causes a loss or not³⁾. This provision only relieves the underwriter in case the breach causes a loss.

In the view of the present writer this sect. 36 (2) of the Act has altered the law, in that it does not reproduce the law as previously laid down in the cases. The rule that an underwriter is not liable for a loss caused by the action of the assured in allowing the ship not to have proper documents, or to have false documents, was applied in the old cases where there was no express warranty of neutrality⁴⁾. The rule, as this writer thinks, was a particular application of the more general principle that an assured cannot recover for a loss which has been brought about by his own misconduct: as to which see later⁵⁾. Consistently with this the owner of insured goods is not debarred from recovering for their loss by capture when that has been occasioned by the ship not having proper documents⁶⁾.

Legality. The Mar. Ins. Act provides that there is an implied warranty that the adventure insured is a lawful one⁷⁾. Here again this seems an unfortunate use of the term warranty. An insurance on an unlawful adventure (*e.g.* on a shipment of goods intended to be smuggled into England) is invalid⁸⁾, and the invalidity depends on positive law, not merely on an implied term of the insurance contract. That this is so is clear from the fact that the underwriter could not waive⁹⁾ the breach of warranty and so make the policy a valid one.

The section further provides that there is an implied warranty that so far as the assured can control the matter the adventure shall be carried out in a lawful manner.

If a voyage which might otherwise be legal is carried out by the assured in an illegal manner (*e.g.* through his violating some statutory rule of navigation or stowage) it may be rendered an illegal voyage, so that the assured cannot recover on his insurance. The cases which prompt the insertion in the section of the words "so far as the assured can control the matter" decide that where the illegality during the voyage is solely due to the acts of the master¹⁰⁾, the assured is not affected thereby. Such cases do not deal with the question as a matter of implied contract between the assured and his underwriter.

IX. The Voyage.¹¹⁾

When an insurance is effected upon a named voyage the underwriter is only liable for losses that occur within the limits of that voyage¹²⁾. There are various particular points that illustrate this fairly obvious rule.

Commencement of voyage. When the named voyage is either "at and from" a place, or "from" a place, the ship need not be at the place at the time when the policy is effected. But she must be at the place and start on the voyage within a reasonable time, or the underwriter may avoid the policy¹³⁾. Thus when a policy was

¹⁾ M. Ins. Act, sect. 36 (1).

²⁾ M. Ins. Act, sect. 36 (2).

³⁾ See above under "Non-Compliance with Warranty".

⁴⁾ See *e.g.* *Bell v. Carstairs* (1811) 14 East, 374, at p. 375, and especially Lord Ellenborough at p. 385.

⁵⁾ *Infra*, p. 533.

⁶⁾ *Dawson v. Atty* (1806) 7 East, 367. Note that sect. 36 (2) of the Act refers only to "a ship".

⁷⁾ M. Ins. Act, sect. 41.

⁸⁾ M. Ins. Act, sect. 3 (1).

⁹⁾ He could of course pay a loss on the illegal contract. But he could not in Court waive the illegality, as he could waive a breach of warranty.

¹⁰⁾ Cf. M. Ins. Act, sect. 55 (2) (a).

¹¹⁾ M. Ins. Act, sects. 42—49.

¹²⁾ Cf. M. Ins. Act, sect. 75 (2).

¹³⁾ M. Ins. Act, sect. 42 (1).

effected on 13th July upon a ship "at and from Montreal," and the ship did not arrive at Montreal until 30th August, the underwriter was discharged. What is a reasonable time is in every case a question of fact¹⁾. It is no answer for the assured to prove that the delay was occasioned by circumstances beyond his control²⁾.

If the delay was caused by circumstances known to the underwriter when he wrote the risk, so that he had reason to expect the delay, or if he waives the condition, *i.e.* acquiesces in the delay as venial, the assured does not lose the benefit of his policy³⁾. The reason is fairly obvious. The underwriter fixes the premium for the named risk: if he is aware that delay in its commencement is probable he takes it into account in so fixing the premium. The principle involved is akin to that underlying the rules as to concealment and disclosure of material facts.

The time when "the contract is concluded", within the meaning of sect 42 (1) of the Act is the initialling of the slip, not the signature of the policy⁴⁾.

Abandonment of voyage. If the ship does not sail from the place of departure named in the policy it is fairly obvious that the risk never attaches, and the underwriter cannot possibly be liable for any loss to the ship occurring after she has sailed from a different port altogether⁵⁾.

If the ship sails from the named place of departure but not for the named destination the risk equally does not attach⁶⁾. She is not upon the insured voyage. If she were insured from London to Monte Video, and she in fact sails from London to Capetown, the underwriter would not be liable for a loss at the mouth of the Thames.

Change of Voyage. In the last case the ship never started for the named destination. If she does start from the named place of departure for the named destination, but in the course of the voyage her destination is changed to a different place, then there is said to be a change of voyage, and the underwriter is discharged from liability after the determination to change the voyage is manifested⁷⁾. Thus if a ship is insured from London to Monte Video and starts from London to Monte Video, but the owner by signal from Beachey Head in the English Channel orders the captain to proceed to Capetown instead, the underwriter will be liable for any loss sustained before, but not for any loss that occurs after this order is signalled, not even for a loss after Beachey Head when the ship is still on the course she would have had to make if bound for Monte Video.

Deviation. There is yet another possibility. The ship may sail from the named place bound for the named destination, but during her voyage she may depart from the proper course to that destination⁸⁾. This is called a deviation. What is the "proper course" of the voyage, for the purpose of this rule, is either the course specified in the policy⁹⁾, or, if it is not so specified, the usual and customary course between the named ports of departure and destination¹⁰⁾. Thus if a ship is insured from London to Monte Video there would be a deviation if she sailed to Monte Video calling at Capetown on the way.

Where there is a deviation without lawful excuse¹¹⁾ the underwriter is discharged altogether from liability from the time of the deviation¹²⁾. Even if the ship gets back again on her proper course the underwriter is not liable for any loss¹¹⁾. Thus if a ship was insured from London to Bordeaux, and after leaving London she went off to Hamburg and thence to Bordeaux, the underwriter would be discharged from the moment she turned off her course to go to Hamburg: and if she came back from Hamburg without any accident and passed down the Straits of Dover for Bordeaux,

1) M. Ins. Act, sect. 88.

2) Contrast the rule as to deviation or delay in the course of the voyage, discussed below.

3) M. Ins. Act, sect. 42 (2).

4) *Maritime Co. v. Stearns* (1901) 6 Com. Cas. 182. See M. Ins. Act, sect. 89.

5) M. Ins. Act, sect. 43.

6) M. Ins. Act, sect. 44.

7) M. Ins. Act, sect. 45.

8) In the language of Casaregis — *Iter navis*, the course of the ship, differs from *iter viaggii*, the insured voyage.

9) M. Ins. Act, sect. 46 (2) (a).

10) M. Ins. Act, sect. 46 (2) (b).

11) See below as to Excusable Deviation.

12) M. Ins. Act, sect. 46 (1).

the underwriter would not be liable for any loss in the Straits or after. Nor does it matter whether the deviation has or has not increased the perils of the voyage.

It is the fact of deviation that is important. A mere intention to deviate, if not acted upon, has no effect¹⁾.

If there are several ports of discharge named in the policy the ship must, in the absence of lawful excuse²⁾, proceed to them or to such as she does go to, in the order named in the policy³⁾. If she does not, there is a deviation which relieves the underwriter³⁾. Thus under a policy "from London to Palermo, Messina and Naples," if the ship went to Naples and then to Palermo and Messina, the underwriter would be liable for no loss after the ship left the route for Palermo to proceed towards Naples. But she may go to Naples only if that is her only intended destination.

If there are several ports of discharge indicated but not named in the policy: *e.g.* "to any port or ports on the West Coast of South America" the ship must proceed to such ports as she does go to in their geographical order. If not there is a deviation⁴⁾.

Delay. The proper course of the insured voyage may be departed from not only in respect of place, but also in respect of time. The voyage must be carried on with all reasonable dispatch. If, without excuse⁵⁾, there is unreasonable delay the underwriter is discharged from the time when the delay becomes unreasonable⁶⁾. What is an unreasonable delay is in any particular case a question of fact⁷⁾. It is immaterial whether the delay in fact increases the risks of the voyage or not. Thus if a ship was insured in the winter from A to B and C, she might, by being laid up for some time at B, have a summer instead of a winter voyage from B to C. None the less the underwriter would be discharged from liability directly the delay at B became excessive and therefore unreasonable.

The word "deviation" is commonly used to denote delay during the voyage as well as deviation in the stricter sense (*i.e.* departure from the proper route). And under the deviation clause⁸⁾ deviation by delay as well as by change of route is held covered⁹⁾.

Excuses for deviation or delay. Deviation or delay is excused, and does not affect the right to recover under the policy, if it is justified by the express or implied terms of the policy, or if it is made necessary by some physical or moral constraint. The Marine Insurance Act specifies¹⁰⁾ excuses for deviation or delay under seven heads as follows:

1. Where it is authorised by any special term in the policy. Thus in a policy from A to B there might be a clause: "With leave to call and land cargo at C." Going to C would then be no deviation. But there must still be no departure from the implied agreement to carry on the voyage with reasonable dispatch. Therefore a delay at C for an unreasonable time would constitute a deviation, even though going there without undue delay would not.
2. When it is caused by circumstances beyond the control of the captain or the assured. This is the most important of all the rules. Therefore delay in a port by reason of insufficient water on the bar, or being driven out of the proper course by bad weather, or any similar deviation or delay that is clearly involuntary, is excused.
3. Where it is reasonably necessary to comply with an express or implied warranty. Thus if a river steamer were insured down a river to a port at its mouth and from thence across the sea, (which would involve a warranty of seaworthiness of varying degrees for the two stages by river and by sea), time reasonably occupied at the port in making her seaworthy for the sea voyage would not constitute any deviation. So under a policy "from A to B and

¹⁾ M. Ins. Act, sect. 46 (3).

²⁾ See below as to Excusable Deviation.

³⁾ M. Ins. Act, sect. 47 (1). Of course the order in which ports are named in the policy might be held to be overridden by the obvious necessities of the case — *e.g.* under a policy "from New York to Manchester and Liverpool".

⁴⁾ M. Ins. Act, sect. 47 (2).

⁵⁾ See below as to Excuses for deviation or delay.

⁶⁾ M. Ins. Act, sect. 48.

⁷⁾ M. Ins. Act, sect. 88.

⁸⁾ See below.

⁹⁾ *Hyderabad Co. v. Willoughby* [1899] 2 Q. B. 530.

¹⁰⁾ M. Ins. Act, sect. 49 (1).

- while there and thence to C." with a warranty, "not to sail from B before 1st April", any delay at B to wait for 1st April would be excused.
4. Where reasonably necessary for the safety of the ship or other insured property, *e.g.* putting into a port of refuge for repairs of the ship, or putting into a port to attend to cargo which has been damaged and requires to be dried or reconditioned.
 5. For the purpose of saving human life on the insured or on any other ship. Life Salvage always justifies deviation or delay. On the other hand deviation or delay to save property where no lives are in danger, and for the benefit of the assured's pocket in earning salvage, is not excusable.
 6. For the purpose of obtaining medical or surgical assistance for any person on board the ship.
 7. Where the deviation is caused by barratry¹⁾ of the master or crew, if barratry is one of the perils insured against. Deviation caused by barratry of the crew would be covered by rule 2 above. Deviation by barratry of the master would not.

When the cause which excuses deviation or delay ceases to operate the ship must resume the insured voyage and prosecute it with reasonable dispatch²⁾. The *Mar. Ins. Act*²⁾ speaks of her "resuming her course". This does not mean that she must necessarily get back to the spot from which she deviated. If, for example, a steamer insured from Monte Video to London necessarily puts into Pernambuco to repair damage, she may, when the damage is repaired, sail straight from Pernambuco to London without going back to the spot from whence she left her original course to London in order to bear up for Pernambuco.

Deviation Clause. The underwriter sometimes agrees by a special clause that in the event of deviation he shall be entitled, not to the discharge from liability that the law gives him, but only to an increase of premium to be agreed³⁾. An example of such a clause is: "In the event of the ship making any deviation or change of voyage it is mutually agreed that such deviation or change shall be held covered at a premium to be agreed."⁴⁾ It will be noticed that this refers to "deviation" and "change of voyage". These words will be construed strictly, and they do not cover anything beyond what is strictly a deviation, (including deviation by delay) or change from the insured voyage after *that* voyage has begun. They cannot be used to cover a voyage which from its beginning is other than the insured voyage and is substituted for it⁵⁾, even though that other voyage is in fact no more hazardous than the insured voyage. In other words they only cover "change of voyage" or "deviation" but not "abandonment of voyage", as those are described under those headings above.

X. Assignment of Policy.⁶⁾

A marine policy may be assigned unless it contains terms expressly prohibiting assignment⁷⁾. Some policies issued by Mutual Associations⁸⁾ prohibit assignment without the consent of the Association: this is to safeguard the Association as to the payment of calls. The ordinary policy of Lloyd's or the Companies not only does not prohibit, but by its opening words⁹⁾ contemplates assignment. The underwriters on a time policy on ship or steamer sometimes guard themselves against the transference of the vessel and its insurance to new owners, in whom they have not confidence, by a clause to this effect: "In the event of the vessel being sold or transferred to new managing owners during the currency of this policy, then, unless the underwriters agree in writing to such sale or transfer, this policy shall be cancelled immedia-

¹⁾ See No. 11 of the Rules for Construction of the Policy in Schedule I of the *M. Ins. Act*.

²⁾ *M. Ins. Act*, sect. 49 (2).

³⁾ Cf. the similar clause as to breach of warranty, *supra*, pp. 518, 522.

⁴⁾ If the parties cannot agree on what is a reasonable premium the Court must settle it as a question of fact. *M. Ins. Act*, sect. 88. To the clause as above quoted there are often added the words, — "provided due notice be given by the assured on receipt of advice of such deviation or change of voyage".

⁵⁾ *Simon Israel v. Sedgwick* [1893] 1 Q. B. 303.

⁶⁾ *M. Ins. Act*, sects. 50—51.

⁷⁾ *M. Ins. Act*, sect. 50 (1).

⁸⁾ See *M. Ins. Act*, sect. 85 and *infra* p. 563, under *Mutual Insurance*.

⁹⁾ "As well in his own name as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain."

tely after the vessel's safe arrival at her next port, if in ballast, or final port of discharge, if loaded; a *pro rata* daily return of premium being granted."¹)

A policy may be assigned either before or after loss²). Before loss a policy can only be assigned to one who is also the assignee of the property insured: if the assignee of the policy has not also the property he will have no insurable interest and therefore cannot make any claim. For anyone who seeks to recover under a policy must, a) be the owner of the policy and its benefits, and b) have an insurable interest as the foundation of the right to any benefit under the policy³). It follows that if an assured parts with or loses his interest in the subject-matter insured he can no longer recover anything under the policy, as having no insurable interest. And as he has no insurable interest the policy in his hands is mere waste paper. He cannot assign it as an effective document to anyone else. The only effective assignment of the policy he can make is to one who takes his insurable interest at the same time, *i.e.* by assigning the policy at the time when, and to the person to whom, he transfers the insured property⁴).

But after loss, and in respect of the right to recover for the loss, the policy may be effectively assigned without any accompanying transfer of the property: indeed so far as the property is lost there is nothing to assign except the right to recover under the policy⁵). The assured in fact assigns the right to recover under the policy which is already complete by reason of a loss having occurred at a time when he, the assignor, had an insurable interest⁶).

There may, however, be successive partial losses under a policy. The assignment of the policy after one loss, without assignment of the insured property, will only be effective in respect of that loss, but not in respect of any future losses. Thus if a ship sustain a particular average loss the assured may assign to anyone the right to recover under the policy for that loss. But in regard to future losses he can only assign the benefit of the policy to one to whom by assigning the property in the ship he gives an insurable interest⁷).

An assured can therefore "pass the beneficial interest in a policy" either a) before loss, and in respect of future losses, to the assignee of the insured property, or b) after loss, and in respect of that loss, to anyone.

Where a policy has been assigned "so as to pass the beneficial interest in it" the assignee can sue the underwriter in his own name⁸), alleging an insurable interest in himself, if the assignment to him was before the loss, or in the assignor, if it was after the loss. The underwriter is entitled in such an action to raise not only any defence open to him against the assignee, (*e.g.* that the loss was not caused by any peril insured against), but also any defence arising out of the policy that would have been open to him against the assignor or the person by whom the policy was effected, (*e.g.* that there was concealment of a material fact on the policy being originally effected⁹). He cannot raise against the assignee a claim he has against the assignor which does not arise out of the policy assigned (*e.g.* a claim for premiums due from the assignor on other policies later in date)¹⁰).

Method of assignment. No particular formality is necessary to affect an assignment of the policy¹¹). An indorsement on the policy is the most obvious method. Assignment of a policy is commonest in the case of the sale of goods upon *c.i.f.* terms. In that case the contract of sale merely by the use of the phrase "*c.i.f.*" stipulates for the assignment of a policy covering the goods, and the policy is effectively assigned by being handed over to the purchaser together with the bill of lading in fulfilment of the contract of sale.

¹) See *Pyman v. Marten* (1907) 13 Com. Cas. 64. As to return of premium see below p. 561.

²) M. Ins. Act, sect. 50 (1).

³) M. Ins. Act, sect. 4.

⁴) M. Ins. Act, sect. 51. See also under *Insurable Interest*, *supra*, pp. 510, 512.

⁵) M. Ins. Act, sect. 51, *proviso*.

⁶) M. Ins. Act, sect. 6 (1).

⁷) The proviso to sect. 51 of the M. Ins. Act might have been better drafted by the addition of the words "and in respect of such loss". The draftsman probably had in mind a total loss only.

⁸) M. Ins. Act, sect. 50 (2).

⁹) M. Ins. Act, sect. 50 (2).

¹⁰) *Pellas v. Neptune Co.* (1879) 5 C. P. D. 34.

¹¹) M. Ins. Act, sect. 50 (3).

XI. The Premium.¹⁾

The amount of the premium is usually²⁾ expressed in the policy, in a Lloyd's policy by stating the rate per cent., in a Company's policy by stating the equivalent of that rate upon the amount insured. If a variation in the rate according to the risks that may in fact be run is agreed upon this is provided for either by a stipulation as to the payment of extra premiums by the assured, or by a stipulation that the underwriter shall return part of the expressed premium, in certain events³⁾.

The ordinary policy contains a statement by the underwriter admitting that he has received the premium: "confessing ourselves paid the consideration due unto us for this assurance by the assured, at and after the rate of 4)." It is therefore fairly obvious that in the absence of agreement to the contrary it would be the duty of the assured to pay the premium to the underwriter when he receives the policy from him⁵⁾.

But hardly any policies are ever effected directly by the assured with the underwriters. They are effected through insurance brokers, and the intervention of the insurance broker, who is the agent of the assured⁶⁾, has by long established custom given rise to very curious results, in variation of the ordinary law of principal and agent and applying only to the business of Marine Insurance. The rule thus established is⁷⁾ that the underwriter looks to the broker alone as his debtor for the premium, and not to the assured (*i.e.* he can only sue the broker, but not the assured, for the premium), while the assured is entitled to look to, and to sue, the underwriter for any loss under the policy or for any return of premium⁸⁾.

The underwriter therefore can never sue the assured for the premium. The Mar. Ins. Act puts this on the ground that the receipt clause in the policy, quoted above, is conclusive as between the underwriter and the assured, (though not between the underwriter and the broker)⁹⁾. But even under a policy containing no receipt clause but an express promise by the assured to pay the premium it has been held that the underwriter cannot sue the assured for the premium¹⁰⁾. It is in all cases a debt due solely by the broker. In truth it is the custom (now translated into a rule of law)¹¹⁾ and not the clause in the policy that prevents the underwriter from claiming the premium from the assured.

Another curiosity of the business practice is that the broker, who is the agent of the assured, is in appearance paid not by him but by the underwriter, though ultimately of course it is the assured who pays for his services. This is because the gross premium payable to the underwriter is by practice subject to a commission of 5 per cent, and a further discount, on the resulting figure, of 10 per cent; *i.e.* if the premium is £ x per cent, what the underwriter in fact receives is £ $x - \frac{1}{20}x - \frac{1}{10}(x - \frac{1}{20}x)$. The broker keeps the 5 per cent. commission as his remuneration, and either keeps the 10 per cent. discount, or accounts for it to the assured, as may be arranged between them¹²⁾.

In practice the underwriter does not receive the premium on each policy from the broker when he issues it to him. There are ordinarily many such transactions between them, and the account for premiums due on various policies is settled periodically between the broker and the underwriter. The broker, being liable to the underwriter for the premium (less the commission and discount), settles as he likes with the assured for the gross premium, less the 10 per cent. discount if that is to be allowed to the assured.

¹⁾ M. Ins. Act, sects. 52—54.

²⁾ In a policy issued by a Mutual Association (see M. Ins. Act, sect. 85, and *infra* as to *Mutual Insurance*) the policy may only refer to the Rules of the Association which provide for the rates of premium.

³⁾ See below as to *Return of Premium*.

⁴⁾ Form of policy, M. Ins. Act. First Schedule.

⁵⁾ M. Ins. Act, sect. 52.

⁶⁾ See above under *Business Methods in Marine Insurance*, at p. 508.

⁷⁾ M. Ins. Act, sect. 53 (1).

⁸⁾ As to Return of Premium, see below p. 560.

⁹⁾ M. Ins. Act, sect. 54.

¹⁰⁾ *Universo Co. v. Merchants Co.* [1897] 2 Q. B. 93.

¹¹⁾ See *Introduction* p. 508.

¹²⁾ Sometimes by arrangement the broker hands over to the assured half of the 5 per cent. commission as well as the 10 per cent. discount.

Broker's Lien. The broker, who is liable to the underwriter for the premium and has paid the stamp duty on the policy, can secure himself as against the assured by exercising a lien on the policy, *i.e.* can refuse to give up the policy to the assured unless he makes good to him the premium (which, as has been shown, includes the broker's commission) and the stamp duty¹). The broker's lien as against the assured who employs him is not merely a special lien, *i.e.* a right to retain any one policy to secure payment of the charges on that policy, but is a general lien, *i.e.* a right to retain any policy to secure payment of his general insurance account against his principal — the balance due upon all policies he has effected upon his behalf²).

But a broker's employer is very often not the actual assured but another broker. If A, a Liverpool shipowner, employs B, a Liverpool broker, to insure his ship, B may employ C, a London broker, to effect part of the insurance in London. C's right of lien on any policy he thus effects may be exercised against both A and B, and may be exercised against A even though A has in fact paid to B the premium and stamp duty for the policy effected by C., so long as B has not paid C. But as C knows that B is an agent for A, he cannot exercise against A a lien on one of A's policies to secure the balance of his account on all policies effected by him for B. He can only exercise his lien to secure the amount he is owed in respect of A's policies. The broker, in short, can only exercise his full right of lien to secure the general balance due to him on all policies as against an employer who is, or who has been reasonably believed by him to be, a principal and not an agent for another³).

XII. Collection of Losses.

When a loss occurs which is recoverable from underwriters it has to be collected, if the total amount insured is of any size, from a number of underwriters or companies. The broker who has effected the policies is in a much better position to collect the amounts due than is the assured himself, and consequently the broker is usually employed to do this. He presents the policies to the various underwriters, with the amount of the claim indorsed on the back, and with them the average adjustment and other documents proving the claim. The underwriters, if they agree to pay the claim as made (and this happens in the vast majority of cases), initial the indorsement on the policy, and settle the claim with the broker. The broker then pays over to the assured the amount he has collected, deducting one per cent. as his remuneration for the business of collection.

The underwriter, it is written above, "settles the claim with the broker". In the case of large claims (*e.g.* for a total loss) the underwriter gives the broker a cheque for the amount. But in the case of small claims these are not paid over to the broker, but are settled in account between the broker and the underwriter in their periodical accounts, claims due by the underwriter being set off against premiums due by the broker, and the balance paid over by the one or the other. The rule of English law as regards the authority of an agent who is employed to collect money on behalf of his principal is that the agent is only authorized to receive the actual money due, and the debtor who owes the money, if paying to one who is known to be an agent, is only discharged as against the principal if he pays over to the agent the actual money due. A settlement in account with the agent would not constitute payment to him within the above rule. But there is another rule of English law which is that if a principal employs an agent to transact business in a particular market, and knows that there are certain customary methods of business used in that market, he is bound by the acts of the agent which are done in accordance with those customary methods⁴). The result of these two rules is as follows. If the assured A employs a broker B to collect a loss on a policy from an underwriter C, and if C settles the loss with B by a settlement in account as above described, and if B then fails to pay over the amount so collected to A, then A can claim payment of the loss from C (alleging that payment to B by the settlement in account was no proper payment to his agent), unless C can prove that A knew of, and therefore impliedly authorized, the method of payment by settlement in account with the broker, which is the custom in the Marine Insurance market⁵).

¹) M. Ins. Act, sect. 53 (2).

²) M. Ins. Act, sect. 53 (2).

³) M. Ins. Act, sect. 53 (2).

⁴) Cf. M. Ins. Act, sect. 87 (1) as to "usage".

⁵) Cf. *Matvieff v. Crosfield* (1903) 8 Com. Cas. 120.

XIII. Ratification of unauthorized insurance.

A broker or other agent may sometimes effect an insurance without receiving instructions or authority to do so. The principal on whose behalf he has intended to act, upon hearing of what he has done, can ratify his act and this subsequent ratification is equivalent to previous authority¹).

This rule is part of the general English law as to agency²). By that law, to enable the principal to ratify, the agent must have intended to effect the contract on the principal's behalf and with a view to his possible adoption of it³). Therefore a broker cannot effect a speculative insurance on behalf of anyone who may afterwards apply to him, so as to enable such person to ratify it. Nor can a broker having effected a provisional insurance on the instructions of A, who declines to agree to the rate or terms, afterwards apply the slip for an insurance he is instructed to get by B, so as to enable B to adopt and ratify it⁴). In other words the broker must have effected the insurance on behalf of the principal who actually ratifies it, if such ratification is to be effective.

The general law of agency does not permit a principal to ratify an unauthorized act at a time when he himself could not do the act in person⁵). There is in marine insurance⁶) a striking exception to this rule, in that the principal may ratify and effectively adopt the unauthorized contract of insurance even after a loss has occurred⁷).

XIV. Loss and abandonment.⁸)

There is one great rule as regards losses recoverable under a marine insurance policy (to which, however, there is one exception, and perhaps two⁹), "*Causa proxima non remota spectatur*". The underwriter is liable for any loss which is proximately caused by a peril insured against; conversely, the underwriter is not liable for any loss which is not proximately caused by a peril insured against¹⁰). The application of this rule is strict, and, though it sometimes involves apparent hardship, either to the assured or to the underwriter, is necessary and logical.

Thus if a ship goes ashore owing to the negligence or misconduct of her master and crew, and becomes a wreck, that is a loss by perils of the seas¹¹). Where a ship was driven by a gale on the coast of France and there captured by the enemy, this was held a loss by capture and not a loss by perils of the seas¹²). Six thousand bags of coffee were insured by an ordinary policy but "free from all consequences of hostilities." The Confederates in the Civil War in U.S.A. extinguished a light on Cape Hatteras. In consequence the vessel went ashore. 150 bags were saved, the rest lost, but 1000 more bags could have been saved but for the interference of the Confederate troops. It was held that the bulk of the goods was lost by perils of the sea and not as a consequence of hostilities, but that the 1000 bags were lost as a consequence of hostilities¹³). Where a ship was insured against ordinary risks, including barratry, but "free from capture and seizure", and owing to the barratrous conduct of the master in smuggling the ship was seized by Spanish revenue officers, this was held to be a loss by seizure and not a loss by barratry¹⁴).

¹) M. Ins. Act, sect. 86.

²) See title "Agency", supra p. 168.

³) The agent must also have purported to act as agent for some principal (*Keighley v. Durant* [1901] A. C. 240), but a broker, by reason of his business, always purports to act as an agent.

⁴) *Byas v. Miller* (1897) 3 Com. Cas. 39.

⁵) *Bird v. Brown* (1850) 4 Ex. 786 at p. 799.

⁶) It is an exception strictly confined to Marine Insurance, and does not apply to Fire Insurance by land. *Grover v. Matthews* [1910] 2 K. B. 401.

⁷) M. Ins. Act, sect. 86.

⁸) M. Ins. Act, sects. 55—63.

⁹) See below as to *Exceptions to the rule of Causa Proxima*.

¹⁰) M. Ins. Act, sect. 56 (1).

¹¹) M. Ins. Act, sect. 55 (2) (a).

¹²) *Green v. Elmslie* (1794) 1 Peake, 278.

¹³) *Ionides v. Universal Co.* (1863) 14 C. B. N. S. 259. The rule as to proximate cause was applied in construing the clause as to "consequences" as well as in regard to the perils insured against. There was, of course, no loss of the 150.

¹⁴) *Cory v. Burr* (1883) 8 App. Cas. 393.

If rats or vermin gnaw or damage insured cargo, there is no loss under an ordinary policy. The action of rats or vermin is not a peril insured against, and is not included in "perils of the seas"¹⁾. But if rats gnaw a pipe in the hold, and sea water thus leaks into the hold and damages the cargo, this is a loss by "perils of the seas". The fortuitous incursion and effect of sea-water, however brought about, is a peril of the seas²⁾. So where, while a vessel was being loaded, one of the sea connexions was left open owing to the carelessness of an engineer, and sea water came in and damaged the cargo, this was held to be a loss by perils of the sea³⁾.

The following two cases may be contrasted. A steamer was insured against fire only, but not against perils of the seas. She was stranded and very badly damaged, and then caught fire and was burnt. It was held that the assured could recover the whole insured value for a total loss by fire⁴⁾. During the Russo-Japanese war a steamer was insured against total loss by perils of the seas, but "free of capture, seizure and the consequences of hostilities". She was captured by the Japanese, and while being taken by the Japanese cruiser to a Japanese port and prize Court she was totally lost by a peril of the seas. It was held that she was lost by capture and the underwriters were not liable⁵⁾.

There are of course cases to be found in which it may be difficult to recognize the strict application of the rule. A ship was loaded with hides and tobacco. Sea water damaged the hides but not the tobacco. The hides however became putrid and their fumes injured the tobacco. It was held that this damage to the tobacco was a loss by perils of the sea⁶⁾. The reasoning applied was that "where mischief arises from perils of the seas and the natural and almost inevitable consequence of that mischief is to create further mischievous results the underwriters are responsible for the further mischief so occasioned". It may be doubted whether this case can be supported⁷⁾. Contrast the following case: an insured ship while loaded with cottonseed was sunk by collision; she was raised, but the cargo was turned into a putrid mass of which the consignees refused to take delivery. The shipowner was at great expense to get the stuff out of the ship and claimed this expense from his underwriters. It was held that they were not liable⁸⁾.

There must, of course, be damage caused by a "peril", which connotes something fortuitous and accidental though not necessarily violent. Therefore damage to the ship or goods by ordinary wear or tear, or ordinary leakage or breakage, or any other ordinary and normal operation of natural causes, is not recoverable⁹⁾. Thus damage to the structure of the ship by the gnawing of rats is no loss on the ship policy. But when water comes in through a hole gnawed by rats and damages cargo, the incursion of water is a peril, qua the cargo, and the damage to cargo is a loss on the cargo policy¹⁰⁾.

Exceptions to the Rule of Causa Proxima. 1. There is one undoubted exception to the rule that the underwriter is liable for any loss which is proximately caused by a peril insured against, *viz.* where such a loss is more remotely caused by the misconduct of the assured¹¹⁾. Thus a ship sank at sea. She was insured under a time policy, so there was no warranty of seaworthiness. The ship having sunk to the bottom there was clearly a loss proximately caused by perils of the seas. It was held however that the underwriters were not liable if they proved that the ship was knowingly sent to sea by the assured in an unseaworthy condition, and that in consequence of this she sank¹²⁾. So where a ship was lost by capture, but her condemnation was

¹⁾ M. Ins. Act, sect. 55 (2) (c).

²⁾ Cf. No. 7 of Rules for Construction of Policy — M. Ins. Act, Schedule I.

³⁾ *Davidson v. Burnand* (1868) L. R. 4 C. P. 117.

⁴⁾ *Woodside v. Globe Co.* [1896] 1 Q. B. 105.

⁵⁾ *Andersen v. Marten* [1908] A. C. 334.

⁶⁾ *Montoya v. London Assurance* (1851) 6 Ex. 451.

⁷⁾ If its reasoning is sound it is difficult to see why there was not, on similar reasoning, loss on the policy in *Taylor v. Dunbar*, cited *infra*, on p. 535 under *Delay*.

⁸⁾ *Field S. S. Co. v. Burr* [1899] 1 Q. B. 579.

⁹⁾ M. Ins. Act, sect. 55 (2) (c).

¹⁰⁾ Hence the M. Ins. Act, sect. 55 (2) (c) says — "the insurer is not liable for any loss . . . proximately caused by rats or vermin".

¹¹⁾ M. Ins. Act, sect. 55 (2) (a).

¹²⁾ *Thompson v. Hopper* (1856) 6 E. & B. 172. The effect of this case is given in M. Ins. Act, sect. 39 (5), see *Loss by Unseaworthiness which is no breach of warranty, supra*, p. 524.

due to the wilful act of the assured in sending her to sea without proper documents, it was held that the underwriters were not liable for the loss¹⁾.

What amounts to "misconduct" within this rule is not satisfactorily defined. Mere negligence on the part of the assured is not enough to bar his claim²⁾, though in one old case what was described as "*crassa negligentia*" was allowed to do so³⁾. Probably there must be on the part of the assured some wilful violation of a legal duty, or the breach by him of some contract made by him, either express or implied⁴⁾.

2. It is stated with more or less confidence in most of the text-books that there is a second exception to the rule as to *Causa Proxima*, viz. where the loss is more remotely caused by the inherent vice of the thing insured. Suppose a cargo of coal is insured *inter alia* against fire, and is destroyed or damaged by a fire occasioned by spontaneous combustion, are the underwriters liable? Most writers seem to answer in the negative. In the only case in point hemp was shipped in a wet or damaged condition, and fire occurred by spontaneous combustion. Lord Ellenborough, in deciding that the underwriters were not liable, said: "If the hemp was put on board in a state liable to effervesce, and it did effervesce and generate the fire which consumed it, upon the common principles of insurance law *the assured cannot recover for a loss, which he himself has occasioned*"⁵⁾. This seems to put the exemption of the underwriter upon the ground of misconduct of the assured, the rule previously considered. If unseaworthiness of the ship, which is inability to withstand the ordinary perils of the seas, may be considered "inherent vice" in the ship, the same result (viz. that the underwriter's exemption from a loss brought about remotely by "inherent vice" only arises when the circumstances involve "misconduct of the assured") seems to follow from a comparison of two well known cases⁶⁾. In the one⁷⁾ the facts were, or were assumed to be⁸⁾:

- a) The vessel was sent to sea in fact unseaworthy;
- b) Her unseaworthiness arose from a latent defect unknown to the owner, and there was no fault on his part;
- c) By reason of the unseaworthiness she went ashore and was lost:

it was held that the underwriters were liable for a loss by perils of the seas.

In the other⁹⁾ the facts were, or were assumed to be¹⁰⁾:

- a) The ship was sent to sea in fact unseaworthy;
- b) The assured wilfully and knowingly sent the ship to sea in this condition;
- c) By reason of her unseaworthiness she was lost by perils of the seas:

it was held that the underwriters were not liable for the loss.

If underwriters insure a cargo of coal against fire, which cargo is known to be liable to spontaneous combustion, there seems no reason, on general principles, why they should not be liable for loss by a peril so obviously involved in the adventure¹¹⁾.

The phrase "inherent vice" may be used not as indicating an exemption for a loss proximately caused by a peril insured against, but as stating affirmatively the proposition that there is no loss proximately caused by a peril insured against. Thus if fruit decays merely from the length of a voyage, you may say that there is no loss by any peril, or affirmatively that the loss is merely by inherent vice¹²⁾. The Mar.

¹⁾ *Bell v. Carstairs* (1811) 14 East, 374. See under *Nationality and Neutrality*, *supra*, p. 525.

²⁾ *Trinder Anderson v. Thames & Mersey Co.* [1898] 2 Q. B. 114.

³⁾ *Pipon v. Cope* (1808) 1 Camp. 434.

⁴⁾ *Willes J., Thompson v. Hopper* (1858) E. B. & E. at p. 1047.

⁵⁾ *Boyd v. Dubois* (1813) 3 Camp. 133.

⁶⁾ In both the policies were time policies, so that there was no warranty of seaworthiness.

⁷⁾ *Dudgeon v. Pembroke* (1877) 2 App. Cas. 284.

⁸⁾ The jury found fact b) as stated in the text, but could not agree as to the facts involved under a) and c). The House of Lords held that as the jury had found b) in favour of the assured, this made it unnecessary to order a new trial to have a) and c) determined, since, assuming the answers to be as stated in the text, the underwriters would still be liable.

⁹⁾ *Thompson v. Hopper* (1856) 6 E. & B. 172.

¹⁰⁾ In fact they were all assumed to be as stated in the text, the case arising on a point of pleading and demurrer.

¹¹⁾ Cf. remarks of Kennedy L. J. in *Greenshields v. Stephens* [1908] 1 K. B. at p. 62. It will be remembered that there is no implied warranty in a policy on goods that the goods are seaworthy. M. Ins. Act, sect. 40 (1).

¹²⁾ *Fawcus v. Sarsfield* (1856) 6 E. & B. 192 is really a case of this sort. "The arbitrator appears to find that" the loss "did not arise from any peril insured against, but from the vice of the subject of insurance" Lord Campbell, *ibid*, at p. 204.

Ins. Act in its only reference¹⁾ to "inherent vice" may well use the phrase in this manner.

Despite the opinions expressed to the contrary, the present writer considers it to be by no means clearly settled that there is this second exception to the rule of *Causa Proxima*.

Delay. Where loss is caused to goods by delay which is brought about by a peril insured against the underwriter is not liable. This is specifically laid down by the Mar. Ins. Act²⁾, though it is in reality only a particular application of the rule that the underwriter is only liable for loss proximately caused by a peril. In most cases his exemption may be asserted on the affirmative ground suggested above, viz. the loss was caused merely by the nature of the subject matter. Thus where 168 slaves were insured against sea perils from Africa to the West Indies, and the ship was so delayed by bad weather that 128 slaves died of privation, it was held that the underwriters were not liable³⁾. Similarly where meat was insured from Hamburg to London, and owing to delay from bad weather it became putrid, this was held to be no loss under the policy⁴⁾.

There is an apparent, though not a real difference, as regards insurance of freight. If by perils of the sea the ship is so damaged that to repair her will take an unreasonable time, the charterer or goods owner is entitled to put an end to the contract of affreightment, and the shipowner can then claim for a loss under his freight policy⁵⁾. But the right to earn, or chance of earning, freight is not a tangible thing like goods. The freight is not damaged by delay. The chance of earning it is in such a case proximately destroyed by the sea perils which damage the ship; the consequent delay is only an element in determining whether the charterer is relieved from the obligations of the contract of carriage, i.e. whether the freight is really lost by the damage to the ship.

In regard to loss of freight of this nature the underwriters very frequently insist on being exempt by the provision of a special clause in the policy, which runs to this effect: "Warranted free from any claim consequent upon loss of time, whether arising from a peril of the sea or otherwise".

Where the loss of freight arises not from the damage to the ship being so great as to entitle the charterer to refuse to ship his goods, but from the charterer having a special option secured to him by the terms of the charter under which he is entitled to refuse shipment if the ship is seriously damaged, the result is different. In that case it is held that the loss is not proximately caused by the peril insured against, but by the fact that the charterer has exercised his contractual right. The underwriters are therefore not liable for the loss of freight⁶⁾. The loss is proximately caused by the act of the charterer, and this is not a peril insured against.

Damage to Machinery. The case of the steamer *Inchmaree* that arose in 1887 was as follows. Her hull and machinery were insured by a time policy. The donkey engine was being used to pump water into the boiler. By the negligence of the engineer a certain valve was left closed whereby water was forced into the air chamber of the donkey pump and it was split. It was held that the damage to the pump was not a loss recoverable under the ordinary form of policy⁷⁾. The Mar. Ins. Act accordingly states that the underwriter is not liable "for any injury to machinery not proximately caused by maritime perils"⁸⁾.

As a result of this case it is now very usual to insert a clause in a policy on a steamer which is known as "the *Inchmaree* clause". It runs as follows: "This insurance is also specially to cover (subject to the free of average warranty⁹⁾) loss of or damage to hull and machinery through the negligence of master, mariners, engineers,

¹⁾ Sect. 55 (2) (c). "The insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject matter insured etc."

²⁾ M. Ins. Act, sect. 55 (2) (b). The section speaks of "ship or goods" but practically it can only be as regards "goods" that the position can arise.

³⁾ *Tatham v. Hodgson* (1796) 6 T. R. 656.

⁴⁾ *Taylor v. Dunbar* (1869) L. R. 4 C. P. 206.

⁵⁾ *Jackson v. Union Marine Co.* (1874) L. R. 10 C. P. 125.

⁶⁾ *Inman Co. v. Bischoff* (1882) 7 App. Cas. 670, but see also *The Alps* [1893] P. 109 and *The Bedouin* [1894] P. 1.

⁷⁾ *Thames & Mersey Co. v. Hamilton* (1887) 12 App. Cas. 484, overruling an earlier case in which a shipowner recovered for damage caused by the bursting of a boiler.

⁸⁾ M. Ins. Act, sect. 55 (2) (c).

⁹⁾ See below p. 553.

or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect¹⁾ in the machinery or hull, provided such damage has not resulted from want of due diligence by the owners of the ship, or any of them, or by the manager”.

Partial and Total Loss²⁾. A loss may be either total or partial. Any loss that is not a total loss is a partial loss³⁾. A total loss may be either a) an actual total loss, or b) a constructive total loss⁴⁾. If there is an insurance against “total loss” this will cover both an actual total loss and a constructive total loss⁵⁾, but a policy is sometimes expressed to be “against the risk of absolute total loss only”, in which case a constructive total loss is not covered. A partial loss may be either a) a particular average loss⁶⁾ or b) a general average loss⁷⁾, or c) a claim for salvage⁸⁾, or d) a claim for particular charges under the sue and labour clause⁹⁾. When a policy covers both partial and total losses (many policies of course being “against total loss only”), and the assured claims for a total loss, but his evidence proves only a partial loss, he may recover for the partial loss¹⁰⁾.

Actual Total Loss.¹¹⁾ There is an actual total loss, a) when the thing insured is destroyed altogether, as by perils of the sea, or by fire, or b) when the assured is entirely deprived of its possession, as by capture. A thing is destroyed within this rule when it ceases to exist in specie, *e.g.* when a wooden ship is turned into a mere “congeries of planks”, or an iron ship into a mass of old iron, which in either case can no longer be called a ship. So goods are destroyed when they are so damaged as to lose their species and no longer answer to the denomination under which they are insured, *e.g.* when barrels of cement are by water turned into lumps of stone, or fruit has become a mere putrid mass. By English law freight is payable on goods which arrive in specie though damaged. The test would be the same: if the damage is only such that freight remains payable, there is no actual total loss.

In the case of a constructive total loss, as will be seen, there must be a notice of abandonment as a condition precedent to the right to recover. In the case of an actual total loss no notice of abandonment need be given¹²⁾.

Missing Ship. Where the ship concerned, *i.e.* as itself insured, or as carrying insured goods, or as earning insured freight, is missing, and after the lapse of a reasonable time no news of her is received, an actual total loss will be presumed¹³⁾. What is a reasonable time is a question of fact¹⁴⁾. By business practice a ship of which no news has been heard is after a certain time posted as missing at Lloyd’s, and insurances upon her are then paid. There is nothing to prevent an assured suing his underwriters before she is so posted, alleging that a reasonable time has elapsed, but he would be well advised to wait for her to be posted.

The presumption in such a case would be that the ship has foundered, *i.e.* been lost by perils of the sea. If a ship was insured against fire only, the assured would not recover, unless he could give some evidence to prove a loss by fire, *e.g.* that the ship was seen on fire.

The actual date of loss may, of course, be important when a ship is insured under a time policy. The assured need not achieve the impossible by proving the actual date; it may be presumed (which means guessed) from all the circumstances. Thus where a ship sailed on a 25 days voyage, 18 days before the lapse of a time

¹⁾ These vague words are obviously difficult to apply. See *Ocean Co. v. Faber* (1906) 11 Com. Cas. 179 and *Hutchings v. Royal Exchange Co.* [1911] 2 K. B. 398.

²⁾ M. Ins. Act, sect. 56.

³⁾ M. Ins. Act, sect. 56 (1).

⁴⁾ M. Ins. Act, sect. 56 (2). In business the phrase “absolute total loss” is used for what the Act calls “actual total loss”.

⁵⁾ M. Ins. Act, sect. 56 (3).

⁶⁾ See below, p. 546.

⁷⁾ See below, p. 546.

⁸⁾ See below, p. 546.

⁹⁾ See below, p. 556.

¹⁰⁾ M. Ins. Act, sect. 56 (4). This must be taken subject to the rules of procedure as to pleading, and the judge’s discretion as to costs. The assured will be well advised to make an alternative claim for a partial loss in any case that is doubtful.

¹¹⁾ M. Ins. Act, sect. 57.

¹²⁾ M. Ins. Act, sect. 57 (2).

¹³⁾ M. Ins. Act, sect. 58.

¹⁴⁾ M. Ins. Act, sect. 58.

policy, and she was never heard of again, the assured on giving evidence of bad weather in the early part of the voyage was allowed to recover¹).

If a total loss is paid under such circumstances, and the ship afterwards turns up, having been extraordinarily delayed, the underwriters could probably claim repayment of their proportions as for money paid under a mistake of fact. If they paid under a judgment, i.e. it was the Court that made the mistake, they would have the ship as their property under the principle of subrogation²).

Constructive Total Loss.³) There is an actual total loss when the thing insured is destroyed, or the assured is absolutely deprived of it. There is a constructive total loss when the thing insured is so damaged that to repair or reinstate it will cost more than it will then be worth, or when it is so placed that to recover it will cost more than it will be worth⁴). The thing insured is a total loss commercially though not physically. The test of what constitutes a constructive total loss used in the cases has been either a) the monetary test, comparison of the cost of repair or recovery with the resulting value obtained, or b) a vaguer test by reference to the hypothetical "prudent uninsured owner", whether, being uninsured and prudent, he would or would not attempt to repair or recover the property. The latter test was more usual and more natural in older times, when facilities of proof as to expenses and values were less readily available. In modern times the test of the prudence of the uninsured owner is measured by the figures the Court can consider. The two tests were, or should have been, always the same: the possibility of applying the first renders the second unnecessary. But where the expenses to be incurred are matters of hypothesis and conjecture it is still legitimate to invoke the supposed prudent uninsured owner in determining the conclusion to be properly inferred.

Thus if a ship is badly stranded, and is still on the ground when the assured makes his claim, it may be fairly obvious that she never can be got off. In that case her recovery is unlikely, however much be spent, and she is a constructive total loss⁵). But it may be fairly clear that by discharging cargo, waiting for spring tides, employing tugs, etc., she probably will be got off. How much she will then be found to be damaged may be more or less known, and consequently how much will be the cost of getting her repaired. Figures of expense and value may thus be available, but with wide margins of conjecture as to their certainty. In such a case the uncertain factors in the arithmetical test may properly be viewed with the eyes of the prudent uninsured owner.

But the case of constructive total loss that is most usually contested in Court is one in which there is much less margin for hypothesis. The ship, in such a case, has been got off the strand: the expenses of that operation are more or less accurately known: the extent of the damage she has sustained has been ascertained by surveys. The contest between assured and underwriters is the contest between their surveyors and repairers as to the extent of damage and the cost of its repair⁶). In this case the Court can leave the prudent uninsured owner out of account. It has to ascertain the actual amount of expenses and the resulting value, and decide the question of constructive total loss or no constructive total loss accordingly⁷).

Constructive total loss of ship. There is a constructive total loss of a ship by damage, when she is so damaged by perils insured against that the cost of repairing her will exceed her value when she is repaired⁸). The comparison is thus between a) the cost of repairs and b) the repaired value. As regards the latter factor, the repaired value, the law is that this is the actual value the ship will have when she is repaired: it is not the valuation of the ship in the policy⁹). But in most modern policies on ships or steamers there is inserted what is called the "Valuation Clause", as follows: "The insured value shall be taken as the repaired value in ascertaining whether the vessel is a constructive total loss".

1) *Reid v. Standard Co.* (1886) 2 T. L. R. 807.

2) See below, *Rights of Insurer on Payment*, p. 558.

3) M. Ins. Act, sect. 60.

4) M. Ins. Act, sect. 60 (1).

5) M. Ins. Act, sect. 60 (2) (i) (a).

6) Doubt arises not because it has been impossible for anyone to ascertain the facts, but because those who purport to have ascertained them differ as to what there was to see.

7) M. Ins. Act, sect. 60 (2) (i) (b).

8) M. Ins. Act, sect. 60 (2) (ii).

9) *Irving v. Manning* (1847) 1 H. L. C. 287. M. Ins. Act, sect. 27 (4).

The "cost of repairs" which must exceed the repaired value, or, if there is the valuation clause in the policy, the insured value, may well include many items of expense besides the actual repairing. It will include all the expenses subsequent to the disaster which are necessary to procure the reinstatement of the ship¹). Thus, if the casualty is a stranding, the expenses of getting the ship off the strand, of temporary repairs to enable her to be towed to a port for permanent repairs, of towage to that port, of dry docking there for surveys, of survey and preparation of specification for repairs, of agency and other expenses incidental to all this, and finally of the actual bill for doing the repairs, will be included.

The extent of the repairs to be done is not necessarily that which would be required to make the ship as good as she was before the accident happened. They must be enough to make her, not perhaps so good a ship as before, but a seaworthy ship fit to navigate the ocean with such cargoes as she has hitherto been meant to carry.

Of the items above specified as part of or incidental to the cost of repairs some, e.g. the cost of getting the ship off the strand, may well be general average expenditure, to which the cargo on board would contribute: or there may have to be a general average sacrifice of cargo by jettison, to which the ship must contribute. And of the damage to the ship some part (e.g. the loss of a mast which has been cut away) may have been a general average sacrifice to which the cargo will have to contribute. In making out the sum of items of cost of repairs a) you include the ship's share of any general average contribution (i.e. to general average expenditure or to general average sacrifice of an interest other than ship) or of salvage, and not the cargo's or freight's share²); but b) you include the whole cost of repairing any general average sacrifice of the ship, without deducting the contribution of cargo or freight thereto³). For the test is what would it cost to rescue and repair the ship, irrespective of the question whether part of this cost may be repayable by some other party⁴); but the expense of getting the ship off the strand is only the ship's share of the expenditure made to get off the ship and the cargo⁵). By the same reasoning there is no deduction made from the actual cost of doing repairs of any allowance for "new for old", such as is made in respect of the payment by underwriters for a particular average loss⁶).

Value of the wreck. When a ship has been badly damaged the position may be as follows. It will cost £12000 to repair her, and she will when so repaired be worth £14000. But her owner instead of repairing her can sell her in her damaged state for £3000. In these circumstances is there a constructive total loss? This question has been raised in several cases in modern times. The assured shipowner in such cases relied on the test of the prudent uninsured owner, and urged that he would obviously sell the ship as she was and pocket £3000, instead of being only £2000 to the good, by spending £12000, and so having the value of £14000. The underwriters on the other hand relied on the arithmetical test, cost of repair against repaired value, and contended that this was on principle the only test where all the facts and figures were available.

In 1903 the Court of Appeal decided⁷) in favour of the underwriters on this question, holding that the "value of the wreck" ought not to be taken into the account. The Marine Insurance Act was passed in December 1906 and there is no doubt that its draftsman intended to reproduce the law as laid down by the Court of Appeal in that case⁸).

¹) Which may include expenses incurred and paid by the underwriters themselves, acting under the "Waiver Clause". *Blairmore v. Macredie* [1898] A. C. 593.

²) *Kemp v. Halliday* (1866) L. R. 1 Q. B. 520.

³) M. Ins. Act, sect. 60 (2) (ii). The use of the word "future" in the last paragraph of this subsection is vague and difficult. Presumably the casualty to the ship is the point at which "futurity" is contemplated.

⁴) This is really the principle of M. Ins. Act, sect. 14 (3).

⁵) Similarly, as regards claims for them on the policy, a general average sacrifice is recovered in full, but only the ship's share of salvage charges or general average expenditure. M. Ins. Act, sects. 66 (4), 73.

⁶) See below, p. 550.

⁷) *Angel v. Merchants Co.* [1903] 1 K. B. 811.

⁸) M. Ins. Act, sect. 60 (2) (ii). He does so by omitting all reference to it rather than by any expression.

Subsequently the same point was raised in a case upon a policy effected before the Act was passed and to which therefore it did not apply. In this case the House of Lords in 1908 reversed¹⁾ the decision of the Court of Appeal, and held that the assured was entitled to have the value of the wreck taken into account.

The chief practical objection to this decision is that such a case as the following may well arise. A ship suffers damage which will cost £3000 to repair and she will then be worth £13000: but she can be sold unrepaid for £11000. No one can suggest that the ship is really a constructive total loss. But if the test of the prudent uninsured be alone employed it is clear that he will be £1000 better off by selling her than by repairing her. The House of Lords guarded against this objection by saying that it is only the value of a "wreck" and not of a merely damaged ship that may be taken into account. The difficulty, however, seems to be that in any case which is near the line (and a principle is chiefly necessary to apply in determining doubtful cases) this seems to involve a begging of the question. The conclusion to be determined is whether the ship is, or is not, a wreck which is not worth repairing: in deciding whether you may or may not employ one premiss in arriving at that conclusion you must by some means decide whether the ship is, or is not, a wreck.

Although there can be little doubt that the draftsman of the Mar. Ins. Act did not intend to vary the law as laid down by the Court of Appeal in 1903 it is possible that it may be held that the law as laid down by the House of Lords in 1908 does apply to a case under the Act. This possibility arises from the fact that nothing is said in it about this question of the value of the wreck, while sect. 91 (2) preserves the rules of the common law "save in so far as they are inconsistent with the express provisions of this Act". The point has not yet arisen²⁾.

The importance of this question has been much lessened by the circumstance that underwriters have commonly adopted the use of a special clause in policies, the effect of which is to counteract the decision of the House of Lords. This is done by an addition to the Valuation Clause, which now runs thus: "In ascertaining whether the vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account".

Constructive total loss of Goods. The same principle applies in regard to goods. But an insurance on goods, which have to be carried in a ship, necessarily differs from an insurance on a ship, which sails the seas of herself. Both ship and goods are insured for a certain voyage, the underwriter undertaking that they shall not be prevented by insured perils from completing that voyage. If the ship is damaged, the question as to constructive total loss concerns only the condition of the ship: if she can be repaired to be seaworthy she can complete her voyage. But if the goods be damaged the test of a constructive total loss cannot concern itself only with the condition of the goods. The goods may be very little damaged, and yet it may be impossible for them to arrive at their insured destination from lack of any means of carrying them there.

The test of a constructive total loss of goods, therefore, is whether the cost of repairing the damage *and* the cost of forwarding the goods to their destination will exceed their value on arrival there³⁾. Indeed there may be a constructive total loss of goods though the first factor, actual damage to the goods, be entirely absent. Thus goods were insured from the East to England, including land transit from Marseilles to Calais⁴⁾: they reached Paris when that city was besieged by the Germans and could not be forwarded, though they were undamaged. The assured having given notice of abandonment succeeded in an action for a constructive total loss, by the insured peril of "arrest, restraints, and detentions"⁵⁾.

As with the cost of repair to a ship, so with the cost of repairing and forwarding goods, account must be taken of all the expenses incidental thereto. Thus the cost of discharging, warehousing, reconditioning, and reshipping, the goods, together with the cargo's proportion, if any, of general average expenditure or salvage must be taken into account, as well as the actual "cost of forwarding" to the insured destin-

¹⁾ *Macbeth v. Maritime Co.* [1908] A. C. 144.

²⁾ Since the above was written it has been held by Bray, J., that under the Act the value of the wreck is *not* to be taken into account. *Hall v. Hayman* [1912] 2 K. B. 5.

³⁾ M. Ins. Act, sect. 60 (2) (iii).

⁴⁾ Cf. M. Ins. Act, sect. 2 (1).

⁵⁾ *Rodocanachi v. Elliott* (1874) L. R. 9 C. P. 518.

ation, and the resulting total must be compared with the estimated value (*i.e.* the actual, not the insured value) of the cargo at this destination.

As regards the "cost of forwarding" which is to be considered there is by the law as laid down in one case¹⁾ a difficulty which has ever since given rise to much discussion. Goods worth £100 are shipped at A for B, and are deliverable at B on payment of £50 freight. At B they will have a market value of something over £150, say £160. On the voyage the ship carrying them is stranded, and becomes a wreck and the goods receive some damage. The goods are landed at C, £50 is spent on reconditioning etc., they are shipped on another ship for B at a freight of £60, and on arrival at B they are worth £100. If the £50, cost of repair, and £60 cost of forwarding be added the result, £110, is more than the value, £100, at B, and there would appear to be a constructive total loss. But it was held in *Farnworth v. Hyde* that you must deduct from £60, the freight by the substituted ship, £50, the freight payable to the original ship, or in other words that you must only take into account the *extra* cost of forwarding in excess of the original cost. On this basis the cost of repair £50, and *extra* cost of forwarding £10, only makes £60, as against arrived value of £100, and there is no constructive total loss.

The criticism that has been urged strongly against this decision is that it makes a deduction upon one side of the account only. The value of an import at its port of discharge includes the equivalent of the freight necessarily paid to have it carried there. If you deduct from the cost of forwarding the original freight which would have been payable, you ought also to deduct that freight from the arrived value; otherwise you are comparing the cost of forwarding exclusive of the original freight, with an arrived value which necessarily *includes* its substantial equivalent. If this be sound, on the case suggested, you might take the cost of repairs £50 and *extra* cost of forwarding £10, and properly compare the resulting total *not* with £100 the arrived value of the goods, but with £100 less the original freight deducted in the first factor in the comparison. You would then have £60 against £50, *i.e.* a constructive total loss by the same figure of difference as by the method of comparing the cost of repairs, and the whole, instead of the *extra*, cost of forwarding, with the actual arrived value.

There seems reason in this criticism. Indeed at the port of refuge the Cargo-owner might, in the reasoning of a prudent uninsured owner, contend for a constructive total loss upon a basis even more favourable to himself. "My position", he might say, "is this. I have spent £100 original cost of the goods; I must spend £50 cost of repair, and £60 cost of forwarding: I shall then realise £100 on delivery. Thus I shall have spent £210 in order to earn £100". But in no case has it been suggested that the original cost of the goods should be added to the sum to be compared with the arrived value. Perhaps that cost may be treated as of a kind similar to that of the "value of the wreck" discussed above.

Until this question is reviewed by the House of Lords presumably the principle of *Farnworth v. Hyde* continues to be law²⁾.

Effect of Transhipment. In the previous section mention has been made of the cost of forwarding goods to their insured destination by a substituted ship. When goods are insured on a voyage even by a named ship, and that ship is by perils insured against so damaged that the goods must be transhipped to another ship, if they are to go on at all, they will be covered by the policy while upon the substituted ship. And equally they will be covered by the policy during any time when they are necessarily put in lighters, or ashore in warehouse or elsewhere, for the purpose of being so transhipped³⁾.

This rule, however, only applies to transhipment rendered necessary by perils insured against. In many bills of lading, especially those of the great lines, the shipowners reserve themselves power to tranship goods and carry them by any ship other than that named in the bill of lading. If goods were insured by the ship A, and in the course of the voyage they were transferred, under such a liberty in the bill of lading and not because of any casualty, to ship B, they would cease to be covered by the goods policy. They are insured on ship A, not on ship B. Goods therefore

¹⁾ *Farnworth v. Hyde* (1866) L. R. 2 C. P. 204.

²⁾ It is true that the M. Ins. Act, sect. 60 (2) (iii) only speaks of the "cost of forwarding", but see sect. 91 (2).

³⁾ M. Ins. Act, sect. 59.

cease to be covered when they are transhipped merely by reason of "any special stipulation in the contract of affreightment"¹⁾.

Total and Constructive Total Loss of Freight. There is much obscurity in the cases as to what constitutes a constructive total loss of freight. So great is that obscurity that the legislature, perhaps with necessary discretion, did not attempt, either in section 60 or elsewhere in the Mar. Ins. Act, to formulate any rules upon the subject. The matter is inherently difficult *first* from the fact that freight is the chance of earning money, and not a tangible piece of property, like a ship or cargo, and *secondly* because the English law allows the insurance of the gross freight without any deduction for the cost of earning it²⁾, with the result that in any enquiry whether circumstances have arisen which make the freight not worth earning there is an obvious inconsistency in comparing the gross freight which the law presumes to be at risk with the net freight which is all that the shipowner can in fact realise. The problem is further complicated by the facts that freight is commonly insured by time policies for a year, and is also commonly insured under the phrase "upon freight chartered or as if chartered", a phrase which presumably conveys some intelligible meaning to the brokers and underwriters who use it, but does not do so to the present writer.

For freight to be earned there must needs be the continued existence in safety of both the ship and the cargo she is to carry. If either the ship, or all her cargo, be destroyed, there would at first sight appear to be a total loss of freight. But this is not necessarily so. If all the cargo be destroyed, there may be other cargo available, which the ship can carry. And if towards the end of a long ocean voyage the ship be destroyed, but the cargo saved, the shipowner may well be able to send on the cargo in another ship at a small cost compared with the freight to be earned thereby.

One may perhaps lay down that there is an actual total loss of freight:

1. If both ship and cargo are totally lost.
2. If the cargo is totally lost, and there is no other cargo available for the ship to carry.
3. If the ship is lost, and there is no other available means of carrying the cargo to its destination.

In regard to the last two rules, however, it is obvious that in one sense there must in most cases be other cargo somewhere available for a ship, and there must somewhere be another ship available to carry on the cargo. The impossibility in either case arises from expense; it is a commercial not a physical impossibility. In the case of loss of ship or goods there is an actual total loss if they are physically destroyed (and the sinking of a ship or goods in deep water is a thing that no conceivable expenditure can remedy), a constructive total loss if their salvation is only commercially but not physically impossible.

It would seem to follow that in any case where either the ship or the cargo survive, so that the earning of freight is rendered only commercially impossible there is only a constructive and not an actual total loss: which involves the necessity of notice of abandonment. But this goes too far. A thing may be so impossible commercially as to be deemed impossible in fact³⁾. And in one of the most lucid utterances of an English judge on this subject the law is laid down thus:

1. If the ship be a total or constructive total loss, "but cargo which was on board be saved under circumstances which leave it doubtful whether such cargo might or might not be forwarded in a substituted ship; or,
2. If the cargo be lost and the ship may or may not probably earn some freight by carrying other goods on the voyage insured,
it may be, and I think the rule is, that in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning such substituted freight"⁴⁾.

There ought probably to be added, as another case in which there is a constructive total loss of freight, involving the necessity of notice of abandonment:

¹⁾ M. Ins. Act, sect. 59.

²⁾ See *supra*, under *Insurable Value*, p. 512.

³⁾ Even as regards ship or goods their recovery may be commercially impossible to such an extent as to amount to physical impossibility.

⁴⁾ Brett J., *Rankin v. Potter* (1873) L. R. 6 H. L. 83 at pp. 102, 103.

3. A case in which there is a probable loss of freight from the fact that repairs to the ship will take so long that the goods-owner is entitled to put an end to the contract of carriage¹).

The advantage to the underwriter, and the disadvantage to the assured imposed in regard to goods by the rule in *Farnworth v. Hyde* discussed above, is, by reason of the rule allowing the insurance of gross freight without consideration of the cost of earning it, exactly reversed. Suppose a shipowner contracts to carry goods from A to B at a freight of £1000. It will cost him £900 to earn this, and so if all goes well he will make £100 profit. He insures £1000 on the freight. But just after the goods are loaded another ship collides with his ship in the harbour at A, i.e. when he has only incurred a small amount (say £50) of the cost of earning his freight. His ship is a constructive total loss. The goods are saved and he can ship them on another ship to B at a freight of £1100. He gives notice of abandonment to his freight underwriters, and as the substituted freight of £1100 exceeds the freight to be earned by him, namely £1000, he recovers £1000 for a total loss. Though he recovers £1000, in truth and in fact he has lost a) the £50 expenses he has incurred and b) the £100 profit he would have made — in all £150. And even if he had carried out the plan of sending the goods on in the substituted ship he would only have lost this £150 plus the extra £100 payable by him to the other ship — in all £250.

Option of Assured in case of Constructive Total Loss. If there is in fact a constructive total loss the assured has an option to claim from the underwriters a total loss or a partial loss²). Theoretically it does not much matter which he does, for he will receive an indemnity in either case. If all ships and goods were insured at their exact actual value practice might coincide with theory. In fact nearly all vessels are insured and valued for more than their real value, and this makes it almost always desirable for the assured owner to claim a constructive total loss of his ship if he can.

If the assured elects to claim a constructive total loss he must signify that election to the underwriters by giving them "Notice of Abandonment". If he does not give a notice of abandonment he can only claim a partial loss³).

Notice of Abandonment. Except in a case in which notice of abandonment is unnecessary⁴), the notice is essential to a claim for constructive total loss. If a ship is insured against total loss only and becomes a constructive total loss, the assured will not recover a penny unless he gives notice of abandonment. The object of the notice is twofold, 1. to signify the election of the assured, 2. to give the underwriters opportunity for enquiry and intervention.

No particular form of notice is necessary. It may be given in writing or orally: it is obviously desirable to give it in writing for the sake of certainty. Any words may be used so long as they amount to a statement that the thing insured is unconditionally abandoned to the underwriters⁵). In practice notice of abandonment is given to underwriters by the broker who has effected the insurance, acting on the instructions of the assured.

The time at which the notice is given is very important. It must be given as soon as the assured is reliably informed of the circumstances of the loss⁶). If it is not so given the assured may lose his right to recover for a constructive total loss on the ground that he did not give notice of abandonment in due time. The ground of this rule is that the assured must not await the progress of events and the turn of markets, so as to make his election at the time most favourable to himself.

But the assured is entitled to have all the material information on which he is to make his election. He is therefore entitled to wait until he has had time to make enquiries necessary to supplement any deficiencies in the information he has received⁷).

Whether the assured has used only a reasonable time to make enquiries, and whether he has then given notice of abandonment with reasonable diligence, are

¹) See *supra* p. 535 under *Delay*.

²) M. Ins. Act, sect. 61.

³) M. Ins. Act, sect. 62 (1).

⁴) See below — *When Notice of Abandonment need not be given*.

⁵) M. Ins. Act, sect. 62 (2).

⁶) M. Ins. Act, sect. 62 (3).

⁷) M. Ins. Act, sect. 62 (3).

questions of fact¹). In one case a delay of 5 days after receipt of information was held unreasonable. But is is not "a question of hours, or even of days, but whether there is substantial delay out of the course of maritime affairs."

The underwriters may accept the notice of abandonment or refuse it. Usually they refuse. But the notice of abandonment is not merely an offer on the part of the assured to give up his property in return for payment of a total loss. It is, if the facts warrant it, the exercise of an absolute right to cede the wreck and recover a total loss under the policy. And so if subsequent investigation shows that there is a constructive total loss, *i.e.* that the assured was justified in exercising his right to abandon, the assured will not be prejudiced by the fact that the underwriters have refused to accept it²).

Acceptance of a notice of abandonment by the underwriters may be either express, or implied from their conduct. Mere silence on their part does not constitute acceptance³). Whether their conduct implies an acceptance is a question of fact. But most policies contain what is called the waiver clause, *viz.* "It is expressly declared and agreed that no acts of the insurer or insured in recovering, saving, or preserving the property insured shall be considered as a waiver or acceptance of abandonment." The effect of this is that after notice of abandonment has been given either the assured can take steps to save the property without being held to have withdrawn his notice, or the underwriters (usually through the agency of the Salvage Association) can take similar steps without being held to have accepted the notice. But even so if the underwriters acted in a way only consistent with ownership of the property, *e.g.* by taking possession and selling it, they would be held to have accepted abandonment notwithstanding the waiver clause: such acts would not be within the clause as being done in "recovering, saving or preserving". And similarly the assured might be held to have withdrawn his notice by acts flatly inconsistent with the cession to the underwriters that it implies.

On the other hand the absence of the waiver clause does not prevent the underwriters from acting as regards the property as salvors rather than as owners. The question would be whether the conduct of the underwriters shows that they have acted as owners, *i.e.* whether their conduct has been consistent only with their having accepted abandonment.

If the underwriters do accept the notice of abandonment the result is conclusive and irrevocable. They become liable for a total loss⁴). Thus on receipt of news of the capture of his ship the owner gave notice of abandonment and it was accepted. The ship was then recaptured and the underwriters refused to pay for more than a partial loss. It was held that they were bound by their acceptance and liable for a total loss⁵). So when underwriters by their conduct accepted notice of abandonment, and then sought to dispute the claim on the ground that there had been a breach of warranty which avoided the policy, they were held liable for a total loss; the acceptance conclusively admitted the loss and liability for it⁶).

When Notice of Abandonment need not be given. Notice of abandonment need not be given in a case where, when the assured receives information of the loss, there can be no possibility of any benefit to the underwriters if notice be given them⁷). The assured cannot do otherwise than treat the loss as total, and the underwriters cannot take any steps to preserve the property: thus both the reasons underlying the necessity for the notice, as mentioned above, have disappeared.

This principle has been applied to three classes of cases:

1. Where the subject-matter has been so damaged that it no longer exists *in specie*, or the assured is irretrievably deprived of it⁸). Strictly speaking these are not cases in which notice is excused. They are cases of actual total loss, and no notice of abandonment is necessary in the case of actual total loss⁹).

¹) M. Ins. Act, sect. 88.

²) M. Ins. Act, sect. 62 (4).

³) M. Ins. Act, sect. 62 (5).

⁴) M. Ins. Act, sect. 62 (6).

⁵) *Smith v. Robertson* (1814) 2 Dow, H. L. C. 474. The underwriters of course would take the ship on payment. See below *Effect of Abandonment*.

⁶) *Provincial Co. v. Leduc* (1874) L. R. 6 P. C. 224.

⁷) M. Ins. Act, sect. 62 (7).

⁸) *Cf. e. g. Mullett v. Shedden* (1811) 13 East, 304.

⁹) M. Ins. Act, sect. 57.

But the principle that excuses notice, otherwise necessary, also provides the reason why it is unnecessary in the case of actual total loss.

2. Where the assured receives news of a constructive total loss and at the same time news of the sale of the subject matter by the master. It is usually said in the text-books, and was said in one case¹), that a sale by the master, to excuse notice of abandonment, must be a reasonable sale justified by the condition and circumstances in which the property was placed. The true view, as the writer believes, is that where the assured hears at once of the disaster and of the sale, notice of abandonment is unnecessary, because useless; the sale has left him nothing to abandon. But if the sale was unreasonable and unjustifiable the assured cannot recover, not because he has given no notice of abandonment, but because there was not in fact a constructive total loss²).
3. In the case of an insurance on freight, when the ship sustains such damage as renders the earning of the insured freight impossible³). In the earlier of such cases⁴), the ship was sold by the master, and the giving of notice of abandonment was held to be excused on the ground that the sale was justifiable. As to this the remarks made above apply: the sale, whether justifiable or not, would excuse the notice; the right to recover for a total loss would depend on the condition of the ship.

Waiver of Notice. Notice of abandonment may be waived by the underwriter⁵), and if so waived need not be given. It is for his protection and he may relieve the assured from the duty to give it. A waiver of notice would prevent the underwriter from raising the plea that no notice had been given, but would not operate as an admission of the loss: it thus differs from an acceptance of notice of abandonment. It should be remembered that "waiver" in the "Waiver clause" mentioned above on p. 543 only refers to conduct after notice of abandonment has been given.

Reinsurance. If an underwriter has reinsured his risk, and notice of abandonment is given to him by the assured on the original policy, he need not give any notice of abandonment to his reinsuring underwriters⁶). His insurable interest is not in respect of any property which he can offer to abandon, it is in respect of his liability⁷). There is therefore nothing which he can abandon. If he claims on his reinsurance policy for a constructive total loss he need only prove that he is liable for a constructive total loss under his own policy. But as he is only so liable if his assured, in a case where notice of abandonment is necessary, has given him such a notice, he must prove that fact. Thus a shipowner A insured his ship against all risks with Company B, and Company B reinsured the ship against total or constructive total loss only with C. The ship was so damaged by sea perils as to be in fact a constructive total loss. A however did not give notice of abandonment to B, but claimed and was paid a partial loss amounting to 100 per cent. of the amount insured. B recovered nothing against C: B was not in fact liable for a constructive total loss, but for a partial loss, though it had in fact paid the monetary equivalent of a total loss⁸).

Test of Validity of Notice of Abandonment. The assured by giving the notice in effect says: "There is a constructive total loss by perils insured against"; the underwriter by refusing to accept the notice says: "There is no constructive total loss". The issue so raised must be determined by ascertaining whether on the facts, and upon the principles before discussed, there is or is not a constructive total loss. The material time at which the facts have to be considered, by English law, is not the time when notice of abandonment is given, but the time when the assured brings his action against the underwriter by issuing a writ. And this is taken as the material time both for and against the assured. As a result, if what was a constructive total loss when notice of abandonment was given has ceased to be so when the writ is

¹) *Knight v. Faith* (1850) 15 Q. B. 649; the decision was doubted by Brett J. and Blackburn J., *Rankin v. Potter* (1873) L. R. 6 H. L. at pp. 102 and 130.

²) If this be so, *Knight v. Faith*, *supra*, may have been rightly decided but for wrong reasons.

³) *Rankin v. Potter* (1873) L. R. 6 H. L. 83.

⁴) *E. g. Idle v. Royal Exchange* (1819) 8 Taunt. 755.

⁵) M. Ins. Act, sect. 62 (8).

⁶) M. Ins. Act, sect. 62 (9).

⁷) See *supra*, p. 510 under *Insurable Interest*.

⁸) *Western Co. v. Poole* [1903] 1 K. B. 376.

issued, the assured will not recover¹). But if what was a constructive total loss at the date of the writ ceases to be so before the case is tried the assured will recover. This is best seen in the case of a loss by capture. Suppose on 1st January a ship-owner hears of the capture of his ship, and at once gives notice of abandonment to his underwriters. The ship is released by a prize Court of the captors on 1st June. If the owner has issued a writ before 1st June he will recover for a total loss; if he does not issue his writ till after 1st June he will not recover²).

The result of this rule in practice is that when a broker gives notice of abandonment on behalf of an assured he frequently adds to it words to this effect: "If you do not accept the abandonment please agree to place the assured in the same position as if a writ had been issued to-day". The underwriter often assents to this. If he does not, the assured can safeguard himself by actually issuing a writ.

Effect of Abandonment³). Where there is a valid abandonment so that the underwriters are liable for a total loss, they are entitled to whatever may remain of the property insured⁴). What remains is called Salvage, which may be either the actual subject-matter insured, or the proceeds of its sale. The salvage becomes the property of the underwriters as a body as from the date of the loss; their individual interest in it of course varies according to the amount of their subscriptions.

This rule has one peculiar result with reference to an insured ship. The ship by abandonment becomes the property of the underwriters as from the date of the loss. It follows that the underwriters become entitled, as an incident of that property, to any freight which is being earned by the ship and becomes payable after the loss⁵). As by English law freight is payable only on completion of the voyage and not *pro rata itineris*, the freight thus payable to the underwriters may include freight in respect of the carriage of cargo before the casualty. In any case the underwriters are only entitled to the net freight, *i.e.* as it is earned for their benefit they must allow for the expenses of earning it, such as wages, port charges, etc., incurred after the loss.

If a ship, which is carrying goods for her owner freight free, is abandoned to the underwriters, they are entitled to receive from the owner the equivalent of freight as from the time of the casualty⁶). The ship has become theirs, and the assured must pay a reasonable sum for having his goods carried on their ship. But this payment will only be the equivalent of *pro rata* freight from the time of the loss until delivery⁷).

Underwriters who as abandonees of a ship thus become entitled to freight earned by her, do not however become in any way parties to the shipowner's contracts of affreightment. Therefore where the captain tranships the cargo and earns freight by so doing, the underwriters as abandonees of the first ship have no claim for any of the freight so earned⁸).

Where a shipowner has abandoned his ship to his ship underwriters, and they have received the freight she was earning, he cannot make any claim for a loss of freight against his freight underwriters. The latter have two sufficient answers to his claim, *firstly* the freight has in fact been earned and paid, and therefore is not lost, *secondly* if you have lost it, it was lost not by perils insured against but by your own act in abandoning the ship to your underwriters on ship⁹).

A clause is sometimes inserted in a policy on ship by which the underwriters agree to waive their right, in the event of a constructive total loss, to receive freight that may be earned. It runs thus: "In the event of constructive total loss no claim shall be made by the underwriters on ship in respect of freight".

XV. Partial Loss.¹⁰)

Any loss which is not a total loss is a partial loss¹¹). A partial loss may be either: a) *Damage sustained*, the pecuniary result of actual damage to the pro-

¹) See however *Blairmore v. Macredie* [1898] A. C. 593.

²) *Ruys v. Royal Exchange Co.* [1897] 2 Q. B. 135.

³) See also *Rights of Underwriter on payment*, *infra*, p. 558.

⁴) M. Ins. Act, sect. 63 (1).

⁵) M. Ins. Act, sect. 63 (2).

⁶) M. Ins. Act, sect. 63 (2).

⁷) *Miller v. Woodfall* (1857) 8 E. & B. 493.

⁸) *Hickie v. Rodocanachi* (1859) 4 H. & N. 455.

⁹) *Scottish Marine Co. v. Turner* (1853) 1 Macq. 334.

¹⁰) M. Ins. Act, sect. 64—66.

¹¹) M. Ins. Act, sect. 56 (1).

perty insured, which damage includes, i) damage involuntarily sustained, (the ordinary "particular average loss"), ii) damage sustained in consequence of a voluntary act, ("general average sacrifice"); or b) *Expenses incurred* in avoiding or diminishing a loss, which may be iii) payment to volunteer salvors, ("salvage charges"), iv) payment by way of contribution to a general average sacrifice or to general average expenditure, v) payment under the "Sue and labour clause", ("Particular charges"). Since a "general average loss" includes both "general average sacrifice" and "general average contributions", the above five items may be restated under four heads:

- i) *Particular Average loss.*
- ii) *Salvage Charges.*
- iii) *General Average loss.*
- iv) *Particular Charges¹).*

Particular Average loss²). A particular average loss is a partial loss by damage sustained involuntarily: it is any partial loss which does not fall under one of the three remaining heads (ii, iii or iv). This may not be a very satisfactory definition, but a particular average loss, being the simplest form of partial loss (*e.g.* the result of a heavy sea which smashes a ship's rudder and sweeps away her deck fittings), is difficult to define except by contrast with, and to the exclusion of, the other classes of partial loss.

As to the amount recoverable for a particular average loss, see below under *Measure of Indemnity*, at p. 549.

Salvage Charges³ are expenses incurred by payment to volunteer salvors, *i.e.* salvors acting independently of contract⁴). If incurred to prevent a loss by perils insured against⁵), they are recoverable under the policy⁶).

Services of exactly the same nature, if rendered by persons hired under agreement by the assured or his agents, are not "salvage charges", but their expense may be recoverable under the policy either as "general average expenditure" or as "particular charges" according to the circumstances of the case⁷). On the other hand "salvage charges" cannot be claimed under the policy under the sue and labour clause as "particular charges"⁸): the importance of this is twofold, first "salvage charges" cannot be recovered in addition to, or in excess of, the total amount insured, secondly they cannot be recovered under a policy "against total loss only".

"Life Salvage", *i.e.* payment to salvors for saving lives on board a ship, cannot be recovered from the underwriters of the ship⁹).

As to the amount recoverable on a claim for "salvage charges" see below under *Measure of Indemnity*, at p. 551.

General Average Loss.¹⁰ The law of General Average is properly part of the law of the contract of affreightment¹¹), and only indirectly concerns the law of Marine Insurance, especially as regards general average expenditure. It is therefore out of place to discuss here the law of general average in detail.

One of the most often quoted utterances of any English judge is the definition of Lawrence J.¹²): "All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo, comes within general average, and must be borne proportionably by all who are interested"¹³).

¹) See below, under *Suing and Labouring Clause*, p. 556.

²) M. Ins. Act, sect. 64.

³) M. Ins. Act, sect. 65.

⁴) M. Ins. Act, sect. 65 (2). As to the law regulating "Salvage" as between salvors and the owners of property salvaged, see title "Maritime Law" *supra*.

⁵) A payment of "salvage", due as salvage as between the shipowner and the salvors, may not be recoverable from the underwriters, if the ship was not threatened with loss by perils insured against; *Ballantyne v. MacKinnon* [1896] 2 Q. B. 455.

⁶) M. Ins. Act, sect. 65 (1).

⁷) M. Ins. Act, sect. 65 (2).

⁸) M. Ins. Act, sect. 78 (2), *Aitchison v. Lohre* (1879) 4 App. Cas. 755.

⁹) *Nourse v. Liverpool Association* [1896] 2 Q. B. 16.

¹⁰) M. Ins. Act, sect. 66.

¹¹) See title "Maritime Law", *supra*.

¹²) Sir Soulden Lawrence, b. 1751, d. 1814. Judge of the King's Bench 1794 to 1808, and of the Common Pleas 1808 to 1812.

¹³) *Birkley v. Presgrave* (1801) 1 East, 220 at p. 228.

All who are interested are the owner of the ship, in respect of his two interests of ship and freight, and the owner, or various owners, of the cargo. The substance of this definition is reproduced in subsections 1, 2, and 3 of sect. 66, of the M. I. Act with the following additions or qualifications; a) "voluntarily", which adverb is implied in "sacrifices", if not in "expenses incurred"; b) "reasonably", *i.e.* the sacrifice or expense must not be extravagant or unnecessary; c) "subject to the conditions imposed by maritime law", *e.g.* if a sacrifice or expense is rendered necessary by the unseaworthiness of the ship, or by the negligence of the crew (and there is no exception of negligence in the contract of carriage), or if there is a jettison of cargo carried on deck (unless on a coasting vessel, or carried there by a well recognized custom, and the contract of carriage does not provide for York Antwerp Rules), in all of which cases the English law of the contract of carriage allows no contribution.

The most obvious examples of a general average sacrifice are the cutting away of a mast, or the jettison of cargo; the most obvious example of a general average expenditure is that involved in the hire of a tug to pull a ship loaded with cargo off a strand.

There is an important difference between the liability of an underwriter for a general average sacrifice of property insured by him, and his liability for a general average sacrifice or expenditure to which the property insured by him has to contribute. The underwriter is liable for the whole of the loss by a general average sacrifice of the insured property¹), without taking into account the contributions towards that loss for which other interests are liable²). On the other hand in respect of general average expenditure he is only liable for the proportion of the expenditure payable by the assured for the insured property³), and similarly, in regard to the sacrifice of interests other than that insured by him, for the contribution payable by the interest insured by him⁴).

Thus, for example, a steamer goes ashore in a storm and she and her cargo are in danger of destruction. There is a general average sacrifice of ship by working the engines to get her off⁵), there is a general average sacrifice of cargo by jettisoning part of it, which involves a general average sacrifice of freight upon the cargo jettisoned, and there is general average expenditure in the hire of a tug to pull off the ship and remaining cargo. The underwriters on ship, cargo, and freight, will respectively be liable for the whole sacrifice of those interests, and for the share of the general average expenditure payable by each. In respect of the sacrifice of any one of these, for which its underwriters have paid in full, they would be entitled by subrogation⁶) to claim the contributions to that sacrifice due from the owner or owners of the other two interests; and in respect of this claim the owner of each of the other two interests would in turn claim to be paid this contribution by the underwriters of that interest. As a result of all this, ultimately, if each interest has been insured for its full value, and if all parties concerned are solvent, the underwriters of each interest will have become liable for just the amount for which their assured would have been liable if there had been no insurances at all.

The above is the legal basis on which the various liabilities have to be worked out. In actual practice the process is much simplified, a) by the fact that the shipowner, or his captain, has exercised his lien on the cargo, and so obtained an average bond, or deposit, from the owners of the cargo, or their underwriters, and b) by the fact that the Average Adjustment sets out the various liabilities of the three interests, and, at any rate as regards insurances on ship and freight, shows the balance of liabilities of the respective underwriters⁷).

General average, as has been said above, is primarily a matter of the contract of affreightment between the parties interested in ship, freight and cargo. Any question as to the liability of an underwriter for a general average loss should be examined

¹) M. Ins. Act, sect. 66 (4). *Dickenson v. Jardine* (1868) L. R. 3 C. P. 639.

²) He will of course by subrogation be entitled to recover these contributions. See below under *Subrogation*, p. 559.

³) M. Ins. Act, sect. 66 (4).

⁴) M. Ins. Act, sect. 66 (5).

⁵) *The Bona* [1895] P. 124.

⁶) See below under *Subrogation*, p. 559.

⁷) See *post*, Addendum II p. 571 for an example of a hypothetical adjustment of the case suggested in the text, based upon simple figures.

by first considering the position solely as between the parties to the adventure, so ascertaining their rights and liabilities, and then only enquiring how far those liabilities fall to be indemnified by the underwriters. Subject to one exception, it is a sound rule that unless as between the parties to the adventure, under the contract of affreightment and independently of any insurance, there is a general average sacrifice or expenditure, there can be no general average loss on any of their insurance policies. Thus if in the case of the steamer suggested above the general average had to be adjusted by some foreign law, and that law did not allow as a general average sacrifice the damage to the engines by working them to get off the strand, the shipowner could not claim that damage as a general average loss from his underwriters.

The one exception to the validity of this rule arises in the case where the ship and the cargo belong to the same person. In that case, apart from insurance, there could be no general average contribution, because there would be no parties to contribute. But for the purposes of his claims on his insurers the shipowner will be treated as the equivalent of two persons, shipowner and cargo-owner, and the assumed rights and liabilities of his relative pockets for ship, freight, and cargo will determine his resulting claims on his policies¹). This may be partly to the advantage and partly to the disadvantage of the shipowner; it may allow him to recover a claim for a general average loss on a policy warranted free of particular average, while on the other hand when claiming for a general average sacrifice he has to give credit for the contribution which, in his other capacity, he is liable to make towards that sacrifice.

Though underwriters are liable for general average losses in the way stated above, there is (except for the chance reference in the Memorandum²) no mention of general average in the policy at all. The liability is for a loss under the general provisions of the policy which promise an indemnity against losses caused by the various insured perils. It follows that an underwriter can only be liable for a general average loss, if the particular sacrifice or expenditure was made in averting or diminishing a loss by a peril insured against³). In practically all cases where the general average is adjusted by English law, the sacrifice or expenditure allowed in general average satisfies that condition. But there may well be items allowed in general average by foreign law which would not do so: for these the underwriter would not be liable.

On an ordinary policy, therefore, and without any special mention of general average the underwriter is liable for a general average loss, a) if it is incurred to avoid an insured peril, and b) if it is a general average loss as between the parties to the adventure, and by the law regulating general average liabilities among them. This law may be foreign law, as we have seen. It has become very usual to mention this liability by a special clause, the use of which presumably arose from a doubt whether, in the absence of any reference to it, the underwriter's liability would extend at any rate to a general average loss by foreign law. The older form of such clause was: "General Average and Salvage charges payable as per official foreign adjustment if so made up, or per York-Antwerp Rules if in accordance with the contract of affreightment"⁴). A more elaborate clause⁵) will be found in the Institute Clauses, 1911, in Addendum I. Such a clause, being an additional engagement⁶) in the policy, may render the underwriter liable for a general average loss which is *not* made to avert a loss by an insured peril, if allowed as general average by the foreign official adjustment.

A claim upon a policy for a general average sacrifice, being a claim for "damage sustained," is a claim for practically the same thing as a particular average loss. But it is not a particular average loss, and cannot be treated as such⁷). This rule may cause advantage or disadvantage to the assured: he can recover for a loss by

¹) M. Ins. Act, sect. 66 (7) *Montgomery v. Indemnity Co.* [1902] 1 K. B. 734.

²) See below under *Particular Average Warranties*.

³) M. Ins. Act, sect. 66 (6).

⁴) See *Harris v. Scaramanga* (1872) L. R. 7 C. P. 481. *De Hart v. Compania Aurora* [1903] 2 K. B. 503.

⁵) The meaning and effect of which is rather obscure.

⁶) Like the additional engagement by the Sue and Labour Clause, or the Running Down Clause.

⁷) *Price v. A 1 Ships Association* (1889) 22 Q. B. D. 580. M. Ins. Act, sect. 64 (1), sect. 76 (1) (3).

a general average sacrifice on a policy warranted "free of particular average"¹⁾; but he cannot take a general average sacrifice into account in order to make up the franchise under a particular average warranty²⁾.

A claim upon a policy for contribution to general average expenditure, being for expenses incurred, is very similar to claims for salvage charges, and for particular charges. Indeed a very slight difference in the circumstances of the case may make the claim fall under one or other of the three heads³⁾. Thus the expense of paying a tug which pulls a vessel off the strand, a) if the tug people are volunteers, will give rise to "salvage charges", b) if the tug is hired, and there is cargo in peril as well as the ship, will create "general average expenditure," and c) if the tug is hired and the ship is in ballast with no freight at risk⁴⁾, will be "particular charges" on the ship policy. But despite this close similarity if an expense is "general average expenditure" it cannot be recovered as "particular charges" under the sue and labour clause⁵⁾. Hence it follows that it cannot be recovered: a) in excess of the total amount insured, nor b) upon a policy "against total loss only", as it might be if claimable as "particular charges."

As to the amount recoverable for a general average loss see under *Measure of Indemnity*, as to a general average sacrifice at p. 549 and as to a general average contribution at p. 551.

XVI. Measure of Indemnity.⁶⁾

The amount which is recoverable upon a policy is based in the case of an unvalued policy upon the full insurable value⁷⁾, and in the case of a valued policy upon the agreed valuation⁸⁾. Each insurer is liable in respect of any loss, for an amount in the proportion that his subscription bears to the insurable value or the agreed valuation⁹⁾. It follows that if the subscriptions of the various insurers do not when all added together amount to the insurable value, or the valuation, that the assured cannot recover in respect of the deficiency: he therefore bears the amount of the loss proportionate to the amount for which he is not fully covered by the insurers, or, in the common phrase, "he is his own insurer" in respect of this amount¹⁰⁾. This proportional liability of each insurer (including the assured in so far as he is his own insurer) applies to every loss, whether under the general contract of indemnity under the policy, or under what we have called the additional engagements, such as the Sue and Labour Clause or the Running Down Clause.

The amount of the whole loss, for which the insurers are thus proportionately liable, is obviously, in the case of a total loss, the full insurable value or the full agreed valuation¹¹⁾. Thus if a ship (or any other interest) is insured for £1500 by 15 underwriters subscribing £100 each, by a policy or policies in which she is valued at £2000, and she is totally lost, each underwriter will be liable for $\frac{1}{15}$ of £2000 (£100), and the assured, as his own insurer, for $\frac{1}{15}$ of £2000 (£500).

The amount of the whole loss, to be so distributed among the insurers and the assured, in the case of partial loss, must be ascertained in a manner varying with the nature of the subject-matter of the insurance.

Partial Loss of Ship.¹²⁾ When any loss has happened which is not total, the problem is to determine what proportion of the insurable value, or the valuation, has been lost. In the case of partial loss of ship (*i.e.* a particular average loss, or a loss by general average sacrifice) this is measured by ascertaining how much it will cost to repair the damage; for the amount of depreciation of the ship is taken to be the sum it would cost to repair her. In the case of a valued policy, if the ship is under-valued, this basis may well give the assured more than an indemnity for the depre-

¹⁾ Though not upon a policy "against total loss only".

²⁾ See below, *Particular Average Warranties*, p. 553.

³⁾ See the remarks of Barnes J. *The Brigella* [1893] P. 189.

⁴⁾ Though the ship is in ballast there may be chartered freight at risk, *Carisbrook Co v. London Provincial Co.* [1902] 2 K. B. 681.

⁵⁾ *Aitchison v. Lohre* (1879) 4 App. Cas. 755. M. Ins. Act, sect. 78 (2).

⁶⁾ M. Ins. Act, sects. 67—78.

⁷⁾ See above, p. 512.

⁸⁾ See above, p. 516.

⁹⁾ M. Ins. Act, sect. 67 (2).

¹⁰⁾ M. Ins. Act, sect. 81.

¹¹⁾ M. Ins. Act, sect. 68.

¹²⁾ M. Ins. Act, sect. 69.

ciation which upon that valuation his ship has really sustained; while if the ship is overvalued it will give him less¹). Upon an unvalued policy, or with a true valuation, it affords a fairly reasonable test of the depreciation sustained. But for general application it is the only practicable one²).

If the damage is repaired, the cost incurred, so long as it does not exceed the insurable value or valuation, is the amount of the loss, which is borne by the underwriters in their proportions as above explained³). The assured, however, is not bound to have his ship repaired. If he does not, an estimate must be made of what it would cost to repair her, or, if she is partly repaired, of what it would cost to repair the unrepaired part: the actual or estimated cost of repairs, or the two combined, will thus provide the amount of the loss⁴).

If after the loss the ship is sold without being repaired, the difference between her insurable value and the sale price gives a measure of the depreciation caused by the loss. In such a case the assured can only claim as the amount of the loss the estimated cost of effecting the repairs, provided that does not exceed the depreciation in value as shown by the sale⁵).

In the old days of wooden ships the doing of repairs, if the ship was of any age, was an advantage which improved her. It was also inevitable that the repairs should cover a good deal of depreciation due only to wear and tear in addition to the actual damage caused by the loss. It was therefore considered that the full cost of repairs should not be taken as the measure of a partial loss. Accordingly there arose a custom by which a deduction of one third was made, except in the case of loss sustained by a new ship on her first voyage, from the cost of repairs, as an allowance in respect of "new for old." With the introduction of iron vessels, the reason for this customary deduction very largely disappeared. Accordingly in practically all modern policies a clause is inserted; "Average payable without deduction of thirds, new for old, whether the average be particular or general"⁶). But if such a clause is not inserted in the policy this deduction of one third must still be made⁷).

Partial loss of freight. (Loss by damage sustained, *i.e.* Particular Average, or General Average Sacrifice). The most obvious manner in which a partial loss of freight occurs is where part of the goods for the carriage of which it is payable are lost by perils insured against. It may also arise without any loss of the goods, if the ship is so damaged by perils insured against that she can only carry part of the goods to their destination.

In the case of a partial loss of freight there must, in order to ascertain the claim on the policy, be an enquiry first as to the amount of the total gross freight at the risk of the assured, and secondly of the proportion of this gross freight which has been lost. The loss claimable upon the policy will be this proportion of the insurable value or of the agreed valuation⁸.) Thus if 1000 tons of coal are shipped from A to B at a freight of 10s a ton, and 500 tons are lost by sea perils on the voyage, the freight earned on arrival will be £250 instead of £500, and there is a loss of half the freight at risk. If the freight is insured under a valuation of £600, the assured will recover

¹) Most ships are in fact overvalued. Hence the common spectacle of a contest between assured and underwriters, the former alleging a constructive total loss, the latter only a partial loss.

²) The alternative basis upon the ascertainment of sound and damaged values, applicable in the case of goods (see below as to *Partial loss of goods*) which from their nature have ascertainable market values, being inapplicable.

³) M. Ins. Act, sect. 69 (1).

⁴) M. Ins. Act, sect. 69 (2) (3). If the damage is not repaired, and the ship is subsequently a total loss while insured by the same policy, the earlier partial loss cannot be recovered. See *Successive Losses* p. 556.

⁵) *Pitman v. Universal Co.* (1882) 9 Q. B. D. 192. The decision is unsatisfactory on principle; a remark which is perhaps justified by the fact that Brett L. J. dissented, holding that the cost of repairs was the sole measure of the loss to be considered.

⁶) See the Institute Clauses, *post* p. 565. Another clause, sometimes used for old iron vessels, is — "In the event of claim, no one third new for old to be deducted from the cost of ironwork repairs of hull, masts or spars": which leaves the deduction to be made from repairs other than of ironwork. Another form is, — "No thirds to be deducted except as regards hemp rigging and ropes, sails, and wooden decks".

⁷) M. Ins. Act, sect. 69 (1) — "less the customary deductions". See No. 13 of the York-Antwerp Rules 1890 for an elaborate scale of deductions from the allowances for cost of repairing general average sacrifices of ship.

⁸) M. Ins. Act, sect. 70.

from each underwriter his proportion of £300; or if the freight is valued in his policies at £400, he will recover from each underwriter his proportion of £200¹⁾).

If the ship is so damaged by perils insured against that she cannot carry on any of the cargo, and the assured hires another ship to carry it on, and so earns his freight, he can claim the hire paid to the other ship as "Particular charges"²⁾.

Partial loss of Goods³⁾. (Loss by damage sustained, *i.e.* Particular Average or General Average Sacrifice). The question here, as in all cases of partial loss, is what is the amount of depreciation caused to the insured property by the insured perils. In regard to the ship, which by its nature is not a thing with an easily ascertainable value, and the damage to which can usually be repaired, the extent of depreciation is ascertained by reference to the cost of repairs. But in regard to goods the position is reversed: damage to them cannot usually be repaired, and they are things which, being constantly bought and sold, have an easily ascertainable value: the extent of their depreciation is therefore ascertained by reference to their market value in a sound and in their damaged condition⁴⁾.

There may be a partial loss of goods by damage sustained either: a) by part of the whole shipment being totally lost, and not arriving at the insured destination; or b) by the whole of the shipment or any part of it being damaged, but arriving at the insured destination.

In the first case, total loss of part, the loss is ascertained by finding the insurable value⁵⁾ of the whole shipment and of the part lost. Under an unvalued policy the loss is the insurable value of the part lost⁶⁾; under a valued policy the loss is that proportion of the valuation which the insurable value of the part lost bears to the insurable value of the whole⁷⁾. If the whole shipment is of one species of cargo (*e.g.* grain or coal), the ascertainment of these proportions will be merely arithmetical; but if "goods" of different species are insured under a single valuation of the whole, the insurable value of the bulk of each species must be ascertained, and the values and valuation be apportioned accordingly⁸⁾.

In the second case, loss by damage sustained by the whole or part of the goods which arrive at their destination, the loss is ascertained by finding the difference between the market value of the goods at their destination in their damaged condition and the market value they would there have had in a sound and undamaged condition, and applying this proportion to the insurable value in the case of an unvalued policy, or to the valuation in a valued policy⁹⁾. The sound and damaged values thus to be compared are the gross market values¹⁰⁾. If necessary, there must be an apportionment of the valuation of different species of goods insured under one valuation as above mentioned.

The assured may have a claim for "Particular Charges" under the Sue and Labour clause, which may be either: a) the cost of forwarding the goods to the insured destination, or b) the cost of reconditioning the goods, as by drying them or repacking. If there is also a claim for particular average he will recover both for the particular charges and for the particular average: but in ascertaining the particular average the damaged value of the goods at the destination must be the value of the goods as reconditioned¹¹⁾; otherwise he would in effect recover the cost of reconditioning twice over.

General Average Contributions and Salvage Charges. In the case of a claim for a) Salvage charges, b) Contribution to general average expenditure, c) Contribution to general average sacrifice of an interest other than the property insured, the assured has had to pay a sum assessed upon the actual value of the property for which he is

¹⁾ As to the effect of the rule that the insurable interest in freight is the gross amount, without taking into account the cost of earning it, see *Insurable Value, Freight, supra*, p. 512.

²⁾ See below, under *Sue and Labour Clause*, p. 556.

³⁾ M. Ins. Act, sect. 71.

⁴⁾ See the judgment of Lord Mansfield in the great case of *Lewis v. Rucker* (1761) 2 Burr. 1167, in which the rule as to partial loss of goods was first settled.

⁵⁾ M. Ins. Act, sect. 16 (3).

⁶⁾ M. Ins. Act, sect. 71 (2).

⁷⁾ M. Ins. Act, sect. 71 (1).

⁸⁾ M. Ins. Act, sect. 72.

⁹⁾ M. Ins. Act, sect. 71 (3). *Lewis v. Rucker* (1761) 2 Burr. 1167.

¹⁰⁾ *Johnson v. Shedden* (1802) 2 East, 580. See M. Ins. Act, sect. 71 (4).

¹¹⁾ *Francis v. Boulton* (1895) 1 Com. Cas. 217.

liable, as between himself and the salvors, or as between himself and the other parties to the contract of affreightment. This contributory value may not be the insurable value under an unvalued policy¹), or the valuation in a valued policy. If the insurable value or the valuation is less than the contributory value the amount recoverable upon the policy will be reduced in proportion to this difference²). Further if the contributory value is reduced by a particular average loss, which is recoverable under the policy, the amount of the insurable value or valuation must be reduced by the amount of that particular average loss, and the balance taken as the amount to be compared, for the purpose of adjusting the claim for the contribution, with the contributory value²). Thus suppose a ship is really worth £12000 but is insured for £10 000 valued at £10 000. She suffers a particular average loss of £1000, and she is liable to make a contribution to a general average sacrifice of cargo. This contribution is assessed upon a contributory value of £11 000 (*i.e.* actual value of ship £12 000 less the £1000 damage) and amounts say to £500. The underwriters on the ship will pay the £1000 particular average. In respect of the £500 contribution they will be liable not for the whole £500, but for $\frac{2}{11}$ of £500. If there were no particular average loss, and a contribution (say £550) was assessed on a value of £12 000 then the underwriters would be liable for $\frac{2}{12}$ of £550.

In the case of Salvage Charges the insured property may be the only interest at risk: *e.g.* in the case of a vessel in ballast saved by volunteer salvors. If the salvage is assessed, as between shipowner and salvors, upon a value greater than the insured value the recovery upon the policy will be reduced on the same principle as above³).

A shipowner sometimes gets himself covered, in respect of this difference between the amount he has to pay for salvage or general average and the amount he can recover on his hull policies, by the addition of the following clause to his policy on Disbursements: "This insurance is also to pay claims for excess general average and salvage charges not collectable under the ordinary policies on hull and machinery by reason of the difference between the value, as expressed in those policies, and the actual contributory values."

Liabilities to third parties⁴). An insurance against liability to a third party⁵) must always be expressed in some special clause added to the policy, and such a clause will state the amount of the loss covered; it is usually the amount which the assured may be held liable to pay or some fixed proportion of it.

The commonest form of insurance against liability to others is that effected by the Running Down Clause (by abbreviation the R.D.C.) in policies on ships and steamers, to protect the shipowner against his liability for damages payable to another shipowner with whose vessel the insured vessel collides, or the owners of cargo upon that other vessel. The R.D.C. came into use after it was decided⁶) in 1836 that damages payable by a shipowner for collision did not constitute a loss upon the policy insuring his vessel against the usual perils. It has always been the practice that by such a clause underwriters only indemnify the shipowner against three quarters of his liability for damages by collision. Presumably it was originally intended that the fact of his being his own insurer for the remaining quarter would be some security for care in navigation: it has, however, been the practice for a long time for the shipowner to protect himself against the liability for the remaining quarter with a Mutual Association or "Club"⁷).

A good many forms of the R.D.C. are used, and there have been more. It would be beyond the limits of this work to examine the differences in effect of these forms⁸) which in many cases are small. The R.D.C. in the Institute Clauses for 1911⁹) may be taken as the commonest form now in use. It will be seen that this limits the indemnity promised to the liability arising out of "collision with any other ship or

¹) Thus *e.g.* the contributory value of goods will be their value at the destination or other place of adjustment, the insurable value the value at the port of shipment.

²) *M. Ins. Act, sect. 73. Balmoral Co. v. Marten* [1902] A. C. 511.

³) See *M. Ins. Act, sect. 73 (2)*. Contrast the position if the salvors are hired, and there results a claim for Particular Charges under the Sue and Labour Clause.

⁴) *M. Ins. Act, sect. 74.*

⁵) *I.e.* other than the liability for Salvage or General Average Contribution.

⁶) *De Vaux v. Salvador* (1836) 4 A. & E. 420.

⁷) See *Mutual Insurance* p. 564.

⁸) See *Mc. Arthur, Appendix III, p. 372* for an elaborate discussion of them.

⁹) See Addendum I. p. 565.

vessel," and the proviso (in italics) further limits this by excluding any liability in respect of the cost of removing a sunken ship by harbour or other authorities, of damage to wharves, piers etc., of the cargo or freight engagements of the insured ship, or of any loss of life or personal injury: *i.e.* the liability covered is only that in respect of damage to the other ship and her cargo. All these excluded liabilities, like the excluded quarter of the liability covered, are commonly insured with a Protection and Indemnity Association or Club¹).

The only other passages in the R.D.C. (the terms of which are fairly intelligible) that call for any comment are first the passage as to "both to blame" ("but when both vessels are to blame, then etc"), and secondly that as to sister ships ("should the vessel hereby insured another vessel belonging to the same owners, etc"). The provision as to both to blame is inserted in view of the rule of the English Courts as to the measure of damages in case both vessels are to blame. This rule is that the damages sustained by each ship are ascertained and halved²). The owner of the ship which has sustained the smaller damage has to pay to the owner whose ship has sustained the greater damage the sum by which the half of the latter damage exceeds the half of the former damage. Thus if ship A and ship B are both to blame for a collision, and the damage to A is £6000 and the damage to B is £4000, then the owner of B will pay to the owner of A £1000, *i.e.* the amount by which the half of £6000 exceeds the half of £4000. If the R.D.C. contained no special provision as to "both to blame", the owner of ship A could not say to his underwriters that he had "become liable to pay" anything to the owner of ship B, and the owner of ship B could only say to his underwriters that he had become liable to pay £1000 to the owner of ship A³). It is accordingly provided that the owner of each ship shall be entitled to claim under the R.D.C. as though in fact the owner of A had to pay £2000 to the owner of B, and the owner of B had to pay £3000 to the owner of A⁴).

The provision as to sister ships is inserted in view of the fact that by English law no one can sue himself. Therefore if two ships are in collision, both belonging to the same owner, he cannot say to his underwriters on either ship that he has "become liable to pay" anything to the owner of the other ship. It is accordingly provided that the case shall be dealt with as though he were in fact two persons, owners of the two ships, and their respective liabilities, since they cannot be settled in Court, be ascertained by arbitration.

If a ship is being towed by a tug, and the tug collides with another ship, that other ship can recover damages for the collision against the towed ship, if there was any negligence on the part of those in charge of the towed ship: the tug and tow are treated as being one ship, and the tow is *prima facie* assumed to be in control of the tug. It has been held that in such a case the owner of the towed ship can recover against his underwriters under the R.D.C., his ship having by its tug been "in collision with another ship or vessel" though in fact his ship never touched the other ship⁵).

Particular Average Warranties⁶). What is called "The Memorandum" at the end of the old form of policy runs thus: "N.B. Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded — sugar, tobacco, hemp, flax, hides and skins are warranted free from average, under five pounds per cent., and all other goods, also the ship and freight, are warranted free from average, under three pounds per cent. unless general, or the ship be stranded". The purpose of this, the earliest, and of all later forms of "Particular Average Warranty", is to free the underwriter from claims for small losses.

"Free from average unless general" in the Memorandum really means "free from particular average,"⁷) *i.e.* it excludes a particular average loss, but does not exclude total loss, or constructive total loss, or salvage charges, or a general average loss, or a claim for Particular Charges⁸).

¹) See *Mutual Insurance* p. 564.

²) Since the above was written the law has been altered by the Maritime Conventions Act, 1911 (1 & 2 Geo V. c. 57). See *supra*, title "Maritime Law."

³) *The London Mutual Association v. Grampian Co.* (1889) 24 Q. B. D. 32.

⁴) As to liability being "limited by law", referred to in the clause, see title Maritime Law, *supra*.

⁵) *The Niobe (Baines v. McEwan)* [1891] A. C. 401.

⁶) M. Ins. Act, sect. 76.

⁷) *I. e.* "unless" means "except".

⁸) M. Ins. Act, sect. 76 (2), and Sched. I. Rules of Construction, No. 13.

It may be presumed that those who invented the Memorandum¹⁾ meant by the phrase "or the ship be stranded" to allow particular average beneath the "franchise" (as the percentage limit is called) to be recovered only when the stranding occasioned the loss. But they did not say so, and it was decided as long ago as 1797, that if a stranding occurred during the currency of the insurance, an excepted particular average became payable whether the stranding had anything to do with it or not²⁾.

It is usual in modern times to add in all policies at the end of the Memorandum after "stranded" the words "sunk or burnt", and in many cases the words, "sunk, burnt, on fire, or the damage be caused by collision with another ship or vessel". The words "sunk, burnt, on fire" will be of similar effect to "stranded," i.e. if any of the events happen the whole limitation of the clause disappears; but, in case of collision, only particular average caused by the collision will be admitted.

A vessel is "stranded", if she comes accidentally upon the bottom, or upon a rock or other obstruction, and remains fast there for an appreciable time. She is not stranded if she takes the ground in the ordinary course of navigation, as in a tidal river or harbour, and without anything extraordinary or accidental happening. But even in a place where she is in the ordinary course meant to take the ground she may do so in such an abnormal manner as to constitute a "stranding," as e.g. in the case of a ship moored in a tidal harbour which through the breaking of her moorings fell over and was stove in. The ship must remain fast: if it is merely "touch and go," a scraping upon the obstruction or bottom, it is no "stranding". It is commonly provided by a special clause in policies that grounding in certain localities (e.g. in the Suez Canal) "shall not be deemed to be a stranding" for the purpose of the Memorandum³⁾.

A vessel is "sunk" (presumably) if she is substantially below water, and cannot sink to a greater depth⁴⁾. A vessel is "burnt" if she is substantially damaged as a whole by a fire⁵⁾. She is not "burnt" if there is merely a fire in her bunkers, or in her cargo.

In a voyage policy the assured may add together successive particular average losses arising from different disasters in order to make up the "franchise", and so, if the total of them all exceeds it, to recover upon the policy. But in a time policy the effect of the Memorandum must be considered in reference to each voyage in fact covered by it. Therefore a) the assured cannot add together particular average losses incurred on successive voyages, in order to claim their total if in excess of the franchise⁶⁾, and b) a "stranding" (or sinking or burning) occurring upon any one voyage will only abolish the effect of the Memorandum as regards any particular average sustained on that voyage, but not in regard to the other voyages during the time insured. What is a "voyage" for the purpose of this rule as to time policies is difficult to define. In the Institute Time Clauses⁷⁾ will be found an elaborate clause by which an attempt is made to regulate the effect of the Memorandum as applied to time policies.

The damage to be taken into account for the purpose of the franchise is only particular average. The assured cannot add together particular average damage and general average sacrifice⁸⁾. Nor can he take "particular charges" into the account, but only the actual damage to the property insured⁹⁾.

The "franchise," (in case of ship, three per cent.) is a percentage upon the insurable value or the insured valuation. The higher the insurable or insured value the higher must be the amount of a particular average loss to be recoverable as exceeding the franchise. This gives rise to a class of clauses which are inserted in order to secure

¹⁾ It was added to the Lloyd's policy form in 1749.

²⁾ *Burnett v. Kensington* (1797) 7 T. R. 710. M. Ins. Act, Sched. I. Rules of Construction, No. 14.

³⁾ See the clause in the Institute Clauses for "Hulls", below, pp. 565 and 567.

⁴⁾ The only case that has occurred was of a timber laden ship, which sank to some extent but from the nature of her cargo was still floating. And on it being proved that, with more water in her and more saturation of the cargo, she would have sunk deeper, it was held that she was not "sunk".

⁵⁾ *The Glenlivet* [1894] P. 48. It was in consequence of this case that the words "on fire" were added.

⁶⁾ *Stewart v. Merchants Co.* (1885) 16 Q. B. D. 619.

⁷⁾ See Addendum I, p. 567.

⁸⁾ M. Ins. Act, sect. 76 (3).

⁹⁾ M. Ins. Act, sect. 76 (4).

that the franchise shall be calculated on totals more favourable to the assured. Thus in the case of steamers which are commonly insured with a separate valuation for "hull and materials" and for "machinery and boilers," there is usually the clause: "Average payable on each valuation separately or on the whole".

In regard to goods there is a great variety of forms of F.P.A. warranties in use¹). It must be remembered that a total loss of part of insured goods (unless it is a general average sacrifice) is only a particular average loss. Thus if 100 bales of cotton are insured and on the voyage 90 of them are lost by an insured peril, but not by a general average sacrifice, there is only a particular average loss, which would not be recoverable if the insurance was "warranted free of particular average" *simpliciter*²). This rule is subject in theory to the exception that where from the description of the insured goods it is clear that articles of varying descriptions are intended to be insured separately, a total loss of goods of any one description may be recovered though the policy be free of particular average³). This exception has in fact only been applied in 1857 in one case of an insurance expressed to be upon a "master's effects," and in another upon an "emigrant's effects", in which recovery for a total loss of goods of one species (*e.g.* the loss by the master of his chronometer) was allowed, though the policy was "free of particular average". It may be doubted if the exception was logical; in practice it can rarely be of importance.

A total loss of part, therefore, is in practically every case only a particular average loss. So also where goods of different owners arrive incapable of identification, by loss of marks or otherwise, so that the various owners are tenants in common of the whole mass of the goods⁴), the loss is only a particular average loss and not a total loss⁵).

The efforts of goods owners and their brokers, by the clauses they get underwriters to adopt, are directed to increasing the extent to which their policies are to cover them for partial losses. This is done in a variety of ways: *e.g.* by providing that the effect of the Memorandum, or of any special F.P.A. warranty, shall be abrogated not only if the ship carrying the goods be "stranded, sunk or burnt," but also if any craft or lighter carrying the goods be "stranded, sunk or burnt"; or by providing that each craft or lighter load shall be deemed to be separately insured; or even that each bale or package shall be deemed to be separately insured; or by a provision that underwriters shall pay for the total loss of any package as if separately insured; or by a provision that notwithstanding the warranty the underwriters shall pay for "any claim for landing, warehousing, forwarding or special charges, should the same be incurred⁶), as well as partial loss arising from transshipment"; or by some combination of this sort of provisions. These clauses are very numerous and varied. The following may be given as one example:

"Warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance. Underwriters, notwithstanding this warranty, to pay for any damage or loss caused by collision with any other ship or craft, and any special charges for warehouse rent, re-shipping or forwarding, for which they would otherwise be liable. Also to pay the insured value of any package or packages which may be totally lost."

The clauses mentioned above are chiefly those which exclude particular average of any amount, subject to their limitations which admit it to any amount. In regard to the Memorandum which limits liability for particular average except in excess of the "franchise" of five or three per cent, there is also a great variety of clauses specifying the amount of goods on which the franchise is to be calculated, *e.g.* "to pay average on each ten bales of cotton," "each five bales of wool", etc. Sometimes the "franchise" in the Memorandum is itself varied, *e.g.* in a policy on sugar: "Average recoverable on each 25 baskets, or 50 bags dry sugar, or 300 bags moist sugar, running landing numbers, or on the whole, but if to U. S. A. the conditions as to franchise

¹) Cf. foot-note (8) on p. 509.

²) M. Ins. Act, sect. 76 (1); *Ralli v. Janson* (1856) 6 E. & B. 422.

³) M. Ins. Act, sect. 76 (1).

⁴) *Spence v. Union Marine Co.* (1868) L. R. 3 C. P. 427.

⁵) M. Ins. Act, sect. 56 (5).

⁶) Such charges if incurred to avert a total loss would be recoverable, despite the F. P. A. warranty, under the Sue and Labour Clause. The object of this special provision is to make them recoverable when incurred only to avert a particular average loss. See below under *Sue and Labour Clause*, at p. 557.

shall be as follows: To pay the whole of any claim if amounting to \$700 on the whole interest, or to pay average if 7 per cent. on each 80 baskets or 240 bags Dry Sugar". The object, of course, of all these clauses is, like the provision in hull policies, "average payable on each valuation or on the whole", to secure that losses, which if the Memorandum stood alone, would not exceed the franchise percentage of the whole insured valuation, shall be recoverable as exceeding the franchise percentage if calculated on the proportion of the insured valuation applicable to a specified part of the whole and in relation to the extent of damage sustained by that part.

Successive Losses. The liability of underwriters on a policy in respect of any one disaster by insured perils extends to their proportions of: a) the whole insured amount, either for a total loss or a partial loss, plus b) any amount properly recoverable under the sue and labour clause, plus c) any amount recoverable under a clause, like the R.D.C., which is an additional engagement in the policy. Thus if various policies are effected for £10 000 on a vessel valued at £10 000 the assured as a result of a collision might conceivably recover nearly £20 000 from the underwriters, £10 000 for a constructive total loss¹), £7500 for three quarters of £10 000 damages he has to pay to the other ship, and a considerable sum under the Sue and Labour Clause.

But apart from the R.D.C. and the Sue and Labour Clause, underwriters may have to pay more than 100 per cent. of their subscriptions. A policy insures against all losses or misfortunes which may be sustained by perils insured against during the whole voyage or period of time that is covered. There may be a number of partial losses during this time, and the underwriter will be liable for all of them, even though their total exceeds the total insured amount²). Thus a ship insured for 12 months might conceivably, if repairs to her could on each occasion be done very promptly, sustain a particular average loss of 20 per cent of her insured valuation once a month. The underwriters in that case would altogether pay £240 in respect of every £100 insured; or if, after sustaining eleven of these partial losses, she was totally lost in the last week of the insured 12 months, the unfortunate underwriters would pay £320 altogether for each £100 insured.

If a partial loss, however, has not been repaired, and is then followed by a total loss, the assured can only recover for the total loss upon a policy which covers both losses³). But where a partial loss occurs under one policy and is not repaired before that policy expires, and another policy is then effected, and a total loss occurs under the second policy without the partial loss being repaired, the assured can recover both for the partial loss under the first policy, and for the total loss under the subsequent policy⁴).

Suing and Labouring Clause.⁵) The Sue and Labour Clause appears in practically all policies⁶), and runs as follows: "And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants and assigns, to sue, labour, and travel for, in and about the defence, safeguard, and recovery of the said goods and merchandises, and⁷) ship, etc., or any part thereof, without prejudice to this insurance; to the charges whereof we, the assurers will contribute each one according to the rate and quantity of his sum herein assured".

This is a clause supplementary to the main contract of insurance, as much so as the Running Down Clause, or other similar additional engagement. The assured can therefore recover a proper claim under the sue and labour clause even in addition to a claim for a total loss⁸). And as a claim under the clause, which is called a claim for "particular charges", is not a particular average loss, it can be recovered under a policy which contains a warranty to be free of particular average⁹).

¹) Or, if he gave no notice of abandonment, as a particular average loss, being the cost of repair.

²) M. Ins. Act, sect. 77 (1).

³) M. Ins. Act, sect. 77 (2).

⁴) *Lidgett v. Secretan* (1871) L. R. 6 C. P. 616.

⁵) M. Ins. Act, sect. 78.

⁶) It may be expressly excluded in an insurance against total loss only, (*Western Co. v. Poole* [1903] 1 K. B. 376), but unless so expressly excluded it forms part of an insurance against total loss only, (*Crowan v. Stanier* [1904] 1 K. B. 87).

⁷) The old form of policy here, as elsewhere, contemplates an insurance of both ship and goods. For modern purposes this "and" means "or".

⁸) M. Ins. Act, sect. 78 (1). See *Le Cheminant v. Pearson* (1812) 4 Taunt. 367.

⁹) M. Ins. Act, sects. 64 (2), 78 (1). *Kidston v. Empire Co.* (1866) L. R. 2 C. P. 357.

A claim for a general average loss¹⁾ or salvage²⁾ is not recoverable under the sue and labour clause³⁾. The importance of this, (since it would not otherwise matter under what part of the policy such claims were recoverable), is that claims for general average and salvage are to be paid under the general promise of indemnity in the policy, and therefore, not being under the additional engagement of the sue and labour clause, cannot be recovered in addition to the total amount insured⁴⁾, nor upon a policy against "total loss only".

The expression "factors, servants, and assigns" has been strictly construed. Thus a ship was insured by A, who reinsured with B, who reinsured with C against total loss only. The ship went ashore, and her owner gave notice of abandonment to A and his fellow underwriters. A settled with the owner for 88 per cent. of the insured amount, and with his fellows then spent so much in floating the ship as (after selling her) made his entire liability 112 per cent. B paid A 112 per cent. on his reinsurance policy and then claimed 112 per cent. from C. It was held that C was liable for 100 per cent. as for a constructive total loss, but was not liable for anything more under the sue and labour clause, as A and his fellows were not the "factors, servants or assigns" of B.⁵⁾

For the assured to recover a claim under the sue and labour clause he must, if necessary, prove:

1. That the expense has been incurred to avert or diminish a loss for which the underwriter would have been liable⁶⁾, and
2. That the nature and amount of the expense is reasonable.

Of these 1. may apply to two sorts of cases, a) when the loss averted would not have been a loss by any peril insured against: thus if live cattle are insured against the ordinary perils, and are threatened with starvation through prolongation of the voyage, their death by delay would be no loss under the policy⁷⁾; therefore the expense of buying extra fodder would not be recoverable⁸⁾; and b) where the loss averted is not of such an amount that the underwriter could be liable for it: thus if goods are insured against total loss only, and a loss happens which threatens a particular average loss, but cannot involve a total loss, expenses to avert the particular average loss cannot be recovered under the policy⁹⁾. As to 2. if the assured takes some extravagant course, when he might pursue a much less expensive one, he cannot recover his unnecessary expense. Thus where insured goods, their ship being wrecked, were forwarded by rail at a cost of £200, when they might have been sent by sea for £70, the assured was only allowed to recover the latter amount.

One leading case illustrates a special application of the sue and labour clause to an insurance on freight. Freight was insured from A to B warranted free of particular average. On the voyage the ship became a total loss at C. The captain chartered another ship to carry the cargo from C to B, and thereby his owner earned his whole freight at B. It was held that the owner could recover the freight he had to pay to the substituted ship under the sue and labour clause in his policy on freight¹⁰⁾.

The amount recoverable from each underwriter is in proportion to his subscription. The assured if not fully covered will bear his own share of the expenses in respect of the part for which he is his own insurer¹¹⁾. Thus if a ship valued at £1500 is insured for £1000 by ten underwriters for £100 each, and £150 sue and labour expenses are incurred, the assured will recover £10 from each of the underwriters.

¹⁾ See M. Ins. Act, sect. 66.

²⁾ See M. Ins. Act, sect. 65.

³⁾ M. Ins. Act, sect. 78 (2), *Aitchison v. Lohre* (1879) 4 App. Cas. 755.

⁴⁾ Subject of course to the rule as to successive losses — M. Ins. Act, sect. 77.

⁵⁾ *Uzielli v. Boston Co.* (1884) 15 Q. B. D. 11. This decision, like that in *Aitchison v. Lohre* (*supra*), has been adversely criticized.

⁶⁾ M. Ins. Act, sect. 78 (3).

⁷⁾ See under *Delay*, *supra*, p. 535.

⁸⁾ The decision in *The Pomeranian* [1895] P. 349, was because the cattle were insured against all risks "including mortality from any cause whatever".

⁹⁾ When a policy contains a particular average warranty the clause often provides that the underwriters shall be liable for all Particular Charges, whether incurred to avert a total or a particular average loss. See above p. 555.

¹⁰⁾ *Kidston v. Empire Co.* (1866) L. R. 1 C. P. 535; L. R. 2 C. P. 357.

¹¹⁾ M. Ins. Act, sect. 81.

The valuation of the policy is binding in this respect. Thus if the ship in the above case, though really worth £1500, was valued in the policies at £1000, the assured could recover the whole £150 from the underwriters¹⁾.

Subsection 4 of sect. 78 of the M. I. Act says that it is the duty of the assured and his agents to take reasonable measures to avert or minimise a loss²⁾. If this means a legal duty, of which the sanction must be his inability to recover for a loss which might have been averted or minimised by such measures, it is difficult to reconcile it with the undoubted rules that an assured is not debarred from claiming for a loss by reason of its having been brought about by the negligence of his servants³⁾ or even of himself⁴⁾, so long as his own negligence does not amount to wilful misconduct⁵⁾.

It might be said that though negligence which causes a loss by perils does not affect the assured's claim, yet, when a loss has happened, negligence which aggravates the pecuniary damage caused by the loss does affect his claim. But this surely involves an equivocation in the use of "loss". If an engineer negligently leaves a sea cock of a steamer open at sea, so that sea water comes in, and, at the time the matter is discovered, has destroyed the insulation of a cold chamber, that damage, if the cock was then closed and the water pumped out, would clearly be a loss by perils of the seas. Suppose, however, on the discovery being made, that the crew do not take the reasonable steps of closing the cock and pumping out, but negligently let the water continue to come in till the ship sinks, is it then to be said that the assured cannot recover for a total loss by perils of the sea?

Until its provisions have been judicially considered and explained, the precise meaning and effect of subs. 4 of sect. 78 of the M. I. Act must be considered very doubtful.

XVII. Rights of Underwriter on Payment.⁶⁾

When underwriters pay for a total loss, whether an actual total loss or a constructive total loss⁷⁾, they become entitled to "salvage", i.e. whatever may remain of the subject-matter insured⁸⁾. The share of each underwriter in the salvage is in proportion to the amount of his subscription, and if the assured is not fully covered he has a share in proportion to the amount for which, being uncovered, he is his own insurer⁹⁾. Thus if a ship of the value of and valued at £3000 be insured for £2000 by 20 underwriters, each subscribing for £100, and if she is a total loss, and the wreck is sold for £300, then each of the underwriters on paying £100 will be entitled to receive back or be credited with £10 (i.e. $\frac{100}{2000} \times \frac{2000}{3000} \times 300$), and the assured will keep the remaining £100 (i.e. $\frac{1000}{3000} \times 300$).

In the case of an insurance on goods, payment by the underwriters for a total loss of part in the same way entitles them to the property in the goods so paid for¹⁰⁾.

Property in a ship or a wreck may be an onerous privilege, e.g. by reason of the right of some harbour authority to recover from its owners the cost of removing it. The underwriters who pay for a total loss may refuse to accept the "salvage", i.e. they are not bound to accept its obligations if onerous¹¹⁾. If, however, underwriters accept a notice of abandonment, in case of a constructive total loss¹²⁾, that probably does constitute a conclusive acceptance of the property insured.

In the case of a partial loss there is no cession of the insured property to the underwriters. A claim for a total loss by its nature involves an abandonment of the property to the underwriters. The assured must give notice of abandonment, if he claims a constructive total loss, and the law implies an abandonment of his property

¹⁾ *Dixon v. Whitworth* (1879) 4 C. P. D. 371, reversed on other grounds on appeal, but not as to this point.

²⁾ The draftsman presumably had in mind *Currie v. Bombay Co.* (1869) L. R. 3 P. C. 72.

³⁾ M. Ins. Act, sect. 55 (2) (a).

⁴⁾ *Trinder v. Thames & Mersey* [1898] 2 Q. B. 114.

⁵⁾ See under *Exceptions to the Rule of Causa Proxima*, *supra*, p. 533.

⁶⁾ M. Ins. Act, sect. 79.

⁷⁾ See *Effect of Abandonment* *supra*, p. 545.

⁸⁾ M. Ins. Act, sects. 63 (1), 79 (1).

⁹⁾ M. Ins. Act, sect. 81.

¹⁰⁾ M. Ins. Act, sect. 79 (1).

¹¹⁾ Hence the wording "becomes entitled to take over", M. Ins. Act, sect. 79 (1).

¹²⁾ See M. Ins. Act, sect. 62 (6).

when he is paid for an actual total loss¹). But in claiming for a partial loss the assured in effect, says, "Please pay me for the damage which my property has suffered," and the property necessarily continues in the assured.

Subrogation. In the case of every loss, whether total or partial, for which underwriters pay, they become entitled (by technical term "subrogated") to all rights and remedies of the assured against third parties in respect of the insured property as from the time of the casualty causing the loss²). This means that they are entitled to require the assured to allow an action to be brought in his name against any one who is liable for damages or any sort of indemnity as a result of the loss. The underwriters will be entitled to the proceeds of such an action in proportion to the amount of their subscriptions, and the assured to his own share in respect of any amount for which he is his own insurer³). Thus if, in the case of the insured ship suggested above, her total loss was caused by collision with another ship, the underwriters on paying the total loss would be entitled to bring an action in the name of the assured against the other ship, and if the other ship were held to blame and had to pay £2700 damages (*i.e.* the value of the ship less £300 the surviving value of the wreck) each underwriter who had paid £100, would receive back £90 as his share of the proceeds of litigation and £10 from the proceeds of the wreck, and the assured would get £2000 from his underwriters, £900 out of the proceeds of the litigation, and £100 from the wreck.

The valuation in the policy is binding upon the assured as well as the underwriter⁴). From a logical application of this rule it may possibly result that underwriters who have paid a total loss, by subrogation get back more than they have paid. In the case suggested above the ship is valued in the policy at £3000 which is her actual value. But if, though valued in the policy at £3000, she was really worth £4800, then the damages recovered from the other ship might be £4500 (*i.e.* the true value £4800 less the value of the wreck £300). Then each underwriter who had paid only £100, would receive £150 of these damages and £10 from the wreck; while the assured would have £2000 from his underwriters, £1500 from the damages and £100 from the wreck, in all £3600⁵).

This principle, that by reason of under valuation in the policy underwriters by subrogation may get back more than they have paid, has only been applied in case of a total loss. It probably does not apply in the case of a partial loss, though the point has never arisen. A partial loss involves no cession of property, but only a claim for the damage sustained. The underwriter by subrogation will be entitled to the proceeds of any right against a third party up to the amount of the claim he has paid, but not beyond. The point could hardly arise as regards a particular average loss on ship, since the underwriter pays for the actual damage sustained, irrespective of valuation, and the amount of the damage sustained is the utmost that could be recovered from a third party. It might arise in a case of particular average on goods, and in principle even upon an unvalued policy. Take the case of goods of an insurable value of £100 (say £95 cost at port of shipment and £5 expense of shipment and insurance)⁶), shipped from A to B at a freight of £50. On the voyage they are damaged by sea perils to the extent of 50 per cent. of their sound value delivered at B. The damage is due to the negligence of those on board the carrying ship, and there is no exception of negligence in the bill of lading. On arrival at B. the freight has to be paid, as the goods arrive in specie. In these circumstances the assured has a claim on his underwriters for £50 only (*i.e.* 50 per cent. of the insurable value)⁷). But he has a claim for damages against the shipowner for 50 per cent. of the sound arrived value of the goods, which is probably at least £150 (original shipped value

¹) Cf. *Brett L. J. Kaltenbach v. Mackenzie* (1878) 3 C. P. D. 467 at p. 471.

²) M. Ins. Act, sect. 79 (1) (2).

³) M. Ins. Act, sect. 81.

⁴) M. Ins. Act, sect. 27 (3).

⁵) In the case which decided this principle, *North of England Assn v. Armstrong* (1870) L. R. 5 Q. B. 244, the ship was insured for £6000 on a valuation of £6000. She was in fact worth £9000. Damages were recovered from the ship that sank her on the basis of her being worth £9000, but in fact, owing to the limitation of the liability of the ship in fault, less than £6000 was recovered as damages. The underwriters were held to be entitled to the whole of the damages, and the principle must support the case suggested in the text.

⁶) See M. Ins. Act, sect. 16 (3).

⁷) M. Ins. Act, sect. 71 (3).

plus freight) if not more. It is impossible that the law which only allows the assured to recover £50 from his underwriters should then allow the underwriters to get back by subrogation £75 or more. The underwriters would get back what they had paid, but no more.

Questions of this sort, however, rarely arise. In ordinary practice the right of subrogation operates daily in a variety of cases, *e.g.* in favour of underwriters on ship against the owners of a colliding ship, in favour of underwriters on goods against the ship that carried them for damages, in favour of underwriters on ship or goods, who have paid the whole of a general average loss, against the other parties liable to contribute in general average. In fact most collision cases, nominally fought between two shipowners, are in reality between two sets of underwriters; and most cases of damage to cargo, nominally between a cargo-owner and a shipowner, are in reality between cargo underwriters as plaintiffs and a Protection Club as defendants.

Underwriters, under this right of subrogation, are only entitled to enforce a right of action vested in the assured; they get no independent right of their own. So where two ships are in collision which belong to one owner there can be no right by subrogation in regard to the collision¹). The shipowner cannot sue himself, and in consequence his underwriters on one ship cannot sue the underwriters of his other ship²). And as underwriters only succeed to the rights of the assured, it may happen that the assured receives some money from a third party which in fact diminishes the loss he has already been paid for by the underwriters, but to which, being a pure gift from the third party to the assured, the underwriters are not entitled³).

It is the fact that underwriters have paid, not their liability to pay, that gives them the right of subrogation. Hence if underwriters pay a loss for which they are not liable, and then claim by subrogation against a third party, it is no defence to the latter to say that the underwriters were not liable for the loss and need not have paid it⁴).

The right given by subrogation does not entitle the underwriter to sue in his own name. But he can do so, on taking an assignment in writing from the assured, by virtue of sect. 25 (6) of the Judicature Act 1873⁵).

In one case⁶) a goods-owner had contracted for the carriage of his goods by a lighterman, on the terms that the lighterman should be liable for no loss except through his negligence. The underwriter with whom the goods were insured, including the risk in lighter, claimed to avoid the policy on the ground that the nature of the contract with the lighterman had not been disclosed to him, and that this, seeing that it affected his rights of indemnity by subrogation, was a material fact⁷). The underwriter succeeded. In consequence of this case it is common to insert in a goods policy what is called the S.L.C. (Special Lighterage Clause), as follows: "Including lighterman's risk without recourse to and from ship or wharf", or "Including all risks of craft, boat, and lighter to and from the vessel, upon whatever terms as to liability or otherwise the Lighterman may be employed".

XVIII. Return of Premium.⁸)

If an underwriter is liable to return the whole or part of the premium, it can be claimed from him by the assured⁹), though the broker, and not the assured, was liable to pay it to the underwriter¹⁰). Even if the broker has not in fact paid the premium to the underwriter, the assured can claim any return premium from the underwriter, at any rate upon a policy containing the receipt clause¹¹).

¹) *Simpson v. Thompson* (1877) 3 App. Cas. 279.

²) Hence the provision as to Sister Ships in the R. D. C. See *supra*, p. 553.

³) *Burnand v. Rodocanachi* (1881) 7 App. Cas. 333. Contrast *Blauwpot v. Da Costa* (1758) 1 Eden, 130 and *Stearns v. Village Main Co.* (1905) 10 Com. Cas. 89.

⁴) *King v. Victoria Co.* [1896] A. C. 250.

⁵) 36 & 37 Vict. c. 66.

⁶) *Tate v. Hyslop* (1885) 15 Q. B. D. 368.

⁷) See *Disclosure, supra*, p. 513.

⁸) M. Ins. Act, sects. 82—84.

⁹) M. Ins. Act, sect. 82 (a).

¹⁰) See under *The Premium, supra*, p. 530.

¹¹) *Dalzell v. Mair* (1808) 1 Camp. 532. Sect. 82 of the M. Ins. Act must be read subject to the effect of sect. 54.

A return of premium may be due by the underwriter in accordance with a clause in the policy (Return by Agreement¹), or by the rules of the law (Return for Failure of Consideration²).

Return by Agreement¹. A return of a certain part of the premium is stipulated for by a clause in the policy in case some of the contemplated risks, for which the whole premium is paid, are not run (*e.g.* in a time policy for 12 months, "to return — per cent. for each consecutive 30 days the vessel may be laid up in port"), or in the event of some circumstance happening whereby the gravity of the risks is lessened, (*e.g.* in the old cases in the great wars, — "to return — per cent. if the ship sails with convoy"). At the present time the commonest clause as to return of premium is that in the Institute Time Clauses³ relating to cancellation and lying up.

Clauses as to return of premium usually end with the words "and arrives", or "and arrival". In a voyage policy, (*e.g.* "if the ship sails with convoy and arrives") they add, as the second condition on which the return is payable, the provision: "if the ship arrives at her insured destination." As transferred into a time policy the words "and arrival" might be more intelligibly translated, "and if the ship survives throughout the currency of the policy".

"Arrival" in such a clause does not mean arrival in safety or without claim on the policy. In fact the words "and arrives" or "and arrival" in practically every case⁴ mean, "and unless there is a claim on the policy for a total or a constructive total loss"⁵.

Return for Failure of Consideration⁶. The underwriter is paid the premium in consideration of his being liable for losses by insured perils. If the risk is never run he is never under any liability, and there is no reason why he should keep the premium. Subject to the exceptions mentioned below, this rule applies:

1. As to the whole premium, when none of the risks insured are ever run⁷), and
2. As to the part of the premium, when part of the insured risks are not run, and the total premium is apportionable for the risks that are, and for those that are not, run⁸).

Return of whole premium. If the assured has no insurable interest at any time during the risk (*e.g.* if he sells the insured ship before the insured voyage or time begins) he can never make any claim on the policy, and he can claim the premium back⁹). If the underwriter avoids the policy *ab initio* by reason of the concealment of a material fact, or misrepresentation, in effecting the policy, he can be liable for no loss, and he must return the premium¹⁰). So if there is a breach of warranty which makes the policy void from its inception (*e.g.* if the insured ship was unseaworthy at the moment when a voyage policy commenced), there is a return of premium¹⁰). So if the insured property has never been imperilled on the insured voyage (*e.g.* if a ship insured "from A to B" never sails from A, or if insured goods are never shipped on the insured voyage) there will be a return¹¹).

In all these cases there is a complete immunity of the underwriter, an entire failure of consideration. But if ever so small a part of the risks insured is run there can be no return of the whole premium. Thus if the assured has sold his ship 24 hours after the policy has attached, the underwriter might have been liable for a total loss during that time, and there can be no return for lack of insurable interest¹²). So if 24 hours after the insured voyage has begun there is a deviation or change of voyage, which relieves the underwriter from any subsequent liability¹³), there can

¹) M. Ins. Act, sect. 83.

²) M. Ins. Act, sect. 84.

³) See pp. 567, 569, 570.

⁴) Under a voyage policy from "A. to B. and for 30 days in port" with a clause for a return "and arrives", if the ship was a total loss three days after reaching B. the return might still be payable. *Horncastle v. Haworth* (1806) Marsh (4 Ed.) 539.

⁵) Consequently lying up returns under a time policy are usually paid only at the expiration of the policy.

⁶) M. Ins. Act, sect. 84.

⁷) M. Ins. Act, sect. 84 (1).

⁸) M. Ins. Act, sect. 84 (2).

⁹) M. Ins. Act, sect. 84 (3) (c).

¹⁰) M. Ins. Act, sect. 84 (3) (a).

¹¹) M. Ins. Act, sect. 84 (3) (b).

¹²) Cf. M. Ins. Act, sect. 84 (3) (d).

¹³) M. Ins. Act, sects. 45, 46.

be no return of premium. So if a ship is insured "at and from" a port, and is seaworthy while "at" the port, but is unseaworthy when sailing "from" it, so that the underwriter is relieved from liability from the latter time¹⁾, there will be no return. So if a ship is insured "at and from A to B", and the policy attaches while she is "at A", but she then sails to C, instead of to B²⁾, there can be no return. In short, "if the risk is once commenced there shall be no return. For if the voyage has commenced, though it be only for 24 hours or less, the risk is run"³⁾.

If a ship is insured "lost or not lost" from A to B, and when the policy is effected she has in fact arrived at B in safety⁴⁾, it might appear as if the underwriter had run no risk and should therefore return the premium. But in truth, if both assured and underwriter are ignorant of her safe arrival, the underwriter has run a risk, viz. the chance that when the policy was effected the ship had already been lost while sailing from A to B. The premium therefore is not returnable, unless the underwriter when he wrote the risk knew that she was safe at B⁵⁾.

Return of part of premium. There can be a return of premium if part of the insured risks have not been run, and if there is a part of the premium apportionable to the part of the risks not run. The premium may be apportionable: a) by relation to the amount of property at risk or its value, or b) by relation to the extent of the risks to which the insured property is exposed. Apportionment of the premium is often possible as to the first, but only very rarely (in modern times never) as to the second.

A. If a merchant insures 100 tons of goods and in fact only 50 tons are ever shipped on the insured voyage he can get a return premium for "short interest": in the example suggested he will get back half the whole premium⁶⁾. So if a shipowner insures two steamers, A valued at £10 000 insured for £10 000, and B valued at £5000, both insured by the same time policy, and if he sells ship B before the period of the policy commences, he can get a return of one third of the total premium⁶⁾.

So if a merchant insures £1000 on certain goods by an unvalued policy, and all the goods are shipped but in fact they are only worth £500, he will get a return of half the premium⁷⁾. Not so, however, if he has so over-insured by a valued policy, (i.e. £1000 on the goods valued at £1000) since the valuation is binding⁸⁾ and it is not open to him to say that his goods were only worth £500.

The same principle applies in case of Double Insurance⁹⁾: the assured has then insured for a greater amount than he has at risk, with two or more sets of underwriters. He can get back the proportion of premiums applicable to the amount over insured¹⁰⁾, subject to the following limitations: a) where the double insurance has been effected knowingly, and not by inadvertence, there can be no claim for any return of premium¹¹⁾; b) no underwriter among those concerned can ever be asked to pay a return of premium if he has at any time, and for however short a time, been liable for a possible claim of the whole amount insured by him without any recourse to another underwriter. Thus if underwriter A insured goods for £100 valued at £100 from R to S "including risk of craft to the ship", and underwriter B insured the goods in identical terms but without the craft risk, the assured, if he made the double insurance not knowingly, could recover half the premium he paid to B, but none of the premium he paid to A.

B. In some old cases a custom was proved whereby the premium was treated as apportionable to the nature or extent of the risks run, and the assured was allowed to recover a part of the premium in respect of the risks not run by the underwriter¹²⁾.

¹⁾ M. Ins. Act, sect. 39 (3), sect. 33 (3).

²⁾ M. Ins. Act, sect. 45.

³⁾ Lord Mansfield, *Tyrie v. Fletcher* (1777) 2 Cowp. 666 at p. 668.

⁴⁾ This may well happen in the case of an insurance of an overdue ship.

⁵⁾ M. Ins. Act, sect. 84 (3) (b), *proviso*. *Bradford v. Symondson* (1881) 7 Q. B. D. 456.

⁶⁾ "Or part thereof", M. Ins. Act, sect. 84 (3) (b).

⁷⁾ M. Ins. Act, sect. 84 (3) (e).

⁸⁾ M. Ins. Act, sect. 27 (3).

⁹⁾ See *supra*, p. 520.

¹⁰⁾ M. Ins. Act, sect. 84 (3) (f).

¹¹⁾ M. Ins. Act, sect. 84 (3) (f), *proviso*. This provision of the Act introduced a change in the existing law, presumably with the object of discouraging double insurance. It probably may involve difficult questions as to when a double insurance is effected "knowingly".

¹²⁾ Cf. *Stevenson v. Snow* (1761) 3 Burr. 1237; *Long v. Allan* (1785) 4 Doug. 276.

There are no such customs in modern times, but theoretically such a custom might arise, and be proved, and the principle would then apply¹).

General Exceptions to right to return. All the rules as to return of premium discussed above are subject to two general exceptions²), *viz.*, that the assured can have no claim to any return: 1. if there has been any fraud on his part, and 2. if the insurance is illegal.

1. If the assured has paid the premium as part of a scheme to defraud the underwriter it is not surprising that the law should refuse him any claim to a return³).
2. If the insurance is illegal the assured and the underwriter are parties to an illegal contract and the maxim of the law is "*In pari delicto potior est conditio possidentis*". An insurance may be illegal either by virtue of the terms of the policy (*e.g.* as containing a P.P.I. clause⁴), or as being an insurance on an illegal adventure (*e.g.* an insurance upon the property of public enemies⁵), or as being an insurance by way of gaming or wagering⁶).

XIX. Mutual Insurance.⁷)

Economically the system of Insurance is one by which the calamities of individuals are borne by the community as a whole. Under the ordinary method of marine insurance with companies or underwriters, the commercial community entrusts its common fund to the underwriters in the shape of premiums, the profit of the latter being their remuneration for managing the business of the common fund. There is another method, more exactly in accord with the economic basis of the system, by which a number of individual shipowners agree to contribute in order to pay for the losses sustained by any of them: this is called Mutual Insurance⁸).

Associations for mutual insurance on these lines originally came into existence as a means of evading the Act of 1720⁹), under which the two companies, The Royal Exchange Corporation and the London Assurance, were granted, and until 1824, when the Act was repealed, enjoyed, a monopoly of carrying on insurance business as corporations or partnerships. Under these early Associations all the members mutually agreed to insure one another, paying for losses by contributions periodically levied by the committee of management or other directing authority: and as each member was only liable for his individual share of losses, and not as a joint contractor, there was no infringement of the Act of 1720.

In 1862 there was passed the first¹⁰) of the modern Acts regulating Joint Stock Companies, and by sect. 4 of that Act any Association of more than 20 persons, not registered under its provisions, was declared illegal. This rendered Mutual Insurance Associations of the old type illegal. There were also difficulties in complying with the provisions of the Stamp Act¹¹), which required a policy to specify the names of the underwriters. As a result there arose the modern method of constituting these associations. By this the Association is registered under the Companies Act as a company limited by guarantee. Policies are issued by the association as an underwriting company, and in the event of any loss it is the company which is liable to be sued. By the Articles of Association or Rules, which are referred to and incorporated in the policy, machinery is provided under which members, whose ships are insured, are to pay "calls" (usually by a payment calculated on each ton of the tonnage of their insured ships) to provide the funds for payment of losses. The affairs of the Association are usually conducted by a firm of managers, who act under the supervision of the Directors (a Committee of insured members), and are paid by the Association.

1) M. Ins. Act, sect. 87 (1).

2) M. Ins. Act, sect. 84 (1).

3) See *Tyler v. Horne* (1785) 1 Park 455 and *Rivaz v. Gerussi* (1880) 6 Q. B. D. 222 at p. 230.

4) M. Ins. Act, sect. 4; *Allkins v. Jupe* (1877) 2 C. P. D. 375.

5) *Vandyck v. Hewitt* (1800) 1 East, 96.

6) M. Ins. Act, sect. 84 (3) (c) *proviso*, and sect. 4.

7) M. Ins. Act, sect. 85.

8) M. Ins. Act, sect. 85 (1).

9) 6 Geo I. c. 18.

10) 25 & 26 Vict. c. 89.

11) 30 & 31 Vict. c. 23, § 7, now re-enacted by 54 & 55 Vict. c. 39 § 93.

In effect, therefore, a Mutual Insurance Association of this modern type is practically the same as an ordinary Insurance Company with the two exceptions:

1. That the premiums payable by the assured are fixed not by bargain between the assured or his broker and the underwriter, but by the amount from time to time found requisite in order to meet losses and the expenses of management, and
2. That the remuneration of the managers of the company is fixed by agreement, and does not depend upon the skill or good fortune of the underwriter in bargaining for premiums with the assured or their brokers.

To policies effected with an Association or Company of this type all the ordinary provisions of the law of Marine Insurance obviously apply, except as regards premiums¹). In practice such a policy usually specifies a certain premium as payable upon its inception (or by certain dated instalments), with a provision, by reference to the rules, for the payment of subsequent "calls" as they may be required.

Any of the ordinary rules of the law may of course be varied by means of the Articles of Association, the Rules, and the Policy²), (*i.e.* the members can enter into any sort of contract they please with the Association), except in regard to matters in which the law expressly limits freedom of contract, *e.g.* legality of the adventure³), wager policies⁴), necessity of a stamped policy⁵), limitation of time policy to 12 months⁶).

If one may judge from the fact that only a small portion of the whole business of insurance of ships is effected with Mutual Associations of this type, the system appears to have no advantage, as regards cheapness to the assured, over the ordinary method of insurance with Companies and Lloyd's Underwriters. There is, however, a large amount of business done with such associations in regard to matters which the Companies and Lloyd's underwriters do not insure. Thus *e.g.* the liability for one quarter of the damage done by collision (since the Running Down Clause only covers three quarters of the damages), and the small damage to ships, which being under the three per cent. franchise, is not recoverable under ordinary policies, are so insured.

A very large amount of business of a rather different type is transacted by Associations of this kind called "Protection and Indemnity Associations." These protect a shipowner against claims by cargo-owners for damage to cargo carried by him, enforce on his behalf claims for demurrage, payment of the freight, etc. and in short, conduct on his behalf most, if not all, the litigation he is engaged in, secure him its results, if favourable, and indemnify him against its results, if unfavourable. Most of this kind of business is not marine insurance in the ordinary sense, and the law does not require it to be effected by means of stamped policies⁷).

All the Associations referred to in this section are commonly known as "Clubs".

XX. Litigation.

A policy is effected either in the name of the actual assured, or in the name of his agent, usually in that of the insurance broker who effects it for him. If an action has to be brought to enforce a claim on a policy the plaintiff, if the policy is effected in the name of an agent, may be either that named agent, or the unnamed principal.

On an insurance of any large amount there are many companies and underwriters interested. It is usual, in order to avoid the necessity of issuing writs against all the companies and underwriters, for an arrangement to be made whereby one company or underwriter is selected as the defendant in a test action, and all the others enter into an agreement with the plaintiff by which they undertake to be bound by the result of the test action.

An underwriter against whom a claim upon a marine policy is made has a special and peculiar right of discovery of documents against the plaintiff. Directly the action is begun he can get an order that the plaintiff shall make an "affidavit of

¹) M. Ins. Act, sect. 85 (2) (4). There is a special provision as to stamping policies of a mutual association after their execution in sect. 95 (1) (a) of the Stamp Act, 1891.

²) M. Ins. Act, sects. 85 (3), 87.

³) M. Ins. Act, sect. 3.

⁴) M. Ins. Act, sect. 4.

⁵) M. Ins. Act, sects. 22, 23 24, 91 (1) (a).

⁶) M. Ins. Act, sect. 25 (2).

⁷) See *supra*, p. 514 under *The policy*.

ship's papers," and that the action shall be stayed until this has been complied with¹). If the plaintiff is only an agent the order will stay the action until the principal actually interested has made the discovery²). The right of the defendant to have discovery of ship's papers only applies in the case of an insurance substantially marine. In the case of an insurance for land transit, though on a marine insurance form of policy, the defendant will only have the discovery available in any ordinary action.

Addendum I.

The Institute Clauses for 1911.

I. Institute Voyage Clauses. Hulls.

And it is further agreed that if the Ship hereby Insured shall come into collision with any other Ship or Vessel, and the Assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby Insured, this Company will pay the Assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the Ship hereby Insured; and in cases in which the liability of the Ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of this Company, the Company will also pay a like proportion of three-fourths of the costs which the Assured shall thereby incur or be compelled to pay; but when both Vessels are to blame, then unless the liability of the Owners of one or both of such Vessels becomes limited by law, claims under this clause shall be settled on the principle of cross liabilities as if the Owners of each Vessel had been compelled to pay to the Owners of the other of such Vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

Provided always that this Clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the Cargo or engagements of the Insured Vessel, or for loss of life or personal injury.

Should the Vessel hereby insured come into collision with or receive salvage services from another Vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other Vessel entirely the property of owners not interested in the Vessel hereby insured; but in such cases the liability for the collision, or the amount payable for the services rendered, shall be referred to a sole arbitrator to be agreed upon between the Underwriters and the Assured.

This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery through the negligence of Master, Mariners, Engineers or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the Ship, or any of them, or by the Manager, Masters, Mates, Engineers, Pilots, or Crew, not to be considered as part Owners within the meaning of this clause, should they hold shares in the Steamer.

General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or, if the contract of affreightment so provides, according to York-Antwerp Rules, or, in the case of Wood cargoes, York-Antwerp Rules omitting the first word of Rule I. ("No"), but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

Average payable on each valuation separately or on the whole without deduction of thirds, new for old, whether the Average be particular or general.

Donkey boilers, winches, cranes, windlasses, steering gear, and electric light apparatus shall be deemed to be part of the hull and not part of the machinery. Refrigerating machinery and insulation not covered unless expressly included in this Policy.

Warranted free from particular average under 3 per cent., but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other Ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid if reasonably incurred, even if no damage be found.

No claim shall in any case be allowed in respect of scraping or painting the Vessel's bottom.

Grounding in the Suez Canal, or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Ayres) or its tributaries, or in the Danube, Demerara, or Bilbao River, or on the Yenikale or Bilbao Bar, shall not be deemed to be a stranding.

¹) See the Annual Practice under the Index Title *Discovery*, heading "Marine insurance action".

²) *Willis v. Baddeley* [1892] 2 Q. B. 324.

In ascertaining whether the Vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of total or constructive total loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given in writing to the Underwriters where practicable, and, if abroad, to the nearest Lloyd's Agent also, prior to survey, so that they may appoint their own Surveyor if they so desire; and whenever the extent of the damage is ascertainable, the Underwriters may take or may require the Assured to take tenders for the repair of such damage. In cases where a tender is accepted by or with the approval of Underwriters, the Underwriters will make an allowance at the rate of £30 per cent. per annum on the insured value for the time actually lost in waiting for tenders. In the event of the Assured failing to comply with the conditions of this Clause, £15 per cent. shall be deducted from the amount of the ascertained claim.

Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities, or warlike operations, whether before or after declaration of war.

Held covered in case of deviation or change of voyage provided notice be given and any additional premium required be agreed immediately after receipt of advices.

With leave to sail with or without pilots, and to tow and assist vessels or craft in all situations, and to be towed.

With leave to dock and undock and go into graving dock.

II. Institute Time Clauses. Hulls.

And it is further agreed that if the Ship hereby Insured shall come into collision with any other Ship or Vessel, and the Assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the Ship hereby Insured, this Company will pay the Assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the Ship hereby Insured, and in cases in which the liability of the Ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of this Company, the Company will also pay a like proportion of three-fourths of the costs which the Assured shall thereby incur, or be compelled to pay; but when both Vessels are to blame, then unless the liability of the Owners of one or both of such Vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the Owners of each Vessel had been compelled to pay to the Owners of the other of such Vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

Provided always that this Clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect to the Cargo or engagements of the Insured Vessel, or for loss of life or personal injury.

Should the Vessel hereby insured come into collision with or receive salvage services from another Vessel belonging wholly or in part to the same owners, or under the same management, the Assured shall have the same rights under this policy as they would have were the other Vessel entirely the property of owners not interested in the Vessel hereby insured; but in such cases the liability for the collision, or the amount payable for the services rendered, shall be referred to a sole arbitrator to be agreed upon between the Underwriters and the Assured.

In port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed and to go on trial trips.

Should the Vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a *pro rata* monthly premium, to her port of destination.

Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing provided notice be given, and any additional premium required be agreed immediately after receipt of advices.

Should the Vessel be sold or transferred to new management, then, unless the Underwriters agree in writing to such sale or transfer, this Policy shall thereupon become cancelled from date of sale or transfer, unless the Vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A *pro rata* daily return of premium shall be made.

This insurance also specially to cover (subject to the free of average warranty) loss of, or damage to hull or machinery through the negligence of Master, Mariners, Engineers, or Pilots, or through explosion, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the Ship, or any of them, or by the Manager. Masters, Mates, Engineers, Pilots,

or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or if the contract of affreightment so provides, according to York-Antwerp Rules, or, in the case of Wood cargoes, York-Antwerp Rules omitting the first word of Rule I. ("No."), but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

Average payable on each valuation separately or on the whole, without deduction of thirds, new for old whether the average be particular or general.

Donkey boilers, winches, cranes, windlasses, steering gear, and electric light apparatus shall be deemed to be part of the hull, and not part of the machinery. Refrigerating machinery and insulation not covered unless expressly included in this Policy.

Warranted free from particular average under 3 per cent., but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other Ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid if reasonably incurred, even if no damage be found.

No claim shall in any case be allowed in respect of scraping or painting the Vessel's bottom.

Grounding in the Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above Buenos Ayres) or its tributaries, or in the Danube, Demerara, or Bilbao River, or on the Yenikale or Bilbao Bar shall not be deemed to be a stranding.

The warranty and conditions as to average under 3 per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence, at one of the following periods to be selected by the Assured when making up the claim, viz.: at any time at which the Vessel (1) begins to load cargo or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage if made) or has carried and discharged two cargoes, whichever may first happen, and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the Vessel sails in ballast to effect damage repair such sailing shall not be deemed to be a sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent. above referred to, particular average occurring outside the period covered by this Policy may be added to particular average occurring within such period provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding Policy.

In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this Policy.

In ascertaining whether the Vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of total or constructive total loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given in writing to the Underwriters, where practicable, and, if abroad, to the nearest Lloyd's Agent also, prior to survey, so that they may appoint their own Surveyor if they so desire; and whenever the extent of the damage is ascertainable, the Underwriters may take or may require the Assured to take tenders for the repair of such damage. In cases where a tender is accepted by or with the approval of Underwriters, the Underwriters will make an allowance at the rate of £30 per cent. per annum on the insured value for the time actually lost in waiting for tenders. In the event of the Assured failing to comply with the conditions of this Clause, £15 per cent. shall be deducted from the amount of the ascertained claim.

Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities, or warlike operations, whether before or after declaration of war.

To return	{	per cent. for each uncommenced month if it be mutually agreed	}	and arrival.
		to cancel this Policy.		
		as follows for each consecutive 30 days the Vessel may be laid up in		
		in port, viz.: —		
		per cent. if in the United Kingdom not under Average.		
		per cent. under Average, or if abroad.		

III. Institute Time Clauses. Hulls—F. P. A. Absolutely.

And it is further agreed that if the Ship hereby Insured shall come into collision with any other Ship or Vessel, and the Assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding

in respect of any one such collision the value of the Ship hereby Insured, this Company will pay the Assured such proportion of three-fourths of such sum or sums so paid as its subscription hereto bears to the value of the Ship hereby Insured, and in cases in which the liability of the Ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of this Company, the Company will also pay a like proportion of three-fourths of the costs which the Assured shall thereby incur, or be compelled to pay; but when both Vessels are to blame, then unless the liability of the Owners of one or both of such Vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the Owners of each Vessel had been compelled to pay to the Owners of the other of such Vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such collision.

Provided always that this Clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the Cargo or engagements of the Insured Vessel, or for loss of life or personal injury.

Should the Vessel hereby insured come into collision with or receive salvage services from another Vessel belonging wholly or in part to the same owners, or under the same management, the Assured shall have the same rights under this policy as they would have were the other Vessel entirely the property of owners not interested in the Vessel hereby insured; but in such cases the liability for the collision, or the amount payable for the services rendered, shall be referred to a sole arbitrator to be agreed upon between the Underwriters and the Assured.

In port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed and to go on trial trips.

Should the Vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a *pro rata* monthly premium, to her port of destination.

Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing provided notice be given, and any additional premium required be agreed immediately after receipt of advices.

Should the Vessel be sold or transferred to new management, then, unless the Underwriters agree in writing to such sale or transfer, this Policy shall thereupon become cancelled from date of sale or transfer, unless the Vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A *pro rata* daily return of premium shall be made.

This insurance also specially to cover loss of vessel through the negligence of Master, Mariners, Engineers, or Pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss has not resulted from want of due diligence by the owners of the Ship, or any of them, or by the Manager. Masters, Mates, Engineers, Pilots, or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the steamer.

General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or, if the contract of affreightment so provides, according to York-Antwerp Rules, or, in the case of Wood cargoes, York-Antwerp Rules omitting the first word of Rule I. ("No"), but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

General average payable without deductions, new for old.

Refrigerating machinery and insulation not covered unless expressly included in this Policy.

Warranted free from particular average absolutely.

In ascertaining whether the Vessel is a constructive total loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

In the event of total or constructive total loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given in writing to the Underwriters, where practicable, and if abroad, to the nearest Lloyd's Agent also, prior to survey, so that they may appoint their own Surveyor if they so desire.

Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities, or warlike operations, whether before or after declaration of war.

To return { per cent. for each uncommenced month if it be mutually agreed } and
to cancel this Policy. } arrival.
in port. per cent. for each consecutive 30 days the Vessel may be laid up }

IV. Institute voyage Clauses. Freight.

1. Including risk of craft and or lighter to and from the ship. Each craft and or lighter to be deemed a separate insurance if desired by the assured.

2. General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or, if the contract of affreightment so provides, according to York-Antwerp Rules, or, in the case of Wood cargoes, York-Antwerp Rules omitting the first word of Rule I. ("No"), but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

3. Warranted free from particular average under 3 per cent. unless the ship be stranded, sunk, or on fire, Underwriters notwithstanding this warranty to pay for any damage or loss caused by fire or collision with another ship or vessel.

4. In the event of the total loss, whether absolute or constructive, of the vessel, the amount underwritten by this policy shall be paid in full, whether the vessel be fully or only partly loaded or in ballast, chartered or unchartered.

5. In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

6. In calculating the amount due under this policy in respect of any claim except under Clauses 2 and 4, all insurances on freight (including honour Policies on Freight) shall be taken into consideration, and when the total of such insurances exceeds in amount the gross freight actually at risk only a rateable proportion of the gross freight lost shall be recoverable under this Policy, notwithstanding any valuation therein.

7. Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise.

8. It is further agreed that should the within-named vessel receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this Policy as they would have were the other vessel entirely the property of owners not interested in the within-named vessel; but in such cases the amount payable for the services rendered shall be referred to a sole Arbitrator to be agreed upon between the Underwriters and the assured.

9. Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

10. Held covered in case of deviation or change of voyage, provided notice be given and any additional premium required be agreed immediately after receipt of advices.

11. With leave to sail with or without pilots, and to tow and assist vessels or craft in all situations, and to be towed.

12. With leave to dock and undock and go into graving dock.

V. Institute time Clauses. Freight.

1. In port and at sea, in docks and graving docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam or sail, with leave to sail with or without pilots, to tow and assist vessels or craft in all situations, and to be towed and to go on trial trips.

2. Including risk of craft and or lighter to and from the ship. Each craft and or lighter to be deemed a separate insurance if desired by the assured.

3. General average and salvage to be adjusted according to the law and practice obtaining at the place where the adventure ends, as if the contract of affreightment contained no special terms upon the subject; or, if the contract of affreightment so provides, according to York-Antwerp Rules, or, in the case of Wood cargoes, York-Antwerp Rules omitting the first word of Rule I. ("No"), but, in all matters not specifically referred to in York-Antwerp Rules I. to XVII. inclusive, the adjustment shall be in accordance with the law and practice obtaining at the place where the adventure ends and as if the contract of affreightment contained no special terms upon the subject.

4. Warranted free from particular average under 3 per cent. unless the ship be stranded, sunk or on fire, Underwriters notwithstanding this warranty to pay for any damage or loss caused by fire or collision with another ship or vessel.

5. In the event of the total loss, whether absolute or constructive, of the steamer the amount underwritten by this Policy shall be paid in full, whether the steamer be fully or only partly loaded or in ballast, chartered or unchartered.

6. In ascertaining whether the vessel is a constructive total loss the insured value in the policies on ship shall be taken as the repaired value and nothing in respect of the damaged or break-up value of the vessel or wreck shall be taken into account.

7. In calculating the amount due under this Policy in respect of any claim except under Clauses 3 and 5, all insurances on Freight (including honour Policies on Freight) shall be taken into consideration, and when the total of such insurances exceeds in amount the gross freight actually at risk only a rateable proportion of the gross freight lost shall be recoverable under this Policy, notwithstanding any valuation therein.

8. Warranted free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise.

9. Should the Vessel be sold or transferred to new management, then, unless the Underwriters agree in writing to such sale or transfer, this Policy shall thereupon become cancelled from date of sale or transfer, unless the vessel has cargo on board and has already sailed from her loading port or is at sea in ballast, in either of which cases such cancellation shall be suspended until arrival at final port of discharge if with cargo, or at port of destination if in ballast. A *pro rata* daily return of premium shall be made.

10. It is further agreed that should the within named Vessel receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the within named vessel; but in such cases the amount payable for the services rendered shall be referred to a sole arbitrator to be agreed upon between the Underwriters and the assured.

11. Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing provided notice be given, and any additional premium required be agreed immediately after receipt of advices.

12. Should the vessel at the expiration of this policy be at sea or in distress or at a port of refuge or of call, the interest hereby insured shall, provided previous notice be given to the Underwriters, be held covered at a *pro rata* monthly premium to her port of destination.

13. Warranted free of capture seizure and detention and the consequences thereof or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations whether before or after declaration of war.

14. To $\left\{ \begin{array}{l} \text{per cent. for each uncommenced month if it be mutually agreed} \\ \text{to cancel this policy.} \\ \text{per cent. for each consecutive 30 days the Vessel may be laid} \\ \text{up in port.} \end{array} \right\} \text{ and arrival.}$

Addendum II.

Hypothetical adjustment of General Average¹⁾ based on the following figures:

Steamer actual value £10 000 insured by Company A for £2000 and at Lloyds for £8000 valued at £10 000. Subject to the Institute Time Clauses.

Cargo 2000 Tons of coal of a gross sound arrived value £2000.

Freight £1000 Gross, insured by B Company for £500 and at Lloyds for £500 valued at £1000.

Damage to engines £200.

Damage to Hull (Particular Average) £500.

Jettison of 500 Tons of Cargo

Hire of tug £300.

Total	Disbursements	General Average		Ship and Owners
		1/3 rd off	In full	
£ 300. 0.0	Hire of tug assisting to float vessel		£ 300. 0.0	
£ 200. 0.0	Repairs to engines (of damage sustained in float- ing operations)	£ 30.0.0	£ 170. 0.0	
£ 500. 0.0	Repairs to Hull (of damage caused by stranding)			£ 500.0.0
£ 250. 0.0	<i>Allowance for cargo jettisoned</i> 500 Tons at £1 per ton £ 500.0.0 Less Freight at 10s. — per ton . . £ 250.0.0 £ 250.0.0		£ 250. 0.0	
£ 200. 0.0	<i>Allowance for Freight on cargo jettisoned.</i> 500 Tons at 10s. per ton £ 250.0.0 Less expenses saved viz Dischar- ging and Dues at 2s. per ton . . £ 50.0.0 £ 200.0.0		£ 200. 0.0	
£ 1450. 0.0		£ 30.0.0 £ 10.0.0 £ 20.0.0	£ 920. 0.0 £ 20. 0.0	£ 500.0.0 £ 10.0.0
	Deduct one third new for old		£ 940. 0.0	£ 510.0.0
cr. 4. 9.0	Credit old Material on engine repairs viz old propeller		cr. 4. 9.0	
£ 1445.11.0			£ 935.11.0	£ 510.0.0
	Statement.		9. 9.0 £ 945. 0.0	

Apportionment of General Average.

<i>The Steamer</i> value in sound state	£ 10 000	
Less repairs	£ 700	
	£ 9300	
Add made good in General Average	£ 186	
	£ 9486	pays £ 796. 8.0
<i>The Freight</i> gross on cargo delivered	£ 750	
Add made good (Gross)	£ 250	
	£ 1000	
Less contingent expenses: Crew's wages . . .	£ 30	
Port charges, discharging etc.	£ 200	
	£ 230	£ 230
	£ 770	£ 770 pays £ 64.13.0
<i>The Cargo.</i> Gross value of quantity delivered . . .	£ 1500	
Less freight	£ 750	
	£ 750	
Add made good	£ 250	
	£ 1000	£ 1000 pays £ 83.19.0
	£ 11256	£ 945. 0.0

¹⁾ See *supra*, p. 547.

Balance.

		To pay	To receive
<i>The Ship owner</i>			
receives:			
Cost of tug hire	£ 300. 0.0		
Repairs to engines	£ 200. 0.0		
Less credit for old Material and thirds deducted	£ 14. 9.0		
	<u>£ 185.11.0</u>	£ 185.11.0	
Allowance for freight made good	£ 200. 0.0		
	<u>£ 685.11.0</u>		
Adjusters fees	£ 9. 9.0		
	<u>£ 695. 0.0</u>		
pays:			
Steamers contribution to General Average	£ 796. 8.0		
Freights contribution to General Average	£ 64.13.0		
	<u>£ 861. 1.0</u>	£ 861. 1.0	
Balance to pay	<u>£ 166. 1.0</u>	£ 166.1.0	
<i>The Cargo Owner</i>			
receives:			
Allowance for cargo jettisoned made good in General Average	£ 250. 0.0		
pays:			
Cargo's contribution to General Average	£ 83.19.0		
Balance to receive	<u>£ 166. 1.0</u>		£ 166.1.0
		<u>£ 166.1.0</u>	<u>£ 166.1.0</u>

Application to Insurances on Steamer.

Insured by policies as under for £10 000. On Hull and Machinery so valued.
Subject to the conditions of the Institute Time Clauses.

<i>The Steamer</i> pays General Average	£ 796.8.0
Add thirds deducted	10.0.0
	<u>£ 806.8.0</u>

Apportioned.

£ 8000 at Lloyd's	pays £ 645.2.5 or £ 8.1.4 ⁰ / ₁₀₀
2000 with A Company	pays 161.5.7
<u>£ 10000</u>	<u>£ 806.8.0</u>

Application to Insurances on Freight.

Insured by policies as under for £ 1000.
On Freight so valued.

<i>The Freight</i> Gross at risk £1000 pays General Average	£ 64.13.0
£1000 insured will pay same	£ 64.13.0

Apportioned.

£ 500 at Lloyd's	pays £ 32. 6.6 or £ 6.9.4 ⁰ / ₁₀₀
500 with B Company	32. 6.6
<u>£ 1000</u>	<u>£ 64.13.0</u>

(Signature of Adjusters.)

Note. I am indebted to a member of the Association of Average Adjusters for his kindness in providing the foregoing Statement. F. D. M.

Title XII. Carriage by Land.

By H. W. Disney, B. A., Barrister-at-Law.

I. Introductory.

The law relating to the carriage of goods is a branch of the law of bailments which has for at least 300 years been recognised in England as possessing distinguishing features. The position of the public or common carrier as an insurer of the goods he carries was clearly defined by Lord Holt in 1703, in the case of *Coggs v. Bernard*¹⁾ and seems to have been well established long before that date.

The calling of a common carrier imposed on the person following it certain duties which were considered of such public importance that he was indictable for failing to fulfil them. Thus, as at common law the innkeeper or the shoeing smith was indictable for refusing without lawful excuse to exercise the calling he professed, so the carrier was indictable for refusing without lawful excuse to carry the goods of any member of the public who was desirous of his services and ready to pay his charges. It is obvious that before railways were made the services of each of these persons was necessary to the trade of the country.

With the growth of trade the business of the carrier and the number of persons following the calling increased, and legal questions came more and more frequently before the courts. Valuable articles sent in parcels which were lost or stolen were very often the subjects of litigation, and the carriers made strenuous efforts to avoid the heavy responsibility laid upon them by the common law doctrine by which they were insurers. The usual way in which they attempted to protect themselves against liability was by posting notices in their offices or receiving houses to the effect that they were not common carriers of certain classes of goods specified in a list, that they would only carry such goods (if at all) on certain conditions set out, and that they would not be responsible for parcels containing such things when delivered to them without notification of their contents. If the consignor of goods had notice or knowledge of such conditions the courts usually held that the conditions defined the terms of the contract between the parties. It was often, however, very difficult to prove that the consignor had notice of the conditions; hence a large element of uncertainty existed in the relationship between the carrier and the owner of the goods carried.

The natural consequence of this was a great volume of litigation, a frequent issue being whether the consignor had the conditions brought to his notice.

During the latter part of the 18th and the early part of the 19th centuries carriage by inland waters became of great importance through the making of many canals and the improvement of navigation on the rivers. With the increased traffic litigation with carriers also increased, and in 1830 Parliament took the matter in hand. The result was the Carriers Act of that year²⁾.

This Act recites that by reason of the frequent practice of sending by public conveyances parcels containing money, jewellery, and other articles of great value in small compass, such valuable property was rendered liable to depredation, and the responsibility of carriers was greatly increased; that persons sending such parcels frequently omitted to notify the value and nature of their contents, so as to enable carriers by due diligence to protect themselves against losses arising from their legal responsibility; and that it was very difficult to fix parties with knowledge of notices published by carriers limiting such responsibility, so that carriers were exposed to great and unavoidable risks and had sustained heavy losses.

The Act contains a list of things which are either articles of great value in proportion to their bulk or else articles which are of very fragile nature. In respect of parcels containing such articles of over £10 in value the carrier is protected from liability, unless he has full information as to the contents, in which case he can charge a sum by way of insurance.

¹⁾ 2 Lord Raym. at p. 918.

²⁾ 1 Will. IV. c. 68. See Appendix.

The Act also provides that no posted notices can have any effect in limiting or otherwise affecting the common law liability of the carrier; but that parties may make any special contract they please with regard to the carriage of goods.

In 1830 railways were still in the experimental stage, and the authors of the Act do not seem to have regarded them as worthy of mention or as likely to compete with the coaches, wagons and canal boats of the existing carriers. In the first quarter of a century of railway construction, moreover, the legislature and the public entirely failed to appreciate the real use to which railways would be put. The idea seems to have been that they would be used like roads; private individuals, traders, and carriers running their own locomotives and vehicles on the rail-roads, and paying tolls to the railway companies, while the companies were to earn their dividends not as carriers but as road proprietors. It was in this frame of mind that Parliament seems to have passed the general Acts relating to railways of 1845 and earlier years. Very soon, however, it was seen that such a use of the railways was out of the question; and though by law any individual has the right on payment of reasonable tolls to use a railway with his own engines and carriages, the courts refuse specifically to enforce the law, recognising that to do so would throw the whole machinery of traffic out of gear and be disastrous to the public¹). Hence the railway companies' locomotives alone use the railways, and the companies are the carriers.

During that first quarter of a century of rapid development, the companies step by step gained a position of enormous strength. There was little check upon many of their charges, and none upon the nature of the contracts they might make. Sometimes a company had a practical monopoly of the whole carrying trade between two important towns, giving such a company an advantage over their customers which was capable of being used oppressively, and was often so used. A great object of the companies was to secure that traffic of a risky nature should only be carried under conditions freeing them from liability for loss or injury. The Carriers Act prevented them from limiting their liability by posting notices, but allowed them to make special contracts. Hence each company had tickets or consignment notes printed relating to certain classes of goods, and when a consignor delivered goods of these classes for carriage he was handed one of these documents, which was a receipt for the charge and contained the conditions on which alone the company would carry the goods. No doubt the consignor often took his ticket without troubling to read the small print upon it, and if all went well perhaps he never knew its contents. But if his goods were injured or lost and he claimed compensation he was referred to the conditions of the contract, to which he had assented in the sense that the document containing them had been put into his hand and he had not dissented. These conditions he probably found were such as to relieve the company of all liability and to deprive him of any compensation.

Public discontent with this state of things grew so great that Parliament interfered by passing the Railway and Canal Traffic Act of 1854²). Since that year the legislature has steadily recognised the principle that in return for the measure of monopoly they enjoy railway companies must submit to control in the interests of the public. Hence their powers of contracting have been regulated; they are forbidden to prefer one customer unfairly to another; they may be compelled to give facilities for traffic where their systems are defective; they may be compelled to arrange with other companies for through traffic; and their methods of conducting their business, and the charges they may make for carriage and for other services in relation to the goods, are strictly controlled.

II. The Common Carrier.

A private carrier is one who does not make the carrying of goods his business or calling, but who on occasion contracts to carry the goods of another for hire. He is an ordinary bailee of the goods and is only bound to use ordinary diligence with regard to them. A common or public carrier, on the other hand, is one who follows the calling of a carrier as a public employment — who makes it his business to carry goods for any person who wishes to hire his services and is prepared to pay his charges.

¹) See *Powell Duffryn Company v. Taff Vale Rail. Co.* (1874) L. R. 9 Ch. 331.

²) 17 & 18 Vict., c. 31. See Appendix.

He is none the less a common carrier because he professes to carry only certain classes of goods (as coal or corn), or to carry only to certain places¹). But if he professes to carry only for certain persons, or classes of persons, and not for the public at large, he is not a common carrier²). He may carry by land or water, or partly by land and partly by water; and some of his termini may be beyond the seas³). The common carrier takes various forms, as the carrier by horse-drawn vehicles, the barge owner, the shipowner, the railway company etc.

A carrier of passengers is not, as such, a common carrier; and the common law as to common carriers does not apply to him.

A common carrier may not refuse, without lawful excuse, to carry for any person who wishes to hire his services⁴). If he does so refuse he is liable to an action for damages, or may be indicted. He may lawfully refuse if he is required to carry otherwise than according to his profession, e. g. to carry goods of a kind which he does not profess to carry, or to a place beyond the field of his operations⁵). It is also a lawful excuse that he has not the means to carry, as where his vehicle is already full (though this does not apply to a railway company which is under statutory obligations to give facilities), or that the goods are not tendered to him at a reasonable time with respect to the time of the commencement of his journey. He may also refuse to carry if the person wishing to hire his services is not prepared to pay his charges at the time of tendering the goods for carriage⁶). His charges however must be reasonable, and the demand of an unreasonable sum is equivalent to a refusal to carry⁷). If an unreasonable sum be demanded and paid the excess may be recovered by the owner of the goods⁸). The common carrier may also refuse to carry goods which are not properly protected by packing according to their nature, where such packing is reasonably necessary⁹).

The obligation of the common carrier arises at law from the mere fact of the delivery to, and acceptance by, him of the goods for carriage. His responsibility begins at the moment he accepts, either personally or by his authorised agent. If he recognises any place as a receiving office, delivery of goods at that place to any person having apparent authority to receive the goods is delivery to the carrier; and the carrier's responsibility begins from the time of such delivery¹⁰).

The obligation of the common carrier is to deliver the goods safely. He is an insurer of the safety of the goods while under his control as carrier, and is responsible for them independently of any negligence on the part of himself or his servant¹¹). Thus, he is responsible for goods lost or destroyed by the wrongful act or default of persons over whom he has no control, or by inevitable accident (as by fire); he is responsible for goods stolen from him although without negligence on his part; he is responsible for goods taken from him by force¹²).

There are however perils against which the common carrier is not insurer. In the first place he is not responsible for loss or injury caused by the "Act of God". This means some act of nature, out of the ordinary course, sudden, violent or irresistible, which he cannot foresee, or against which (if he foresees) he cannot guard by any ordinary or reasonable precautions — e. g. lightning, or an extraordinary snowstorm or tempest¹³).

In the second place, the common carrier is not responsible for loss or injury caused by the King's enemies. These are the armed forces of a foreign State between which and this Kingdom war exists. The exception does not extend to loss or injury caused by rioters or rebels or armed robbers.

¹) *Johnson v. Midland Rail. Co.* (1849) 4 Ex. 367.

²) See *Nugent v. Smith* (1875) 1 C. P. D. 19.

³) See *Pinciani v. London v. South Western Rail. Co.* (1856) 18 C. B. 226.

⁴) *Boson v. Sandford* (1691) 1 Show. 101.

⁵) *Johnson v. Midland Rail. Co.* (ante).

⁶) *Wyld v. Pickford* (1841) 8 M. & W. 443.

⁷) *Crouch v. Great Northern Rail. Co.* (1856) 11 Ex. 742. *Garton v. Bristol & Exeter Rail. Co.* (1861) 30 L. J. Q. B. 273.

⁸) *Great Western Rail. Co. v. Sutton* (1869) L. R. 4 H. L. 226.

⁹) *Munster v. South Eastern Rail. Co.* (1858), 27 L. J. C. P. 308.

¹⁰) *Colepepper v. Good* (1832), 5 C. & P. 380.

¹¹) *Morse v. Shue* (1672), 1 Vent. 190, 238. *Coggs v. Bernard* (1703), 2 Ld. Raym. 909.

¹²) *Ibid.*

¹³) *Nugent v. Smith* (ante), *Bridden v. Great Northern Rail. Co.* (1858), 28 L. J. Ex. 51.

It is the duty of the carrier to use all reasonable skill and diligence in the circumstances to avoid these excepted perils of which he has notice, and if loss or injury from such perils might have been avoided by the use of reasonable diligence he is not excused — e.g. where his vehicle falls into the hands of the enemy by reason of his negligence.

But though the common carrier is thus an insurer against perils from without, he is not responsible for loss or injury due to some inherent defect or vice in the thing carried, which develops in transit without any negligence on his part; e. g. he is not responsible for the fermentation of fruit, the decay of fish, or injury to an animal by its own ferocity or unruliness in the course of transit¹). He is bound however to carry all goods with due regard to their nature, and is responsible for all injury to the goods which might have been avoided by due and reasonable care on his part²).

Nor is the common carrier responsible for loss or injury due to negligence on the consignor's part without any negligence on his own part³). Thus, it is the duty of the consignor to pack goods in such a manner as their nature requires; and if goods are not so properly packed and they are injured in transit from this cause, the carrier is not responsible⁴). If goods are injured in transit and any distinct part of such injury can be traced to improper packing, the carrier is not responsible for that part of the injury⁵). If in course of transit the carrier discovers that goods are in danger of being injured from being improperly packed, and if he can by any reasonable means obviate the threatened danger, it is his duty to use these means, and the owner of the goods is bound to indemnify him⁶). When the carrier can see that goods are not properly packed at the time he accepts them for carriage, but accepts them nevertheless, he takes the risk and in case of injury he is not entitled to shelter himself behind the plea of improper packing⁷).

Again it is the duty of the consignor to affix to the goods, or otherwise supply to the carrier, the address of the consignee, so full, accurate, and legible as to enable the carrier with due diligence to readily find the consignee; and the carrier is not responsible for loss or injury due to neglect of this duty⁸). The carrier may refuse to accept unaddressed goods, but if he knowingly accepts them and they are lost for want of an address, he is responsible⁹).

The duty of the common carrier is not only to carry safely, but also to deliver safely to the consignee, or at the house of the consignee if he undertakes to deliver away from his own office or station¹⁰). He delivers to any other person or at any other place at his own risk, and is not protected by the fact that he was defrauded into delivering to the wrong person¹¹). There is no presumption that he is obliged to deliver at the house of the consignee, or at any place other than his own office or station at the end of the transit. In the absence of agreement he is only bound to do so when such delivery is within the ordinary course of his business. It is usually within the ordinary course of the business of a railway company to deliver goods of small size at the place of address, provided such place is within a certain distance of the station of destination. Where the carrier delivers at the place of address he has performed his contract when he has delivered the goods safely to any person at that place who appears to have authority to receive them¹²). Where it is not part of his contract to deliver away from his office or station, the carrier should give the consignee notice of the arrival of the goods, if he has knowledge of the consignee's address¹³). When a carrier undertakes to convey to a place to which his own vehicles do not run, so that he has to perform part of his contract by employing another

¹) *Blower v. Great Western Rail. Co.* (1872), L. R. 7 C. P. 655.

²) *Davidson v. Gwynne* (1810), 12 East, 381.

³) *Talley v. Great Western Rail. Co.* (1870), L. R. 6 C. P. 44.

⁴) *Hart v. Bazendale* (1867), 16 L. T. 390. *Baldwin v. London Chatham and Dover Rail. Co.* (1882), 9 Q. B. D. 582.

⁵) *Higginbotham v. Great Northern Rail. Co.* (1861), 2 F. & F. 796.

⁶) *Notara v. Henderson* (1872), L. R. 7 Q. B. 225.

⁷) *Richardson v. North Eastern Rail. Co.* (1872), L. R. 7 C. P. 75.

⁸) *Caledonian Rail. Co. v. Hunter* (1858), 20 Sess. Cas. (2nd. Ser.) 1097.

⁹) *Campbell v. Caledonian Rail. Co.* (1852), 14 Sess. Cas. (2nd. Ser.) 806.

¹⁰) *Chapman v. Great Western Rail. Co.* (1880), 5 Q. B. D. 278.

¹¹) *Hoare v. Great Western Rail. Co.* (1877), 37 L. T. 186.

¹²) *M'Keon v. M'Ivor* (1870), L. R. 6 Ex. 36.

¹³) *Neston Colliery Co. v. London & North Western Rail. Co.* (1883), 4 Rail. & Can. Cas. 257.

carrier, he is responsible for the goods for the whole journey unless he protects himself by contract¹).

The liability of a common carrier as such is co-extensive with the transit of the goods. The transit begins the moment the goods are accepted for carriage and lasts until terminated in one of the following ways;

1. Delivery.
2. Tender of delivery and refusal to accept. This includes refusal by consignee to pay charges and consequent exercise by the carrier of his right of lien.
3. Failure to deliver, through inability to find the consignee or other cause beyond the carrier's control.
4. Failure of consignee to remove the goods within a reasonable time after receiving notice of arrival at the carrier's office or station. By the conditions of the consignment notes in general use by the railway companies the time is fixed at 24 hours.
5. Failure of consignee to remove the goods within a reasonable time of arrival at the station of destination when the carrier is not bound to give notice of arrival. This time is also fixed at 24 hours by the above mentioned consignment notes.
6. Agreement with the owner that the carrier shall warehouse the goods.

When the goods remain in the possession of the carrier after the termination of the transit the responsibility of the carrier for their safety is no longer that of a carrier but of a warehouseman, he being liable only in case of negligence²) and having, as a rule, a right to make a charge for warehousing³).

The owner of the goods may at any time during the transit require the carrier to deliver at some place other than the originally named place of destination; and if the demand so to deliver is made in such circumstances as to give the carrier reasonable opportunity of complying therewith, he is bound to do so⁴). In the absence of notice to the contrary the carrier may presume that the consignee is owner⁵).

Where the consignor as an unpaid seller has the right of stoppage *in transitu* he may exercise that right by taking actual possession of the goods or by giving due notice of his right to the carrier. Where he gives such notice, it is the duty of the carrier to redeliver the goods to the consignor, or according to his directions⁶); and he is liable in an action for damages for conversion of the goods if, after such notice, he delivers to the consignee⁷). Such notice is effectual so long as the goods are in the possession of the carrier as carrier and no longer; as soon as the transit is at an end and the carrier is holding the goods as agent for the consignee, the right of the consignor to stop them is at an end⁸). The notice may be given to the person who is actually in possession of the goods, or to his principal; but if given to the principal the notice to be effectual must be given at such time and in such circumstances that the principal by the exercise of reasonable diligence may communicate it to his servant or agent in time to prevent delivery to the consignee⁹).

A common carrier is not an insurer against delay in delivery. His duty is merely to be diligent to deliver within a reasonable time in the circumstances of the case. Hence he is only responsible for delay when he has expressly contracted to deliver within a certain time or where he does not deliver within a reasonable time and the delay is due to negligence on the part of himself or his servant¹⁰). The fact that a train arrives at its destination after the time stated in the time tables of a railway company is of itself no evidence of negligence; but when a train arrives a very long time after the professed time there is a presumption of negligence the onus of re-

¹) *Machu v. London & South Western Rail. Co.* (1848), 2 Ex. 415.

²) *Heugh v. London & North Western Rail. Co.* (1870), L. R. 5 Ex. 51. *Chapman v. Great Western Rail. Co.* (ante).

³) *London & North Western Rail. Co. v. Croke* (1904), 20 T. L. R. 506.

⁴) *Scotthorn v. South Staffs Rail. Co.* (1853), 22 L. J. Ex. 121.

⁵) *Cork Distillery Co. v. Great Southern & Western Rail. Co.* (1874), L. R. 7 H. L. 269.

⁶) Sale of Goods Act, 1893, s. 46. See also Titles "Sale of Goods" and "Maritime Law" pp. 363, 406 ante.

⁷) *Litt v. Cowley* (1816), 1 Taunt. 169.

⁸) See *Bethel v. Clark* (1888), 20 Q. B. D. 615 and *Lyons v. Hoffnung* (1890), 15 App. Cas. 391.

⁹) Sale of Goods Act, 1893, s. 46.

¹⁰) *Taylor v. Great Northern Rail. Co.* (1866), L. R. 1 C. P. 385.

butting which is on the company¹). The carrier is bound to deal with the goods in the ordinary way of his business; and if he departs from that way without good reason, as by an unnecessary deviation from his usual route, he is responsible for delay so caused²).

The obligation of the common carrier may be varied by express or implied contract applying to the transaction; but the obligation to deliver the goods in safety cannot be varied by any public notice given by the carrier³). Where the carrier is a railway or canal company, no contract is valid which limits the liability of the company for negligence, unless the conditions of such contract are just and reasonable, and the contract is in writing signed by the consignor or his agent⁴). In the case of other carriers no writing is necessary, and the existence of any contract varying the common law obligation of the carrier is a question of fact. If however the terms of any such alleged contract are contained in any ticket, consignment note or other such document handed to the consignor, those terms are not binding on the consignor unless he has assented to them. Such assent may be express, or may be implied from the fact that the terms were brought to the consignor's notice and that he did not dissent therefrom⁵). The terms are sufficiently brought to his notice if they are plainly printed on the face of the document handed to him, or if they are printed on the back of the document and a plain reference to them appears on the face⁶).

When the liability of a common carrier is varied by contract, it continues as at common law except in so far as it is so varied; hence the exclusion of some risks by the terms of the contract does not affect risks not provided for⁷). If it is desired to exclude liability for the negligence of the carrier or his servants, clear words must be used⁸).

The liability of the common carrier is not affected by the fact that he has insured the goods, whether he insures on his own account or as agent of the owner⁹).

III. The Carriage of Valuables.

By the Carriers Act, 1830¹⁰), common carriers by land are protected to some extent from the great risks run by them in dealing with valuable goods. There are certain articles for which under the provisions of this Act no common carrier is liable in case of loss or injury unless at the time the goods are delivered to him the value and nature of them is declared to him. These are: gold or silver coin of the realm or of any foreign State, any gold or silver in a manufactured or unmanufactured state, any precious stones, jewellery, watches, clocks, or time pieces of any description, trinkets, bills, bank notes of any bank in the United Kingdom, orders, notes or securities for payment of money. English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state and whether wrought up or not wrought up with other materials, furs, or hand-made lace¹¹), contained in any parcel or package delivered to the carrier to be carried for hire or to accompany the person of any passenger in any public conveyance, when the value of such article or articles or property contained in any such parcel or package shall exceed the sum of £10¹²).

¹) *Roberts v. Midland Rail. Co.* (1877), 25 W. R. 323. *Lord v. Midland Rail. Co.* (1867), L. R. 2 C. P. 339.

²) *Hales v. London & North Western Rail. Co.* (1863), 32 L. J. Q. B. 292. *Page v. Great Northern Rail. Co.* (1868), 1 R. 2 C. L. 228.

³) The Carriers Act, 1830, ss. 4 and 6. See Appendix.

⁴) Railway & Canal Traffic Act, 1854, s. 7 (See post, Sect. IV).

⁵) *Henderson v. Stevenson* (1875), L. R. 2 Sc. & Div. 470. *Harris v. Great Western Rail. Co.* (1876), 1 Q. B. D. 515.

⁶) *McCartan v. North Eastern Rail. Co.* (1885), 54 L. J. Q. B. 441. *Parker v. South Eastern Rail. Co.* (1877), 2 C. P. D. 416.

⁷) *Price & Co. v. Union Lighterage Co.* [1904] 1 K. B. 412.

⁸) *Acton v. Castle Mail Packets Co.* (1895), 73 L. T. 158.

⁹) *Hill v. Scott* [1895] 2 Q. B. 713.

¹⁰) 11 Geo. IV. & 1 Will. IV, c. 68. See Appendix.

¹¹) Carriers Act Amendment Act, 1865 (28 & 29 Vict. c. 94). See Appendix.

¹²) Carriers Act, 1830, s. 1. See Appendix.

Where a parcel containing such things of the value of over £10 is delivered to a carrier with a declaration of the value and nature of the contents, the carrier has the right to demand and receive an increased rate of charge above the ordinary rate of carriage, as compensation for the risk entailed by the care of such valuable articles. His right to demand this increased charge, however, depends on there being a legible notice of such *ad valorem* charges conspicuously displayed in his office or receiving house¹). If the carrier does not display this notice he has no right to make any charge beyond the ordinary charge for carriage, but he is entitled to the protection of the Act whether he displays the notice or not.

When such a declaration has been made and the increased charge has been paid, or an agreement has been entered into for the payment thereof, the consignor has a right to a signed receipt for the parcel acknowledging it to have been insured, and a carrier who refuses on demand to give such a receipt loses all the protection of the Act²). This receipt is not liable to any stamp duty.

The consignor having made the required declaration, and having paid, or agreed for the payment of, such increased charge as is properly demanded, the carrier's liability is that of an insurer as at common law. In the case of "undeclared goods" (i. e. goods to which the Act applies but which are not declared) the carrier is not responsible for their loss or injury, even though such loss or injury is caused by gross negligence on the part of him or of his servant³). But the carrier remains liable for all acts of wilful misfeasance, as by converting the goods to his own use⁴).

The Act affords the carrier no protection against liability for mere delay in carrying out his contract, but he is protected against liability for delay caused by loss⁵). Loss may be permanent or only temporary. If goods are temporarily lost and recovered, the carrier is protected from liability for delay caused by the loss; but he is bound to deliver the goods within a reasonable time of so recovering them, and is liable for delay if he fails to do so⁶).

The Act gives no protection to the carrier where the goods are lost or injured through the felonious act of his servant⁷). Where the owner of undeclared goods which have been lost or injured claims to hold the carrier liable on the ground of his servant's felony, it is not necessary that he should give evidence sufficient to convict an individual servant of felony⁸). It will be sufficient for him, in order to throw the burden of proof on the carrier, to prove a *prima facie* case of felony against some unidentified person, and to prove that such person must in all reasonable probability have been a servant of the carrier. It is not sufficient merely to prove that it is more probable the goods were stolen by a servant of the carrier than by any other person, where the public had opportunities of access to the goods⁹).

A servant of the carrier is not protected by the Act in any way from personal responsibility for the consequence of his own negligence or misconduct¹⁰). Where the place of some other person (such as a shop or public house) is recognised by the carrier as a receiving house for goods, the servant of the proprietor of such place is the servant of the carrier for the purpose of the Act¹¹); and so is the servant of another carrier, or agent, employed by the contracting carrier to perform part of the agreed services¹²).

Whether or not any particular article comes within the description of the articles specified in the Act is a question of fact, not of law. A thing which is merely accessory to a thing within the Act is part of that thing and is itself within the Act; e.g. the frame of a picture is part of the picture and comes within the Act¹³). Where

¹) Ibid., s. 2.

²) Ibid., s. 3.

³) *Hinton v. Dibbin* (1842), 2 Q. B. 646.

⁴) *Morritz v. North Eastern Rail. Co.* (1876), 1 Q. B. D. 302.

⁵) *Millen v. Brasch* (1882), 10 Q. B. D. 142.

⁶) *Hearn v. London & South Western Rail. Co.* (1855), 24 L. J. Ex. 180.

⁷) Carriers Act, 1830, s. 8. See Appendix.

⁸) *Vaughton v. London & North Western Rail. Co.* (1874), L. R. 9 Ex. 93.

⁹) *McQueen v. Great Western Rail. Co.* (1875), L. R. 10 Q. B. 569.

¹⁰) Carriers Act, 1830, s. 8.

¹¹) *Stephens v. London & South Western Rail. Co.* (1886), 18 Q. B. D. 121.

¹²) *Machu v. London & South Western Rail. Co.* (1848), 2 Ex. 415.

¹³) *Henderson v. London & North Western Rail. Co.* (1870), L. R. 5 Ex. 90.

a parcel contains things of the description of those mentioned in the Act to the value of over £10 and also other things, the Act applies to the things within the Act but not to such other things nor to the case which contains the things¹). Where a case contains things within the Act of over £10 in value and no other things, the case is an accessory of its contents and the Act applies to the case as well as to the contents²).

The Act has no application to articles not contained in any parcel or package; but anything which is made by the consignor to contain articles within the Act may be a parcel or package in this sense. Thus, a furniture van packed with a large quantity of goods of various kinds and sent by railway is a parcel or package; and if undeclared pictures contained in such van are injured or destroyed the railway company is entitled to the protection of the Act with regard to them³).

When a consignor has declared goods to be of a certain value such declaration is conclusive against him with regard to the value; but the carrier is in all cases entitled to put the owner to strict proof of the actual value of the goods⁴). The value in the case of goods sold and consigned to the buyer by the seller is the contract price to the seller. Hence where goods are bought for less than £10 in order to be re-sold and are re-sold for over £10, the Act applies to the goods when sent by a carrier to the second buyer⁵).

IV. Special Contracts with Railway and Canal Companies.

Every railway and canal company is liable for the loss of, or injury to, goods in receiving, forwarding, or delivering them, occasioned by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration made or given by the company limiting such liability; and every such notice, condition, or declaration is null and void. But any company may make any conditions limiting its liability with respect to the receiving, forwarding, or delivering of goods which are just and reasonable in the judgment of the court before which any question relating thereto is tried; provided that such conditions are contained in a document signed by the consignor or the person delivering the goods to the company for carriage⁶). However just and reasonable the conditions of a contract limiting the liability of a company for negligence may be, they are of no effect whatever unless they are in writing signed by the consignor or his agent; and conditions contained in such a contract, although in writing signed by the consignor or his agent, are of no effect unless they are just and reasonable⁷). The foregoing restrictions apply only where a company is endeavouring to avoid liability; hence a contract may be enforceable against a company although neither in writing nor signed⁸). They apply also only to conditions which attempt to limit the liability of a company for negligence in the receiving, forwarding or delivering of goods; hence a company may contract out of liability for other matters without restriction⁹).

The restrictions apply to all acts of negligence, not only in the actual carrying or delivering of the goods, but in the process of receiving the goods¹⁰). They have no application, however, to matters outside the transit of the goods; hence there is no restriction on contracts for warehousing the goods after transit¹¹).

The restrictions apply only to contracts for carriage upon a railway company's own railway; and therefore when a company contracts to carry goods to a place on the railway of another company, a condition that it will not be liable for the goods when handed over to that other company is good if sufficiently brought to the knowledge of the consignor although not signed by him¹²).

¹) *Treadwin v. Great Eastern Rail. Co.* (1868), L. R. 3 C. P. 308.

²) *Wyld v. Pickford* (1841), 8 M. & W. 443.

³) *Whaite v. Lancashire & Yorkshire Rail. Co.* (1874), L. R. 9 Ex. 67.

⁴) *Carriers Act*, 1830, s. 9. See Appendix.

⁵) *Blankensee v. London & North Western Rail. Co.* (1882), 45 L. T. 761.

⁶) *Railway & Canal Traffic Act 1854* (17 & 18. Vict., c. 31), s. 7. See Appendix.

⁷) *Peek v. North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473.

⁸) *Baxendale v. Great Eastern Rail. Co.* (1869), L. R. 4 Q. B. 244.

⁹) *Shaw v. Great Western Rail. Co.* [1894] 1 Q. B. 373. *Duckham v. Great Western Rail. Co.* (1899), 80 L. T. 774.

¹⁰) *Hodgman v. West Midland Rail. Co.* (1864), 10 L. T. 609.

¹¹) *Van Toll v. South Eastern Rail. Co.* (1862), 6 L. T. 244.

¹²) *Zunz v. South Eastern Rail. Co.* (1869), L. R. 4 Q. B. 539.

When a railway company contracts to carry goods to a place involving a transit partly by sea and partly by land, the restrictions do not apply to the sea portion of the transit; unless by the private Act of a company which empowers it to own and work steamships, section 7 of the Railway and Canal Traffic Act, 1854, is made to apply to traffic in those ships¹). In general, conditions exempting a railway company from liability for loss or damage to goods caused by perils of the sea, provided the conditions are published in a conspicuous manner in the company's receiving office and printed in a legible manner on the receipt or freight note given by the company for the goods, are as valid as part of the contract between the parties as if the company had signed and delivered to the consignor a bill of lading containing such conditions²).

Railway companies are bound to carry all such goods as they profess to carry as common carriers for a reasonable sum, with liability for negligence; but there are kinds of goods which it is reasonable that a company should refuse to carry as insurers³). They may be exempt from liability as insurers while remaining liable for negligence by a contract which need not be in writing or signed⁴). But they can only be exempt from liability for negligence by a signed contract which sets out, or clearly incorporates by reference, the conditions limiting their liability; and they must in addition support the burden of proving that such conditions are just and reasonable as between them and the owner of the goods⁵). Whether a condition is just and reasonable is a question which must depend on the circumstances of each particular case and is for the court, not for the jury⁶).

Prima facie conditions which entirely exempt a company from all liability⁷), or which exempt a company from liability in case of misconduct on the part of its servants⁸), or which require a consignor to insure the goods by paying a sum varying with the value of the goods⁹), are unjust and unreasonable and therefore void. But when the conditions of a contract are *prima facie* neither just nor reasonable they may be proved to be both just and reasonable by shewing that an alternative was open to the consignor, either to send his goods for a reasonable sum at the company's risk so far as regards negligence, or to send them under an agreement by which he freed the company from liability, receiving from the company good consideration for such agreement¹⁰). If he adopts the latter alternative the consignor is said to send the goods at "owner's risk". Where such a fair alternative is open to a consignor, and he chooses, for the consideration offered to him, to free the company from liability, there is a presumption that the contract is just and reasonable¹¹). But where no fair alternative is offered to the consignor, and no real or adequate consideration is given to him for freeing the company from its liability, the presumption is that the contract is not just and reasonable¹²).

The alternative must be a fair one, such as a consignor might reasonably consider; an alternative which no reasonable person could possibly adopt is no alternative at all¹³). Thus, where the cost of consigning goods at company's risk is out of all fair proportion to the cost of consigning at owner's risk the consignor cannot be said to have a fair alternative¹⁴). But when the alternative is a fair one, conditions agreed to for adequate consideration may be just and reasonable although the company is thereby exempt from all liability whatsoever, even for the misconduct

¹) See *The Stella* [1900] P. 161.

²) Regulation of Railways Act, 1868, s. 14.

³) See *Allday v. Great Western Rail. Co.* (1864), 11 L. T. 267. *Ashenden v. London, Brighton & South Coast Rail. Co.* (1880), 5 Ex. D. 190.

⁴) *Shaw v. Great Western Rail. Co.* [1894] 1 Q. B. 373.

⁵) *Peek v. North Staffs Rail. Co.* (1863), 10 H. L. Cas. 473.

⁶) *Great Western Rail. Co. v. McCarthy* (1887), 12 App. Cas. 218.

⁷) *Peek v. North Staffs Rail. Co.* (ante). *Lloyd v. Waterford & Limerick Rail. Co.* (1862), 15 I. C. L. R. 37.

⁸) *Ronan v. Midland Rail. Co.* (1884), 14 L. R. Ir. 157.

⁹) *Peek v. North Staffs Rail. Co.* (ante). *Dickson v. Great Northern Rail. Co.* (1886), 18 Q. B. D. 176.

¹⁰) *Manchester, Sheffield & Lincolnshire Rail. Co. v. Brown* (1883), 8 App. Cas. 703.

¹¹) *Ibid. Lewis v. Great Western Rail. Co.* (1877), 3 Q. B. D. 195.

¹²) *Rooth v. North Eastern Rail. Co.* (1867), 15 L. T. 624.

¹³) *Dickson v. Great Northern Rail. Co.* ante.

¹⁴) *Ibid.*

of its servants¹). Whether or not an alternative offered is a fair one is a question of fact depending on the circumstances of each case. If it appears on the face of the contract that there was such an alternative when in fact there was no such alternative, the conditions are not just and reasonable²). On the other hand, if there was in fact a fair alternative, although it was not apparent on the face of the written contract, the conditions may be just and reasonable³).

Railway companies are under no obligation to carry goods which are not properly protected by packing, if the nature of the goods is such as to make packing reasonably necessary. Hence if such damageable goods are offered to the company for carriage not so protected, it may refuse to carry them except at owner's risk. Here the alternative offered to the consignor is to pack the goods and then send them at company's risk, or to send them unpacked at owner's risk; and the inducement offered to him to accept the latter alternative is the saving of cost to him in not having to bear the expense of packing and the extra charge for greater weight. This is a fair alternative and such conditions are just and reasonable⁴).

Again, railway companies are under no obligation to carry goods (except perishable goods and passengers' luggage) by passenger train. If then they agree to carry goods by passenger train, they may so agree on condition that they carry only at owner's risk⁵). But goods carried by passenger train are carried by the company as an insurer unless the company is protected by a signed contract⁶).

The ordinary alternative, however, offered to consignors is an alternative of rates of charge; the rate for goods carried at owner's risk being substantially lower than the rate for the same goods carried at company's risk, but the difference not being so great that no one could reasonably accept the company's risk rate.

In the absence of any definition of the term in the contract, "owner's risk" means that the company in carrying the goods is exempt from its ordinary liability as insurer but remains liable for either injury or delay due to negligence⁷). The contract however usually defines the meaning of "owner's risk" much more in favour of the railway company. By the ordinary form of owner's risk consignment note in general use a railway company is exempt from all liability for loss, damage, misdelivery, delay or detention, except upon proof that such loss, damage, misdelivery, delay or detention arose from wilful misconduct on the part of the company's servants. Therefore in the usual course of things, and in the case of most kinds of goods, the companies do not attempt to avoid liability for any loss or other injury caused by misconduct.

Although by a proper contract they may no doubt avoid liability even for misconduct, the courts lean strongly against their attempting to do so⁸). Wilful misconduct is misconduct which is intentional as distinguished from accidental, and is far beyond even gross negligence. It involves the doing of something, or the omitting to do something, on the part of a person, which that person knows is a wrong thing to do, or to omit, in the circumstances⁹). If a railway servant knows that what he is doing, or omitting to do, may endanger the safety of goods, and he intentionally does, or omits to do, that thing, careless of the consequences, he is guilty of wilful misconduct¹⁰). When a complaint was made to the higher officials of a company that a certain mode of stowing a certain class of goods in a train was likely to injure the goods, but there was no evidence that this complaint was brought by those officials to the knowledge of those immediately answerable for the loading of the goods, it was held that the fact that goods were after the complaint stowed in the manner complained of was no evidence of misconduct; but if it had been proved

¹) *Manchester, Sheffield & Lincolnshire Rail. Co. v. Brown* (ante).

²) *Allday v. Great Western Rail. Co.* (1864), 11 L. T. 267. *Duckham v. Great Western Rail. Co.* (1899), 80 L. T. 774.

³) *Moore v. Great Northern Rail. Co.* (1882), 10 L. R. Ir. 95.

⁴) *Sutcliffe v. Great Western Rail. Co.* [1910] 1 K. B. 478.

⁵) *Stone v. Midland Rail. Co.* [1904] 1 K. B. 669.

⁶) *Wilkinson v. Lancashire & Yorkshire Rail. Co.* [1907] 2 K. B. 222.

⁷) *Robinson v. Great Western Rail. Co.* (1865), 35 L. J. C. P. 123. *D'Arc v. London & North Western Rail. Co.* (1874), L. R. 9 C. P. 325. *Mitchell v. Lancashire & Yorkshire Rail. Co.* (1875), L. R. 10 Q. B. 256.

⁸) *Ashenden v. London Brighton & South Coast Rail. Co.* (1880), 5 Ex. D. 190.

⁹) *Forder v. Great Western Rail. Co.* [1905] 2 K. B. 532. *Graham v. Belfast & Northern Counties Rail. Co.* [1901] 2 Ir. 13.

¹⁰) *Lewis v. Great Western Rail. Co.* (1877), 3 Q. B. D. 195.

that the complaint had been brought to the knowledge of the persons in charge of the loading, and that they had allowed the loading to be effected in such manner, there would have been evidence of misconduct¹).

The onus of proving misconduct is on the person who alleges misconduct, and it will not be presumed from facts showing negligence only. Thus it will not be presumed from proof of great delay in delivery²) or of misdelivery³) or from the fact that the goods have suffered damage which cannot be explained⁴). But where goods are intentionally (though innocently) delivered by a servant of the company to a person whom he knows not to be the consignee or his agent, misconduct may be presumed⁵). So, where goods sent by railway are never delivered at all, and no explanation is given to the owner, there is evidence of misconduct⁶).

In the year 1910 the English railway companies adopted an amended form of owner's risk consignment note for ordinary goods carried at a reduced rate, by which they accept liability in spite of the general provision in the following cases:

1. Non-delivery of any package or consignment fully and properly addressed, unless such non-delivery is due to accidents to trains or fire.
2. Pilferage from packages of goods protected otherwise than by paper or other packing readily removable by hand, provided the pilferage is pointed out to a servant of the company on or before delivery.
3. Misdelivery where goods fully and properly addressed are not tendered to the consignee within 28 days⁷) after despatch. Provided that the company is not to be liable in the said cases of non-delivery, pilferage, or misdelivery, on proof that the same has not been caused by negligence or misconduct on the part of the company or its servants.

Where goods are carried at a lower rate on condition that the company shall only be liable in case of negligence such condition is just and reasonable, and the onus of proving negligence in case of damage or loss is on the owner of the goods⁸).

A condition that a company will not be responsible for loss of market is *prima facie* reasonable⁹). Loss of market may occur without any negligence on the part of the company, as by delay for which the company is not to blame. But a company cannot protect itself from liability for loss of market by delay which is due to its negligence, except by a just and reasonable and signed contract.

Amongst conditions which have been held to be unreasonable are such as free a company from responsibility for the safety and suitability of its premises¹⁰), or from the soundness and sufficiency of its rolling stock¹¹).

When a company by a through booking contract accepts goods for delivery at a place on the railway of a second company, it is an agent for such second company to make a contract for it, and the second company is entitled to the full benefit of an owner's risk contract covering the whole transit¹²). A condition in a through booking contract that the contracting company shall not be responsible for the goods from the time it hands them over to the second company is a reasonable condition¹³), and may be binding although not signed by the consignor, as it does not exempt the contracting company from liability for negligence on its own line¹⁴). In such case the burden of proof is on the contracting company to show that the goods were handed over safely to the second company¹⁵). The second company is liable for its own acts and defaults unless protected by contract; but if it is sought to make it liable the burden of proof is on the plaintiff to show that

¹) *Forder v. Great Western Rail. Co.* (ante).

²) *Graham v. Belfast & Northern Counties Rail. Co.* (ante).

³) *Stevens v. Great Western Rail. Co.* (1885), 52 L. T. 324.

⁴) *Haynes v. Great Western Rail. Co.* (1879), 41 L. T. 436.

⁵) *Hoare v. Great Western Rail. Co.* (1877), 37 L. T. 186.

⁶) *Curran v. Midland Rail. Co.* [1896] 2 Ir. 183.

⁷) This time is varied in case of perishable goods.

⁸) *Harris v. Midland Rail. Co.* (1876), 25 W. R. 63. *Smith v. Midland Rail. Co.* (1887), 57 L. T. 813.

⁹) *Duckham v. Great Western Rail. Co.* (1899), 80 L. T. 774.

¹⁰) *Rooth v. North Eastern Rail. Co.* (1867), L. R. 2 Ex. 173.

¹¹) *M'Manus v. Lancashire & Yorkshire Rail. Co.* (1859), 28 L. J. Ex. 353.

¹²) *Barratt v. Great Northern Rail. Co.* (1904), 20 T. L. R. 175.

¹³) *Aldridge v. Great Western Rail. Co.* (1864), 33 L. J. C. P. 161.

¹⁴) *Zunz v. South Eastern Rail. Co.* (1869), L. R. 4 Q. B. 539.

¹⁵) *Kent v. Midland Rail. Co.* (1874), L. R. 10 Q. B. 1.

the loss or injury took place on its railway¹). Where in a through^rbooking contract the contracting company stipulates that it shall be responsible only for the misconduct of its own servants, and misconduct is proved on the part of someone, the onus is on the contracting company to prove that the guilty person was not its servant²).

V. Dangerous Goods.

Any person who delivers to a carrier goods of a dangerous nature, of which it is not reasonable from the description of the goods to expect him to be aware, is bound to give the carrier notice of their dangerous nature, and if he does not do so he is liable for the consequences of such omission³).

No person is entitled to carry by railway or to require any railway company to carry any aquafortis, oil of vitriol, gunpowder, lucifer matches, or any other goods which are dangerous in the judgment of the company. If any person sends any such goods by railway without distinctly marking their nature on the outside of the package containing them, or otherwise giving notice in writing to the company, he is guilty of an offence and liable to forfeit £20 to the company. A railway company may refuse to accept any parcel suspected to contain goods of a dangerous nature, or require the same to be opened to ascertain the contents⁴).

The Explosives Act, 1875⁵) contains regulations for the carriage of gunpowder and other explosives and for their packing. All railway and canal companies which carry explosives must make bye-laws, which must be approved of by the Board of Trade, for regulating the conveyance, loading, and unloading of explosives. With regard to the carriage of explosives by other carriers bye-laws are made by the Home Secretary. Heavy penalties may be inflicted for the breach of any of these bye-laws⁶).

Ammunition for the naval and military forces of the Crown must be carried, when required, by every railway company on terms agreed upon between the department of government concerned and the company⁷).

Railway companies are not limited by Statute as to the charges they may make for the carriage of dangerous goods. They are not bound to carry any such goods, but if they do carry them they may charge such reasonable sum as they think fit⁸).

VI. The Carriage of Animals.

The liability of a carrier for the safety of animals which he undertakes to carry is similar to his liability in the case of other goods. Unless therefore he is protected by contract he may be liable as an insurer⁹). Railway and canal companies are bound to give reasonable facilities for the carriage of such kinds of animals as are conveyed by any railway or canal company¹⁰); but they cannot be called upon to carry as insurers any animals which they do not profess to carry as common carriers¹¹). If however, they make any conditions limiting their liability for negligence such conditions are void, as in the case of inanimate goods, unless they are contained in a document signed by the consignor or his agent, and unless they are just and reasonable¹²).

Inasmuch as animals can move of themselves, are subject to fright and to hunger and thirst, and are apt to be restive, playful or ferocious, their carriage is subject to serious risks not present in the case of inanimate goods. Carriers who undertake to carry animals must, however, at their risk make provision for all the ordinary acts of such animals, unless they protect themselves by contract. But where animals are injured by conduct on their part which is extraordinary, by unusual ferocity,

¹) *Tuohy v. Great Southern & Western Rail. Co.* [1898] 2 Ir. R. 789.

²) *Mahoney v. Waterford & Limerick Rail. Co.* [1900] 2 Ir. R. 273.

³) *Farrant v. Barnes* (1862), 31 L. J. C. P. 137.

⁴) Railways Clauses Act, 1845 (8 Vict., c. 20), s. 105.

⁵) 38 Vict., c. 17, ss. 33—39.

⁶) *Ibid.*

⁷) Cheap Trains Act, 1883 (46 & 47 Vict., c. 34), s. 6.

⁸) See the almost identical Rates and Charges Order Confirmation Acts of the various companies. Schedule. Part IV.

⁹) *Blower v. Great Western Rail. Co.* (1872), L. R. 7 C. P. 655.

¹⁰) Railway & Canal Traffic Act, 1854 (17 & 18 Vict., c. 31), ss. 1 & 2. See Appendix.

¹¹) *Dickson v. Great Northern Rail. Co.* (1886), 18 Q. B. D. 176.

¹²) Railway & Canal Traffic Act, 1854, s. 7. See Appendix.

by fright or panic which cannot be avoided or controlled by any ordinary and reasonable measures on the part of the carrier, the carrier is exempt from liability, even if carrying as an insurer, on the ground of inherent vice¹).

Conditions which reduce the liability of a railway company to the least possible may be just and reasonable, provided a fair alternative was open to the consignor²). It is *prima facie* an unreasonable condition that a railway company shall not be liable for injury to animals due to their vehicles being unsuitable or insufficient³) or to their places for loading or unloading being improper⁴). It may be a reasonable condition that a company shall not be responsible for injury caused to horses or other animals by kicking or struggling from fright; but if such a condition be made, it only applies where the fright is caused by the ordinary incidents of transit; it does not apply to fright caused by the negligence of the company⁵).

Where a company carries animals on condition that it shall only be liable in case of negligence, the onus is on the owner in case of injury to prove negligence⁶). The mere fact that an animal is found injured at the end of a journey is not of itself evidence of negligence⁷); but if the owner can show that there was anything improper in the mode of carriage, e. g. that the train was shunted with undue violence or that the couplings were improper, there is evidence of negligence on the company's part⁸).

Where an animal is provided by the owner with a halter, a collar and chain, or other such means of controlling the animal in transit, the carrier is not responsible if the animal escapes or is injured through such means of control being insufficient⁹). If, however, the carrier can see when the animal is delivered to him for carriage that the means of control are insufficient, but accepts the animal with such means, the carrier so accepts at his own risk¹⁰).

At the end of the transit it is the duty of the consignee to be prepared to accept delivery of an animal, and the railway company is not liable for damage caused by there being no one ready to receive it on arrival¹¹). A company is bound, however, to act reasonably according to the circumstances in such a case; and is entitled to incur reasonable expenses in the care of the animal, and to recover such expenses from the owner¹²).

A condition that a railway company shall not be liable for injury caused by delay in the carriage of animals is *prima facie* unreasonable¹³). Delay may cause depreciation in the condition and value of animals from hunger and thirst, and unless protected by contract a company is liable for depreciation so caused, if it is responsible for the delay¹⁴), but not if it is not so responsible¹⁵). It may therefore become its duty to feed or water animals in transit. It may also be its duty to feed or water in transit by express contract or by its custom in the circumstances¹⁶). Every railway company must provide food and water for animals in transit at such stations as the Board of Agriculture directs, and to the satisfaction of that Board. This food or water must be supplied to the animals at the request of the person in charge of them or of the consignor. If an animal is kept for 24 hours on a journey without water through the person responsible not making such request that person is guilty of an offence and liable to a fine. This time may be shortened by order of the Board to any time not less than 12 hours in the case of particular animals. The company supplying food or water may make such reasonable

¹) See *Blower v. Great Western Rail. Co.* (ante). *Kendall v. London & South Western Rail. Co.* (1872), L. R. 7 Ex. 373.

²) *Great Western Rail. Co. v. McCarthy* (1887), 12 App. Cas. 218.

³) *McManus v. Lancashire & Yorkshire Rail. Co.* (1859), 28 L. J. Ex. 353.

⁴) *Rooth v. North Eastern Rail. Co.* (1867), L. R. 2 Ex. 173.

⁵) *Gill v. Manchester, Sheffield, & Lincolnshire Rail. Co.* (1873), L. R. 8 Q. B. 186.

⁶) *Smith v. Midland Rail. Co.* (1887), 57 L. T. 813.

⁷) *Russell v. London & South Western Rail. Co.* (1908), 24 T. L. R. 548.

⁸) *Pickering v. North Eastern Rail. Co.* (1887), 4 T. L. R. 7.

⁹) *Richardson v. North Eastern Rail. Co.* (1872), L. R. 7 C. P. 75.

¹⁰) See *Stuart v. Crawley* (1818), 2 Stark. 323.

¹¹) *Wise v. Great Western Rail. Co.* (1856), 25 L. J. Ex. 258.

¹²) *Great Northern Rail. Co. & Swaffield* (1874), L. R. 9 Ex. 132.

¹³) *Allday v. Great Western Rail. Co.* (1864), 34 L. J. Q. B. 5.

¹⁴) *Ibid.*

¹⁵) *Bridgen v. Great Northern Rail. Co.* (1858), 28 L. J. Ex. 51.

¹⁶) *Curran v. Midland Great Western Rail. Co.* [1896] 2 Ir. 183.

charge for doing so as the Board approves, and may recover the same as a debt from either the consignor or the consignee. It also has a lien on the animals so supplied for such charges, and a general lien therefor upon any other animals consigned by or to the same consignor or consignee. The Board also have wide powers of making orders regulating the carriage of animals, so as to provide against unnecessary suffering in transit and to prevent the spread of disease¹).

No railway or canal company is liable in the case of loss of, or injury to, any horse for more than £50 damages, or in the case of any head of cattle of the ox species for more than £15, or in the case of any sheep or pig for more than £2; unless the consignor at the time of delivery to the company declares any such animal to be of a higher value than the sums mentioned. If such declaration be made, then the company is entitled to demand and receive, by way of compensation for the increased risk and the greater care required, a reasonable percentage on the value of the animal above the sum mentioned, in addition to the ordinary charge for carriage. The scale of such charges must be set out in a notice posted at the company's station or office²).

A railway company has no right to demand any extra charge in respect of its knowledge of the value of any particular animal, unless a specific declaration of value has been made in order to inform the company of such value, the owner being entitled to send it uninsured if he pleases³). When such a declaration of value has been made the owner is estopped from alleging any higher value, in case of any claim arising out of the contract of carriage; but the onus of proving the value declared is on the owner⁴). This limitation of liability applies to every act of the company in either receiving, forwarding or delivering an animal. Hence when a horse is brought on to the premises of a company in order to be sent by railway, and is there injured by the negligence of the company before there is time to make an intended declaration of value, the liability of the company is limited to the sum of £50⁵).

In the case of animals other than those mentioned it is *prima facie* unreasonable for a company to make a condition that it shall not be liable for more than a named sum unless a higher value be declared and a percentage on the excess of such value above the named sum be paid⁶). But with regard to any particular kind of animal a company may show that such a condition is reasonable in view of the risks run, the peculiar circumstances of the case, and the amount of the charge⁷).

VII. Rates and Charges.

Every common carrier is entitled to demand to be paid a reasonable sum for the carriage of goods at the time when they are delivered to him for conveyance; or, if he chooses to accept them without such payment, at the time when he has carried the goods to the agreed destination and is ready to deliver them to the consignee. He is not bound to treat all his customers equally, but in no case may he charge an unreasonable sum⁸). The demand of an unreasonable sum is equivalent to a refusal to carry⁹), and if such a sum be paid under protest the excess above what is reasonable may be recovered in an action for money had and received¹⁰).

Where the carrier is a railway company the maximum rates it may charge for nearly all kinds of goods are fixed by statute. By the Railway and Canal Traffic Act, 1888¹¹) it was provided that every railway company should submit to the Board of Trade a revised classification of merchandise traffic and schedule of maximum rates and charges applicable thereto. After these classifications and schedules had been enquired into and settled by the Board a special Act of Parliament was passed

¹) The Diseases of Animals Act, 1894 (57 & 58 Vict., c. 57), ss. 21—23.

²) Railway & Canal Traffic Act, 1854, s. 7. See Appendix.

³) *Robinson v. London & South Western Rail. Co.* (1865), 12 L. T. 347.

⁴) *McCance v. London & North Western Rail. Co.* (1864), 11 L. T. 426.

⁵) *Hodgman v. West Midland Rail. Co.* (1864), 10 L. T. 609.

⁶) *Dickson v. Great Northern Rail. Co.* (1886), 18 Q. B. D. 176. *Peek v. North Staffordshire Rail. Co.* (1863), 10 H. L. Cas. 473.

⁷) *Williams v. Midland Rail. Co.* [1908] 1 K. B. 252.

⁸) *Harris v. Packwood* (1810), 3 Taunt. 264. *Branley v. South Eastern Rail. Co.* (1862), 31 L. J. C. P. 288.

⁹) *Garton v. Bristol & Exeter Rail. Co.* (1861), 30 L. J. Q. B. 273.

¹⁰) *Great Western Rail. Co. v. Sutton* (1869), L. R. 4 H. L. 226.

¹¹) 51 & 52 Vict. c. 25, s. 24.

for each company confirming the settlement and fixing the maximum rates for carriage and other charges¹). In their general provisions these Acts are almost identical.

The maximum rates chargeable for the carriage of goods includes in general the provision by the company not only of the necessary locomotive power but also of the vehicle in which the goods are conveyed. In the case however of very bulky goods (such as bricks or coal) and of goods which are destructive to the vehicle (such as coal tar), which come under Class A of the classification, a company need only provide the locomotive power and may require the trader to find his own trucks. In such cases if the company does supply trucks it is entitled to make a reasonable charge for the use of the trucks in addition to the usual charge for carriage. With regard to all goods, except those falling under Class A, a railway company is not obliged to carry in the trader's trucks if it is prepared to carry in suitable trucks of its own. If, however, it does carry in trader's trucks it must give the trader a rebate off the usual charge²).

In addition to the charges for actual carriage a railway company may make terminal charges not exceeding the prescribed maxima, for station accommodation and for services in loading or unloading or in covering or uncovering the goods³). It may also charge a reasonable sum in addition to the maximum rates where at the request of the trader it collects or delivers goods elsewhere than at its own stations, or performs certain other services in relation to the goods⁴).

Perishable goods must be carried by passenger train, unless a company provides some similar speedy service. Except such articles and passengers' luggage no company is obliged to carry merchandise by passenger train and the prescribed maximum rates do not apply to goods carried in such trains⁵). A company may if it chooses carry merchandise in passenger trains and in that case may make reasonable charges in excess of the prescribed maxima⁶).

Every railway or canal company must keep books at every station or wharf showing the rates charged from that place to every place to which goods may be sent by a through booking; and such books must be open to the inspection of any person interested at any reasonable hour⁷). They must also keep open for inspection the books containing the classification of merchandise⁸). If a railway company intends to increase any rate or charge published in the above mentioned books, it must first give, in the prescribed manner, notice of such intention. Persons affected by the increase may then make complaint to the Board of Trade that the proposed increase is unreasonable, and it rests with the Railway and Canal Commission to decide whether it is reasonable and whether it may be made⁹). Rates below the maxima are not necessarily presumed to be reasonable, and if a company intends to raise any rate the onus since 1892 is upon it to satisfy the Commission that in the circumstances the increase is justifiable¹⁰).

Any person who sends goods by railway is bound on demand by the company to give it an account in writing of the nature and quantity of such goods¹¹). If in any such account or consignment note the consignor gives a false description of the goods, in order to defraud the company by getting the advantage of a lower rate than that applicable to the goods, he is guilty of an offence¹²).

Besides dangerous goods, which have been mentioned, there are other goods which no railway company is bound to carry — such as articles of unusual length,

¹) See London & North Western Rail. Co. (Rates & Charges) Order Confirmation Act, 1891 (54 & 55 Vict., c. CCXXI), and similar Acts.

²) Confirmation Acts, 1891, Sch. s. 2, and *Spillers & Bakers Ltd. v. Great Western Rail. Co.* [1911] 1 K. B. 386.

³) Confirmation Acts, Sch. ss. 3 & 4.

⁴) Ibid. s. 5.

⁵) Ibid. s. 27, and Part V.

⁶) *Stone v. Midland Rail. Co.* [1904] 1 K. B. 669.

⁷) Regulation of Railways Act, 1873 (36 & 37 Vict., c. 48), s. 14.

⁸) Railway & Canal Traffic Act, 1888, s. 33.

⁹) Railway & Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), s. 1.

¹⁰) Ibid. See *North Staffs Colliery Owner's Association v. North Staffs Rail Co.* [1908] 2 K. B. 765.

¹¹) Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, s. 98.

¹²) Ibid. s. 99. *Barr, Moreing & Company v. London & North Western Rail. Co.* [1905] 2 K. B. 113. *General Electric Company Limited v. Evans* (1911), 105 L. T. 199.

bulk or weight, wild beasts etc. For such things a company may charge such sum as it thinks fit, provided the charge is in the circumstances reasonable¹⁾.

VIII. The Rights and Remedies of the Carrier.

As a general rule the contract of the carrier is with the consignor alone. Therefore it is the consignor who is responsible for the charges for carriage, unless the carrier has notice that in delivering the goods to him the consignor is acting as the agent of the consignee or of some other person²⁾. If the consignor delivers the goods for carriage by the order of the consignee the contract is with the consignee and he is liable in an action by the carrier for the charges³⁾. A representation by the consignor that the consignee will pay, where the consignor is not acting as the agent of the consignee, does not affect the liability of the consignor or bind the carrier⁴⁾; but when the carrier agrees to look only to the consignee for payment the consignor is no longer liable⁵⁾.

By the conditions of the ordinary consignment notes in use by the railway companies it is provided that in all cases where the charges are not prepaid the goods are accepted by the company only upon condition that the sender remains liable for the payment to the company of the charges for carriage, without prejudice to the company's rights, if any, against the consignee or any other person.

If a carrier accepts goods for carriage without demanding prepayment, he cannot recover his charges unless he has delivered the goods⁶⁾ or tendered delivery.

The carrier has a special property in the goods entrusted to him for carriage and may maintain an action for their recovery against any person who wrongfully deprives him of them or injures them, whether he is liable for their loss or not⁷⁾. And if the goods are stolen from the carrier the property in the goods is rightly laid in the carrier in an indictment against the thief⁸⁾.

The carrier also has an insurable interest in the goods, and if the goods are lost or destroyed while in his custody he may recover their full value from the insurer⁹⁾.

At common law the carrier has a particular lien on the goods carried for his charges for carriage¹⁰⁾. His lien is good against the owner even where the consignor had no right to deal with the goods¹¹⁾. Where the carrier agrees to give credit beyond the time when the goods should be delivered to the consignee he has no lien; but his lien is only destroyed where the agreement to give credit is inconsistent with the lien¹²⁾.

A carrier can only have a general lien upon the goods by agreement, express or implied, with the owner of the goods. By such an agreement he may have the right to retain the goods as security for the payment of a general account for the carriage of other goods. The onus of proof is on the carrier to prove such an agreement, but its existence may be implied from a long course of dealing between the parties¹³⁾. By the conditions of the ordinary consignment notes in use by the railway companies all goods are received by a company subject to a general lien for any moneys due to them from the owner of the goods upon any account.

A carrier has no right to stop goods in exercise of a lien, either general or particular, except on completion of the transit¹⁴⁾.

If several parcels of goods are carried for the same consignee at the same time under separate contracts, the carrier's lien attaches to each parcel separately; he must therefore deliver those upon which the carriage is paid, and is not entitled to

¹⁾ Confirmation Acts, Sch. Part. IV.

²⁾ *Great Western Rail. Co. v. Bagge* (1885), 15 Q. B. D. 625.

³⁾ *Dawes v. Peck* (1799), 8 Term. Rep. 336.

⁴⁾ *Great Western Rail. Co. v. Bagge* (ante).

⁵⁾ *Drew v. Bird* (1828), 1 M. & M. 156.

⁶⁾ *Barnes v. Marshall* (1852), 21 L. J. Q. B. 388.

⁷⁾ See *Claridge v. South Staffs Tramway Co.* [1892] 1 Q. B. 422. *The Winkfield* [1902] P. 42.

⁸⁾ *R. v. Deakin* (1800), 2 Leach, 862.

⁹⁾ *London & North Western Rail. Co. v. Glyn* (1859), 28 L. J. Q. B. 188.

¹⁰⁾ *Skinner v. Upshaw* (1702), 2 Ld. Raym. 752.

¹¹⁾ *Exeter Carrier's case* (1703), 2 Ld. Raym. 867.

¹²⁾ *Raitt v. Mitchell* (1815), 4 Camp. 146. *Crawshay v. Humfray* (1820), 4 B. & Ald. 50.

¹³⁾ *Aspinall v. Pickford* (1802), 3 B. & P. 44. *Rushforth v. Hadfield* (1806) 7 East, 224.

¹⁴⁾ *Wiltshire Iron Co. v. Great Western Rail. Co.* (1871), L. R. 6 Q. B. 776.

hold all till the carriage of all has been paid¹). Where several parcels of goods are carried under one contract and some have been delivered, the carrier may hold those not delivered till the carriage of all has been paid²). Goods upon which a carrier exercises his right of lien must be kept safely by him for a reasonable time in a convenient place, so that the consignee shall have a fair opportunity of paying the charges and taking delivery³). The carrier has however no right to enforce warehousing charges for thus keeping the goods⁴).

The carrier's right to retain the goods is a merely passive right and he has no right to sell them even though the owner does not pay carriage within a reasonable time. The carrier, however, may have a right of sale by agreement, and this right is given to railway companies by the conditions of the ordinary consignment notes.

Where a railway company is entitled to charge a reasonable sum, not fixed by statute, for collection or delivery, or for certain other services, the amount of such sum in case of difference must be determined by an arbitrator appointed by the Board of Trade⁵). If no difference has arisen as to the amount of any such charge the company may recover the same by action; but in case of difference as to the amount arising before action, the courts have no jurisdiction until such an arbitration has determined what are the reasonable charges⁶).

IX. Rights and Remedies of the Owner of the Goods.

In the case of loss of, or injury to, goods while in the custody of a common carrier as such, the owner of the goods is the person entitled to sue for damages⁷). The presumption is that the consignee is the owner; but when a consignor has as bailee a special property in the goods, being responsible for them until delivery to the owner, the consignor has a right to sue⁸). A consignor who is not the owner has in general no right to sue, but he may have such right by the terms of the contract with the carrier⁹).

When the seller of goods in pursuance of the contract of sale delivers them to a carrier for the purpose of transmission to the buyer, and does not reserve the right of disposal, the property in the goods, as a rule, passes on such delivery to the buyer¹⁰). And whether the carrier is named by the buyer or not delivery to the carrier is *prima facie* deemed delivery to the buyer¹¹). Hence, in case of loss or injury, the buyer is in general the person who has the right to sue for damages. The seller, however, must make such a contract with the carrier as agent for the buyer as is reasonable, having regard to the nature of the goods and all the circumstances of the case; and if he omits to do so, and the goods are lost or injured in transit, the buyer may decline to treat delivery to the carrier as delivery to himself¹²). In such a case, the goods being at the risk of the consignor, he is entitled to sue. So, where the goods are sent by the seller on approval only, or on sale or return, or otherwise in such circumstances that the property in the goods remains in the seller, the consignor is the person to sue¹³). Similarly, where the goods are at the risk of the consignor through there being no enforceable contract of sale in existence for want of a memorandum in writing of the contract¹⁴).

Where goods are delivered by the carrier in a damaged condition the measure of his liability is the difference between the value the goods would have had at the place of destination if they had been delivered uninjured and the actual value at

¹) *Prently v. Midland Great Western Rail. Co.* (1866), 14 W. R. 314.

²) *Ex p. Cooper, re McLaren* (1879), 11 Ch. D. 68.

³) *Crouch v. Great Western Rail. Co.* (1858), 27 L. J. Ex. 345.

⁴) *Somes v. British Empire Shipping Co.* (1860), 8 H. L. Cas. 338.

⁵) Confirmation Acts, Sch. s. 5.

⁶) *London & North Western Rail. Co. v. Billington* [1899] A. C. 79. *London & North Western Rail. Co. v. Donellan* [1898] 2 Q. B. 7.

⁷) *Fragano v. Long* (1825), 4 B. & C. 219.

⁸) *Freeman v. Birch* (1833), 3 Q. B. 492.

⁹) *Murphy v. Midland Great Western Rail. Co.* [1903] 2 I. R. 5. See *Cork Distilleries Co. v. Great Southern & Western Rail. Co.* (1874), L. R. 7 H. L. 269.

¹⁰) Sale of Goods Act, 1893 (56 & 57 Vict., c. 71), s. 18. See title "Sale of Goods", *ante*, and Appendix.

¹¹) *Ibid.* s. 32 (1).

¹²) *Ibid.* s. 32 (2).

¹³) *Swan v. Shepherd* (1832), 1 Moo. & R. 223.

¹⁴) *Coombs v. Bristol & Exeter Rail. Co.* (1858), 3 H. & N. 510.

that place when delivered. Where the goods are delivered so badly damaged as not to be reasonably or easily capable of repair, the consignee may reject them and treat them as destroyed¹).

When the goods are destroyed in transit, or are lost and never delivered at all, the carrier is liable for the full value of the goods²). In the case of trade goods this value is the value at the place to which the goods were consigned³). If there is a market for such goods at that place the value for which the carrier is liable is the market value of the goods at that place at the time when the goods should have been delivered; but if there is no such market, then the value is the cost of the goods together with the cost of carriage and such profit as the owner might reasonably have expected to have made⁴). If a consignor has declared a certain value of the goods, he is estopped from asserting that they were of any higher value.

Where the consignee has suffered damage from delay in the delivery of the goods, for which the carrier is responsible, the damages he can recover are "either such as may fairly and reasonably be considered as arising naturally, i. e. according to the usual course of things, from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it". If there were special circumstances in the case communicated by the consignor to the carrier, and so within the knowledge of both parties when the contract was made, it must be assumed that damages arising from the breach of the contract in those circumstances were in the contemplation of the carrier. But if those special circumstances were unknown to the carrier, he can only be supposed to have had in his contemplation such damages as would arise usually and under ordinary circumstances from a breach of the contract⁵). Where the consignor communicates to the carrier the special purpose which he has in view in sending the goods, damages which are the natural result of the failure of that purpose through delay in delivery may be recovered⁶). When special circumstances are made known to the carrier, which show that heavy loss may be the result of delay, the carrier is not bound to accept the goods for carriage with such a responsibility⁷); but if he does accept them with such knowledge, and without safeguarding himself by agreement, then he is responsible for that loss if it occurs. Where the special circumstances are not known to the carrier he is not liable for damages arising from those circumstances⁸). Delay does not in ordinary circumstances lead to loss of profits, therefore loss of profits cannot in ordinary circumstances be recovered as damages for delay. Thus, where there was delay in the delivery of cotton and in consequence, for want of raw material, a cotton mill stood idle for some days and the owner lost so many day's profits of working, it was held that such loss of profits was too remote, the circumstances being unknown to the carrier⁹). But damages measured by loss of profits are not too remote when the special circumstances were within the carrier's knowledge¹⁰).

Delay does in ordinary circumstances frequently lead to decrease in value. Hence, where the market value of goods has fallen between the time at which they ought to have been delivered and the time at which they actually were delivered, the difference may as a rule be recovered from the carrier¹¹).

Where goods are received by the carrier with notice that they are for a particular market, damages arising from loss of market may be recovered; but in the absence of such notice loss of market is not an ordinary consequence of delay for which the carrier can be held responsible¹²).

Where the late delivery complained of would not have caused loss except for a defect in the condition of the goods which caused their value when delivered to

¹) *Dick v. East Coast Railways* (1901), 4 F. 178.

²) *Crouch v. London & North Western Rail. Co.* (1849), 2 Car. & K. 789.

³) *Rice v. Bazendale* (1861), 30 L. J. Ex. 371.

⁴) *O'Hanlan v. Great Western Rail. Co.* (1865), 12 L. T. 496.

⁵) *Hadley v. Baxendale* (1854), 9 Ex. 341.

⁶) *Simpson v. London & North Western Rail. Co.* (1876), 1 Q. B. D. 274.

⁷) *Horne v. Midland Rail. Co.* (1873), L. R. 8 C. P. 131. *Gee v. Lancashire & Yorkshire Rail. Co.* (1860), 30 L. J. Ex. 11.

⁸) *Ibid.*

⁹) *Gee v. Lancashire & Yorkshire Rail. Co.* (ante).

¹⁰) *Simpson v. London & North Western Rail. Co.* (ante).

¹¹) *Collard v. South Eastern Rail. Co.* (1861), 4 L. T. 410.

¹²) *Hawes v. South Eastern Rail. Co.* (1885), 52 L. T. 514.

be less than it would have been if they had been delivered at the proper time, such loss is too remote¹).

Where the consignee becomes liable for delay to a third party, and is obliged to pay damages to such third party, he can recover those damages from the carrier, if the carrier is in fault; unless they are such as arose out of special circumstances of which the carrier had no notice. In such circumstances too, the consignee may recover from the carrier costs of an action brought against him for such damages, but only where it was reasonable for him to defend the action²).

X. The Facilities to be given by the Carrier.

Apart from statute a common carrier is not bound to increase the facilities he possesses in order to carry the goods of persons wishing to employ him³).

Every railway company and canal company, however, must according to its powers afford all reasonable facilities for receiving, forwarding and delivering traffic. "Traffic" includes passengers and their luggage, animals, goods of all kinds that are conveyed by any such company, and vehicles adapted for running on the railway or passing on the canal. Every such company must also afford all reasonable facilities for through traffic from and to its own railway or canal to and from other contiguous or communicating railways or canals⁴). This statutory obligation is enforced by the Railway and Canal Commission, which may by order require a company to give such facilities as it determines to be reasonable, and may require two or more companies to make mutual arrangements for through traffic at through rates⁵).

Its jurisdiction to order facilities to be afforded is limited by the powers of the company in question; and these powers may either be physical powers or statutory powers.

In deciding what facilities are reasonable the Commissioners are guided chiefly by the convenience of the public; but however convenient to the public a suggested facility may be, it will not be ordered when the expense of affording it would be an unfair burden on the company, or when it would be likely to disorganise the general system of working the company's traffic⁶).

A company may be ordered to supply suitable offices, platforms and other structures required for conveniently dealing with traffic; but when a structure cannot be supplied or enlarged without the acquisition of land by the company, and the company has not power to acquire the necessary land, no order can be made⁷). Where such an order is made the company's discretion as to the precise manner of carrying out the order will not be controlled, nor will it be ordered to erect specified works⁸).

A railway company may be ordered to afford reasonable facilities for the junction of a private siding with its railway and for the receiving, forwarding and delivering traffic from, upon, and to, such siding⁹).

Any person interested may apply to the Commission for an order against two or more railway companies to arrange together to carry his traffic through under one contract and for one payment¹⁰).

Where there is unreasonable delay of traffic through a company not supplying sufficient rolling stock, it may be ordered within its powers to make good the deficiency¹¹). Also where a strong case is made out a company may be ordered to run more trains¹²).

¹) *Baldwin v. South Eastern Rail. Co.* (1882), 2 Q. B. D. 582.

²) See *Hammond v. Bussey* (1887), 20 Q. B. D. 413.

³) *Riley v. Horne* (1828), 5 Bing 217.

⁴) *Railway & Canal Traffic Act, 1854* (17 & 18 Vict. c. 31), ss. 1 & 2. See Appendix.

⁵) *Railway & Canal Traffic Act, 1888* (51 & 52 Vict., c. 25).

⁶) *Sussex County Council v. London Brighton & South Coast Rail. Co.* (1892), 8 Ry. & Can. Tr. Cas. 17. *Holyhead Local Board v. London & North Western Rail. Co.* (1881), 4 Ry. & Can. Tr. Cas. 37.

⁷) *Thomas v. North Staffs Rail. Co.* (1876), 3 Ry. & Can. Tr. Cas. 1.

⁸) *South Eastern Rail. Co. v. Hastings Corporation* (1881), 6 Q. B. D. 586.

⁹) *Railways (Private Sidings) Act, 1904* (4 Edw. VII, s. 19).

¹⁰) *Railway & Canal Traffic Act, 1888*, s. 25.

¹¹) *Watkinson v. Wrexham, Mold & Connah's Quay Rail Co.* (1880), 3 Ry. & Can. Tr. Cas. 446. *Spillers & Bakers Ltd. v. Great Western Rail. Co.* [1911] 1 K. B. 386.

¹²) *Innes v. London, Brighton & South Coast Rail. Co.* (1875), 2 Ry. & Can. Tr. Cas. 155.

XI. Preference of Customers.

At common law there is no obligation upon a carrier to treat his customers equally; and he may if he chooses give facilities to one which he refuses to another, or charge one less than he charges another for similar services, provided his charges to the latter are reasonable¹).

Railway companies, however, although they may vary their charges to accommodate them to the circumstances of the traffic, must not prejudice or favour particular persons, and must charge all persons equally for the carriage of goods of the same description over the same portion of their railway²). Goods are held to be of the "same description" for this purpose if they are similar for purposes of carriage, although their actual nature may be different³). Where a railway company charges one person more than another for goods of the same description carried under similar circumstances between the same two points, the first-mentioned person may recover the overcharge by action⁴).

No railway or canal company may give any undue or unreasonable preference or advantage to any particular person, or to any particular description of traffic, in any respect whatever; nor may any such company subject any person, or description of traffic, to any kind of undue or unreasonable prejudice or disadvantage⁵).

The Railway and Canal Commission alone can decide whether preference is undue or not; and a person claiming to be unduly prejudiced under this provision has no right of action to recover overcharges, nor can he set off such overcharges against a claim for carriage of his goods⁶). Under certain conditions however, in case a complaint of undue preference is made to the Commission and substantiated, it may award damages to the party prejudiced⁷).

It must always be a question of fact for the Commissioners whether preference which is proved is undue or unreasonable; for preference may be perfectly fair and reasonable, and a mere inequality of charge is not proof of undue preference⁸). But when it is proved that a company is making lower charges to one trader, or class of traders, or the traders of any district, for similar goods or for similar services, than it is making to other traders, or classes of traders, or to the traders in another district, or making any difference in treatment in respect of any such trade or traders, the burden of proving that such lower charges or difference do not amount to undue preference, lies on the company⁹).

Any circumstances which make the cost of carrying for one person less than the cost of carrying for another may justify a preference, provided the difference of charges bears a fair proportion to the difference of cost.

Competition may justify a preference to the traders of one place over the traders of another, when the railway company is subject to competition by sea or land in the case of the first place and not in the case of the second¹⁰).

A company may not prefer one trader to another in a similar position merely to secure the custom of the first; e. g. where lower charges are made to one in consideration of an agreement by him to send all his goods by the company's railway for a fixed time, there is undue preference¹¹). But when two traders are not in the same position, as when one has access to the railway of a rival company while the other has not, it may be justifiable for the company to give a preference to the first as the only way of securing his custom¹²).

Again, preference may be justifiable towards a trader who supplies traffic to the railway company in very large quantities, or at regular times, or packed in

¹) *Branley v. South Eastern Rail. Co.* (1862), 12 C. B. N. S. 63.

²) Railways Clauses Act, 1845 (8 Vict., c. 20), s. 90.

³) *Great Western Rail. Co. v. Sutton* (1869), L. R. 4 H. L. 226.

⁴) *Denaby Main Colliery Co. v. Manchester, Sheffield & Lincolnshire Rail. Co.* (1885), 11 App. Cas. 97.

⁵) Railway & Canal Traffic Act, 1854, s. 2. See Appendix.

⁶) *Lancashire & Yorkshire Rail. Co. v. Greenwood* (1888), 21 Q. B. D. 215.

⁷) Railway & Canal Traffic Act, 1888, s. 12.

⁸) *Phipps v. London & North Western Rail. Co.* [1892] 2 Q. B. 229.

⁹) Railway & Canal Traffic Act, 1888, c. 27 (1).

¹⁰) *Foreman v. Great Eastern Rail. Co.* (1875), 2 Ry. & Can. Tr. Cas. 202.

¹¹) *Diphwys Cassen Slate Co. v. Festiniog Rail. Co.* (1874) 2 Ry. & Can. Tr. Cas. 73.

¹²) *Phipps v. London & North Western Rail. Co.* (supra).

a manner to make handling easy, or in any other circumstances which effect a saving of expense to the company¹).

In deciding whether a lower charge, or difference in treatment, does or does not amount to an undue preference, the Commissioners may (inter alia) take into consideration whether the lower charge or difference is necessary in the interests of the public to secure the traffic in question²). Thus, although *prima facie* the traders of any place are entitled to the benefit of the geographical position of that place, it may be to the interest of the inhabitants of some large centre of population that the traders of a more distant place should be preferred to the same class of traders in a nearer place, if such preference is necessary to secure a supply of a particular commodity from the more distant place³).

No railway company however may make, nor may the Commissioners sanction, any difference in the charges made for, or any difference in the treatment of, home and foreign merchandise in respect of the same or similar services⁴). This applies however only to discrimination between home and foreign merchandise as such; e. g. by carrying foreign produce from a port to an inland place for less than the company charge for carrying home produce in similar circumstances. When the foreign produce is delivered to the company in circumstances which would justify a preference if the goods were home produce, a preference of the foreign produce may be reasonable. Thus foreign goods delivered to a railway company at a port in full train loads, packed in a manner to occupy a very small space in proportion to their weight, may be properly carried at lower rates than are charged for the same class of goods produced in the neighbourhood of the port, but delivered in small and ill packed quantities; provided the company is prepared to give the same terms to the home produce if delivered to them in the same manner as the foreign⁵).

Goods may however be carried to a port by railway for export at lower rates than are charged for the same goods for consumption at the port; for here there is no competition between the two classes of goods, and such preference may be to the interest of the public⁶).

In its capacity as carrier from and to its stations by road in the collection and delivery of goods, a railway company must not prefer itself to other carriers rendering similar services. Hence if a charge made includes collection or delivery as well as conveyance by railway, the company must allow a fair rebate from that charge to a customer who employs some other carrier to collect or deliver⁷).

¹) *London & North Western Rail. Co. v. Evershed* (1878), 3 App. Cas. 1029.

²) *Railway & Canal Traffic Act*, 1888, s. 27 (2).

³) *Liverpool Corn Traders' Association v. Great Western Rail. Co.* (1892), 8 Ry. & Can. Tr. Cas. 114.

⁴) *Railway & Canal Traffic Act*, 1888, s. 27 (2).

⁵) *Mansion House Association v. London & South Western Rail. Co.* [1895] 1 Q. B. 927.

⁶) *Lancashire Patent Fuel Co. v. London & North Western Rail. Co.* [1904] 12 Ry. & Can. Tr. Cas. 77.

⁷) See *Pickfords v. London & North Western Rail. Co.* (1908), 98 L. T. 170.

Title XIII. Trade Marks and Trade Names, with Sections on Passing off and the Merchandise Marks Acts.

By F. G. Underhay, M. A., Barrister-at-Law.

I. Introduction.

Until the year 1875 no system of registration of trade marks was established in the United Kingdom, and there was no statutory law with regard to trade marks, except the Merchandise Marks Act, 1862. That Act related only to criminal offences of false marking and remained almost a dead letter. Up to the date mentioned the whole of the trade mark law was to be found in a series of decisions of the Courts, which, commencing at an early date, developed rapidly during the middle of the nineteenth century. It is not to be regretted that the system was developed before the Legislature stepped in, for whilst it was founded on a single principle, namely the prevention of dishonest trade, the subject was of a nature in which freedom from precise definition and adaptability to the growing needs of the trading community were of great importance. The difficulty which mainly presented itself was that of reconciling the protection of the trader from unfair use by others of signs which indicated his goods with the prevention of the assertion of a monopoly in what was common or in what ought fairly to be open to use by other traders.

At common law it was an actionable wrong fraudulently to pass off goods not of the plaintiff's manufacture as his goods; and from this principle the protection of a trade mark sprang; but, as the common law could only give relief in damages, the concurrent jurisdiction of the Court of Equity came to be generally invoked in order to obtain the more effective remedy of an injunction against a repetition of the wrong, and in that Court it was established that actual fraud or fraudulent intent on the part of a defendant was not a necessary ingredient in a plaintiff's case¹).

In an action for passing off the plaintiff may complain of deception by means of verbal misrepresentations, direct or indirect, that the defendant's goods are those of the plaintiff or by means of imitation of the general get up of his goods or of his trade name, or by other means; and from this general form of action was evolved that for infringement of his trade mark, that is the symbol or combination of symbols so used by him in connection with his goods that it has come to indicate his goods. The result of the protection of such symbols by the Courts was that the trader came to be regarded as having a kind of property in them, although there was some difference of opinion whether or not his rights could properly be described as property.

The important principles laid down by the Courts in this period before legislation have been recognised and adopted by the legislature and reference is frequently still made to them in trade mark cases. One disadvantage of the non-registration system was, however, that in each new proceeding a plaintiff had to prove afresh that the mark which he claimed as his trade mark was such in fact, that is to say, that it was the indicium of his goods. The necessity of proving this in each case, possibly at great cost, was recognised as throwing an undue burden on a trader, and the expedient of registration was introduced for the purpose of giving greater protection or at all events an easier remedy.

The Trade Marks Registration Act, 1875, established a Register of trade marks, and enumerated the essential particulars, of one or more of which a trade mark had to consist for the purpose of registration. The chief defect in the Act was that a word, however distinctive, could not be an essential particular, unless it was the name of an individual or firm printed, impressed, or woven in some particular and distinctive manner, or a signature, or unless it had been used as a trade mark before the passing of the Act.

The Act of 1875 was repealed by the Patents, Designs and Trade Marks Act, 1883, of which Part IV related specially to trade marks. "Fancy words not in common use" were admitted to registration, but the decisions of the Courts limited the words qualified for registration within such narrow bounds, that an amending Act

¹) *Millington v. Fox*, (1838) 3 My. & Cr. 338.

was passed in the year 1888¹⁾. Under the last mentioned Act, there could be registered "an invented word or words", or "a word or words having no reference to the character or quality of goods, not being a geographical name". The Act contained provisions requiring, subject to certain exceptions, the disclaimer of all additions to essential particulars.

In 1905 the Trade Marks Act of that year²⁾ was passed to consolidate and amend the law of trade marks. The previous Acts were repealed, and the existing Register was incorporated as part of the Register under the Act of 1905. But, although repealed, the previous Acts are in some respects still of importance, because the validity of the original entry of any trade mark registered in the old Register is, subject to certain qualifications, to be determined in accordance with the statutes in force at the date of its entry in the Register, and the trade mark retains its original date³⁾. But no trade mark which was upon the Register at the commencement of the Act and which under the Act "is a registrable trade mark"⁴⁾, is to be removed from the Register on the ground that it was not registrable under the Acts in force at the date of its registration⁵⁾.

The present article is confined to the law under the Trade Marks Act, 1905, which will be referred to shortly as the Act of 1905.

The Register kept under the Act is under the control of the Comptroller-General of Patents, Designs and Trade Marks, who is referred to in the Act as the Registrar⁶⁾ and acts under the superintendence and direction of the Board of Trade. The practice under the Act is regulated by the Trade Mark Rules, 1906, made by the Board under powers conferred on it by the Act⁷⁾. It is not proposed to deal here in detail with the practice, but some provisions of the Rules will be noticed. Persons desirous of registering marks can obtain all necessary information from the Patent Office⁸⁾. It is advisable before applying to register a mark to have searches made to ascertain whether there are already on the Register marks with which the proposed mark will conflict, and for this and other reasons it will often be found advisable, particularly in the case of a foreign applicant, to obtain professional assistance from a solicitor or trade mark agent conversant with the practice under the Act⁹⁾.

II. Registrable Trade Marks.

a) What is a Trade Mark.

The earlier Trade Mark Acts contained no definition of a trade mark, so that for the meaning of the expression one was thrown back on judgments delivered in cases in which it had been necessary to consider what constituted a trade mark. The Act of 1905 contains the following definition¹⁰⁾: "In and for the purposes of this Act (unless the context otherwise requires) a "trade mark" shall mean a mark used or proposed to be used upon or in connexion with goods for the purpose of indicating that they are the goods of the proprietor of such trade mark by virtue of manufacture, selection, certification, dealing with or offering for sale" and "mark" includes "a device, brand, heading, label, ticket, name, signature, word, letter, numeral, or any combination thereof". The definition of a trade mark embodies the attributes and limitations which had been laid down by the Courts, except that, apart from statute, no trade mark could be constituted without actual use to an extent sufficient to connect it with the goods upon which it was borne or in connection with which it was used. The Registration Acts give a new way of acquiring a trade mark, namely

¹⁾ Patents, Designs and Trade Marks Act, 1888 (51 & 52 Vict. c. 50).

²⁾ 5 Edw. VII, c. 15.

³⁾ T. M. Act, 1905, sec. 6.

⁴⁾ *Query*, whether this means at the date of the decision or at the commencement of the Act, (April 1st, 1906); see *Gestetner's T. M.* [1908] 1 Ch. 513; *Philippart v. Whiteley* [1908] 2 Ch. 274.

⁵⁾ A further qualification is that for such marks the validity of the original registration cannot be impeached after Aug. 11th, 1912, except on two grounds; see below, *Effect of Registration*.

⁶⁾ Sect. 6.

⁷⁾ Sect. 60.

⁸⁾ The full address is Patent Office, Trade Marks Branch, 25 Southampton Buildings, London, W. C.

⁹⁾ An applicant, and a proprietor of a trade mark, who does not reside or carry on business within the United Kingdom, is required to give an address for service within the United Kingdom; R. 9.

¹⁰⁾ Sect. 3.

registration, thus the words "or proposed to be used" are included in the statutory definition. A trade mark can exist apart from registration¹⁾, and it is therefore no offence to describe an unregistered trade mark as a trade mark²⁾.

It will be seen from the definition that the office of a trade mark is to indicate a trade connection between the goods and the owner of the mark, so that none but a trader can own a trade mark. The only exception, if it be one, is in the case of standardisation trade marks, which were first introduced by the Act of 1905. The registration of such a trade mark can only be effected by permission of the Board of Trade and in favour of an association or person undertaking the examination of goods in respect of origin, material, mode of manufacture, quality, accuracy or other characteristic of goods, and certifying the result by mark used upon or in connection with such goods³⁾.

It is not necessary that the proprietor of a trade mark should be at any time the absolute owner of the goods on which it appears; he may for instance be a person through whose hands they pass. Thus in the Covent Garden case it was held that the selector of natural products could have a valid trade mark⁴⁾. In that case the owners of the trade mark, which was put upon baskets containing the goods, sold them on commission for the grower, but they had the right to reject goods not of the requisite quality, and the mark in question indicated that the goods were dealt with or offered for sale by them; and it was held that they had a special property in the goods either by virtue of "dealing with or offering for sale" or at all events by virtue of selection, and that the mark was a trade mark within the definition contained in the Act. Moreover a trade mark may have a two-fold signification; for example, it may signify that the goods are the manufacture of one person and have been shipped or dealt in by another, the manufacturer and shipper or dealer thus having a joint property in the mark, and neither of them having an exclusive right to the use of the mark⁵⁾.

It was established by the *Linoleum* case⁶⁾ that, where a person invents and patents a new article, he cannot after the expiration of his patent restrain others from describing and selling the article by the name which he has given to it; for to allow him to do so, would be practically to extend the monopoly conferred on him by the patent. This decision has been followed in numerous cases⁷⁾. The doctrine may probably be put more broadly so as to apply to any case in which the introducer of a new article, whether patented or not, gives it a name, for the name of the article itself cannot be a good trade mark⁸⁾. Thus where the manufacturers of an article had sought by advertisements and otherwise to connect a name with themselves, and in the trade it had come to have such connection, yet, because to the public it signified merely the article, it was held that it was not registrable as a trade mark⁹⁾.

In order to constitute a trade mark the mark must be used or proposed to be used "upon or in connection with goods". The Act of 1905, as well as each of the earlier Acts, contains provisions for the registration of old trade marks, that is to say, marks used as trade marks before the passing of the first registration Act (Aug. 13th, 1875), and the Court has had frequently to consider in connection with such marks what is "use as a trade mark". Use on wrappers or boxes in which the goods are contained may be use as a trade mark, and in fact such use is more common than on the goods themselves, but in some cases use, such as on packing cases, merely to indicate the contents, and not "to sell the goods in the market" (the goods not being brought before the ultimate customer in the packing cases) has been held not to be use as a trade mark¹⁰⁾. Such use would however seem to come

¹⁾ *Sen Sen Co. v. Britten* [1899] 1 Ch. 692. But with an exception in favour of, some old marks, unregistered trade marks cannot be sued upon; Section 42.

²⁾ S. C.

³⁾ See Section 62.

⁴⁾ *Major v. Franklin* [1908] 1 K. B. 712.

⁵⁾ *Robinson v. Finlay* (1878), 9 Ch. D. 487; *Tarantella Trade Marks* (1910), 27 R. P. C. 573.

⁶⁾ *Linoleum Co. v. Nairn* (1878), 7 Ch. D. 834.

⁷⁾ *Application of Bowden's Patent Syndicate* (1909) 26 R. P. C. 205; *Gestetner's T. M.* [1908], 1 Ch. 513 are recent instances.

⁸⁾ See judgment of Cozens Hardy, L. J. in *Chesebrough's T. M.* [1902], 2 Ch. 1, *Philippart v. Whiteley* [1908] 2 Ch. 274; *Gramophone Co's Application* [1910] 2 Ch. 423.

⁹⁾ *Gramophone Co's Application*, *supra*.

¹⁰⁾ *Powell's T. M.* [1894] A. C. 8. (Yorkshire Relish). There was a trade mark on the bottles in which the sauce was sold.

within the words "upon or in connection with goods" of the definition clause, but in each case it would be a question of fact whether they were so used "for the purpose of indicating" that the goods were the goods of the proprietor of the trade mark. The following passage from the judgment of Bowen, L. J. in *Powell's Trade Mark*¹⁾ is quoted as one of the leading judicial statements of the function of a trade mark: "The function of a trade mark is to give an indication to the purchaser or possible purchaser as to the manufacture or quality of the goods, to give an indication to his eye of the trade source from which the goods come, or the trade hands through which they pass on their way to the market. It tells the person who is about to buy, or considering whether he shall buy, that what is presented to him is either what he has known before under the similar name, as coming from a source with which he is acquainted, or that it is what he has heard of before as coming from that similar source. It is obvious that, if it is to be an indication to the purchaser's eye of what I have stated, it must either be impressed on the goods or so accompany the goods as to produce that effect upon the purchaser. Accordingly it may be either marked on the goods themselves, or, if that is not possible or convenient, it may be marked on the vehicle of the goods, and may be, and sometimes, I dare say, is, marked upon a covering or exterior such as a packing case. But when you are considering a mark upon the vehicle as distinct from a mark on the goods you must ask yourself carefully, Is this used as a trade mark? Is its object and use to indicate to the purchaser what I have suggested?"

Another question may arise on the definition clause out of the custom of traders to advertise their marks, e.g. in newspapers, or on hoardings, or by putting them on their letter-paper. The cases on the earlier Acts seem to show that such use is not use "as a trade mark". It is doubtful whether such use of a mark would bring it within the definition contained in the Act of 1905.

b) What Trade Marks are Registrable.

A "registrable trade mark" means a trade mark which is capable of registration under the provisions of the Act²⁾. A trade mark is not capable of registration unless it contains or consists of at least one of the essential particulars mentioned in Section 9 of the Act or is an old trade mark, that is to say, one in use before the 13th of August, 1875, nor unless it is not such as to be prohibited from registration by any of the provisions of the Act. For instance, a trade mark containing an essential particular may be incapable of registration owing to the presence on the Register of a conflicting mark, or because it is calculated to deceive.

Essential particulars are enumerated in Section 9 under five headings:

1. "The name of a company, individual, or firm represented in a special or particular manner". This heading has been in all the Registration Acts with some modifications. The name need not be that of the applicant for registration; it is often desired to register the name of a predecessor in business, and that can be done. The class is not however confined to names having some connection with the applicant; but it does not include the name of an imaginary person, e.g. a heroine from a novel³⁾. In the case of the name of a person living at the date of the application or then recently dead, the Registrar may require the consent of such person or his legal representatives, as the case may be⁴⁾. The word "represented" covers all manners of representation, such as printing, weaving, or impressing. The words "special or particular manner" would not be satisfied by ordinary characters of printing, nor it would seem by the representation of the name as a signature, for signatures are specially provided for under the second heading.
2. "The signature of the applicant for registration or some predecessor in his business". This heading also has appeared in all the Registration Acts. It will be observed that, unlike 1, the name (in the form of a signature) is limited so as to confine it to that of the applicant or some predecessor in business. Descriptive trading styles such as "The Excellent Tea Company" or "The London Stout Company" were not accepted by the Registrar under

1) [1893] 2 Ch. 388.

2) T. M. Act, 1905, section 3.

3) *Holt & Co's T. M.* [1896] 1 Ch. 711 (Trilby), decided under the Act of 1888.

4) Rule 15.

the earlier Acts, and probably would still be refused. The intention of the Act appears to be to confine this heading to personal names.

3. "An invented word or invented words". This heading was first introduced by the Act of 1888. It is not a valid objection to the registration of a word as an invented word that it has some reference to the character or quality of the goods; thus "Solio" was allowed to be registered for photographic paper¹⁾ although it might be said to suggest the sun, and therefore in connection with photographic paper to suggest the nature of the goods. No considerable amount of invention is required, but the word must be an invented word and not a mere mis-spelling or an immaterial or insignificant alteration of an ordinary word or words, such as "Uneeda"²⁾, or "Absorbine"³⁾, nor must it be the name of the article⁴⁾. And it must be invented for the purpose of use as a trade mark in connection with the goods for which it is proposed to be registered⁵⁾.
4. "A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname". Under this heading ordinary English words can be registered, provided that they do not offend against the limitations set forth. Thus names of animals are frequently registered, as they have the advantage of being capable also of pictorial representation. But words that are merely descriptive of the goods or ordinary words of commendation cannot be registered; to allow such registration would be an undue interference with the rights of the public. In the Act of 1888 the word "reference" was not qualified by the adjective "direct", and both the Registrar and the Courts were sometimes astute in finding in words proposed for registration some reference, although perhaps remote, to the character or quality of the goods. It is of course a question of fact in each case whether a word has such reference to the character or quality of the goods as to debar it from registration. It might be extremely prejudicial to the interests of other traders if one trader were to be allowed to appropriate to himself the use of a geographical name or a surname in connection with particular goods if that is its ordinary signification; and the legislature has therefore prohibited the registration under this heading of such names; but a word may be in fact a geographical name or surname without being ordinarily taken to be such, for instance, such words as "monkey" and "bear" cannot be said to be geographical names in their ordinary significations, although there are islands bearing those names⁶⁾.
5. "Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs 1, 2, 3, and 4, shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark." Mark includes a device, brand, heading, label, ticket, letter⁷⁾, numeral⁸⁾. Any of these if distinctive, or any distinctive combination of any of them, can be registered under 5, without any special order, but an order of the Board of Trade or the Court is necessary in the case of a name, signature or word or words, which have not the qualifications necessary to fall within one of the four earlier descriptions. For the purposes of the section "distinctive" means "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons"⁹⁾. And "in determining whether a trade mark is so adapted, the tribunal may, in the case of a trade

¹⁾ *Eastman Photographic Materials Co's Application* [1898] A. C. 571.

²⁾ *National Biscuit Co's Application* [1901] 1 Ch. 550.

³⁾ *Christy & Co. v. Tipper* [1904] 1 Ch. 696; [1905] 1 Ch. 1 (Absorbent Ointment).

⁴⁾ *Gestetters T. M.* [1907] 2 Ch. 478 (cyclostyle); *Philippart v. Whiteley*, [1908] 2 Ch. 274, (*Diabolo*).

⁵⁾ *Hommel v. Bauer Co*, 21 R. P. C. 576, *Société le Ferment (application of)* (1912) 29 R. P. C. 497 (*Lactobacilline* held registrable).

⁶⁾ Thus "Magnolia" was held not to be a geographical name within the meaning of the section, although it happened that there were towns of that name in the United States, *Magnolia Metal Co's T. M.* [1897] 2 Ch. 371.

⁷⁾ The letters "W. & G.", in ordinary characters have recently been refused registration by the Court. (*W. & G. Du Cros' Application* (1912) 29 R. P. C. 65). In other cases letters have been held by user to have become distinctive.

⁸⁾ Section 3.

⁹⁾ Cf. the definition of a trade mark, above p. 595.

mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered". If a trade mark is registered with a limitation in whole or in part to one or more specified colours that fact is to be taken into consideration in deciding as to its distinctive character¹).

This fifth heading was intended to authorise the registration of all marks which either by use had in fact come to be trade marks, or which were such as to be capable of being trade marks when used. Whether a mark has already been used or not, it must be "adapted" to be a trade mark; therefore such a word as "Perfection", being a mere word of commendation, cannot be registered, even although the application to register be supported by a large body of evidence to show extensive use²). Mere user is not necessarily decisive. The duty of the Board of Trade or of the Court is not to declare that the mark ought to be registered, but only to give liberty to proceed with the application³); and a wide discretion is vested in the tribunal. The rights of opposing parties are in no way prejudiced, the application being open to opposition in the ordinary course after advertisement of the application, notwithstanding the order. There are some words which are incapable of being "adapted to distinguish" such as "good", "best" and "superfine". They cannot have a secondary meaning as indicating only the goods of the applicant⁴). There are other words which are capable of being so "adapted", and as to such words the tribunal may be guided by evidence as to the extent to which use has rendered the trade mark distinctive⁵). There must be something in the word itself as distinguished from the way in which it is used to make it adapted to distinguish the goods, except that the Act provides that in a particular case, namely that in which the trade mark is in actual use, the tribunal may take into consideration the extent to which user has rendered the trade mark distinctive. The principle of the Perfection case extends so as to forbid the appropriation by one trader of any word forming part of the common stock of the English language unless the word is adapted to distinguish the goods in the sense mentioned⁶). The tribunal can only have regard to user upon or in connection with goods for the purpose of indicating that such goods are the goods of the person so using the mark, and the required distinctiveness must be due to such user⁷). The following are other cases of words being refused or allowed to go forward by the Court under the paragraph under consideration. "Orlwoola" refused for articles of clothing as being a mere mis-spelling of "All Wool"⁸). "California Syrup of Figs", allowed to proceed as a collocation of four words, not giving a monopoly in the word "California" by itself⁹). "Gramophone" refused for sound recording instruments, on the ground that it was the name of the article and to the public it denoted a talking machine with a disc, as opposed to a cylinder record, without any connotation of the source of manufacture, although to the trade it connoted the source of manufacture¹⁰). "Diamine" refused, it being a word used by chemists in conjunction with other words to describe bodies containing two amine groups, although unintelligible to persons not possessing a knowledge of chemistry¹¹). "Primus" was ordered to be accepted for stoves, on the ground that it indicated the applicants'

¹) Section 10.

²) *Joseph Crosfield & Sons' Application*, [1910] 1 Ch. 118.

³) The proper form of order is, according to the most recent case on the point, that for the purpose of the application to the Registrar the mark applied for is to be deemed a distinctive one within section 9 (5) and that the Registrar do accept the application and proceed with the same accordingly; *Application by the Itala Fabbrica di Automobili* (1910), 27 R. P. C. 493.

⁴) A surname is not as a rule adapted to distinguish the owner from persons of the same name who may be dealing in the same goods; *Application of Pope's Electric Lamp Co. Ltd.* [1911] 2 Ch. 382; *Lea's Application and Mc Ewan's Application* (1912) 29 R. P. C. 165. Appeal in *Lea's case* dismissed (March 3rd, 1913). A surname may in exceptional circumstances be shown to be adapted to distinguish.

⁵) See the judgment of Cozens-Hardy, M. R. in the Perfection case.

⁶) See the judgment of Buckley, L. J. in *Cassella's Application*, (1910) 27 R. P. C. at p. 459.

⁷) *In re Gramophone Co's Application* [1910] 2 Ch. 423.

⁸) *In re Brock Ltd.* [1910] 1 Ch. 130.

⁹) *In re California Fig Syrup Co.* [1910] 1 Ch. 130.

¹⁰) *In re Gramophone Co's Application* [1910] 2 Ch. 423.

¹¹) *Cassella's Application* (1910), 27 R. P. C. 453.

stoves, and had not become an ordinary English word¹). "Itala" has been ordered to be accepted for motor cars²).

Old marks. Certain classes of old trade marks, that is to say, trade marks in use before the 13th of August 1875, the date of the passing of the first Registration Act, have received special privileges of registration under all the trade mark Acts, including the Trade Marks Act, 1905. In order that an old mark should be registrable as such it must:

1. Consist of a "special or distinctive word or words, letter, numeral, or combination of letters or numerals", it must
2. Have been used as a trade mark by the applicant or his predecessors in business before the 13th of August, 1875, and it must
3. Have been continued to be used (either in its original form or with additions or alterations not substantially affecting its identity) down to the date of application for registration³).

It was held under the earlier Acts that an old mark must have been used alone as a trade mark⁴), and the same construction would probably be put on the present Act, and of course the use must have been in the United Kingdom, and on goods with respect to which registration is sought. The Rules provide for a statement of the time during which and of the persons by whom the trade mark has been used and for verification of such statement if required. It is apprehended, however, that the number of trade marks capable of registration as old marks, and not now registered is small. Where the registration of an old mark has been allowed to lapse the trade mark may be re-registered as an old mark on a fresh application, and where an applicant fails to satisfy the Registrar as to the mark having been used as an old mark and re-registration is therefore refused, it is open to the owner to make a fresh application and adduce more complete evidence⁵).

The Trade Mark Rules 1906 impose some limitations on what may be registered. By Rule 11 the Registrar may (and he does in practice) refuse to register any application upon which the following appear:

- a) The words "Patent", "Patented" or "By Royal Letters Patent", "Registered" "Registered Design", "Copyright", "Entered at Stationer's Hall", "To counterfeit this is forgery", or words to like effect;
- b) Representations of their Majesties or of any member of the Royal Family.

By Rule 12 representations of the Royal Arms or Royal Crests, or arms or crests so nearly resembling them as to lead to mistake, or of British Royal Crowns, or of the British National flags, or the word Royal, or any other words, letters, or devices calculated to lead persons to think that the applicant has Royal patronage or authorisation, may not appear on trade marks the registration of which is applied for, with a proviso in favour of "old marks"⁶). The Registrar may call for justification of the use of a representation of the arms of a foreign State or place⁷), or for consent to the use of the arms or emblems of any city, borough, town, place, society, body corporate, or institution⁸), or for consent to the use of the name or representation of a living person, or of one recently dead, the consent of the legal representatives being necessary in this case⁹). Moreover where the name or a description of any goods appears on a trade mark the Registrar may refuse to register such mark in respect of any goods other than the goods so named or described¹⁰). But where the name or description varies, registration with a statement to that effect may be permitted¹⁰).

The subjects of cotton marks and Sheffield marks are dealt with separately below.

¹) *Hjorth's Application* (1910), 27 R. P. C. 461.

²) *Application of Itala Fabbrica di Automobili* (1910) 27 R. P. C. 493.

³) See the proviso to section 9. See Rule 12, as to the registration of old marks, comprising the Royal Arms, British National Flags, &c.

⁴) *Richards v. Butcher*, [1891] 2 Ch. 522.

⁵) *Application of William Hunt & Sons, The Brades Ltd* (1911) 28 R. P. C. 302.

⁶) See above, as to this expression. Registration is now refused of "Imperial", "King's", "Queen's", and "Crown"

⁷) Rule 13.

⁸) Rule 14.

⁹) Rule 15.

¹⁰) Rule 16.

III. The Register of Trade Marks and Registration.

The Register of Trade Marks is kept at the Patent Office¹⁾, and is open to the inspection of the public²⁾. Certified copies of any entry in it can be obtained on payment of the prescribed fee. The entries in the Register comprise registered trade marks, the names and addresses of their proprietors, notifications of assignments and transmissions, disclaimers, conditions and limitations³⁾. No notice of any trust is to be entered on the Register or received by the Registrar⁴⁾, but equities in respect of a trade mark are enforceable⁵⁾. For the purposes of registration goods are divided into 50 classes⁶⁾, and a trade mark must be registered in respect of particular goods or classes of goods⁷⁾, that is to say, a mark may be registered for any whole class or only for some of the goods comprised in it; or it may be registered in more than one class, but by separate registrations. A trade mark should not be registered for goods in connection with which it is not intended to use it, as such a registration may result in an application to rectify the Register by striking out the goods for which it is not used⁸⁾. Indexes are kept at the Trade Marks Office to assist in searches, e.g. an index of devices, and an index of words.

There are two special Registers, one for Sheffield marks for metal goods, and the other for cotton marks and known as the Manchester Register. These are dealt with separately below⁹⁾.

Procedure.

Registration. It is not proposed to deal elaborately with the procedure necessary for registration of a trade mark, but only to indicate the broad outlines. An applicant for registration should seek further information from the Trade Marks Branch of the Patent Office or from an agent. The details of procedure are contained in the Trade Mark Rules 1906, which prescribe the Fees to be paid, the Forms to be used, and the classification of goods into 50 classes.

The procedure and Forms to be employed differ according as the application is:

1. An ordinary application.
2. A special application, that is to say, an application to register a distinctive name, signature, or word or words, for which an order of the Board of Trade or the Court is necessary¹⁰⁾.
3. Registration of a series of trade marks.
4. An application for a standardisation mark¹¹⁾.
5. A Sheffield mark; or
6. A cotton mark.

1. Any person claiming to be the proprietor of a trade mark can apply to register it, and it is not necessary that a trade mark applied for should have been previously used¹²⁾. The applicant must give an address for service within the United Kingdom¹³⁾. If the application is made by a firm or partnership, it may be signed in the name or for and on behalf of the firm or partnership by any one or more members thereof. If it is made by a body corporate, it may be signed by a director or by the secretary or other principal officer of such body corporate¹⁴⁾. An agent authorised in the prescribed form may be employed, and may sign the application¹⁵⁾. The application goes before the Registrar, who considers whether the mark conforms to the Act and whether it conflicts with any other trade mark on the Register, or is otherwise open

¹⁾ 25 Southampton Buildings, London W.C. see also above p. 595.

²⁾ Section 7 and Rule 96.

³⁾ Section 4.

⁴⁾ Section 5.

⁵⁾ Section 38 (2).

⁶⁾ See the third Schedule to the Rules.

⁷⁾ Section 8.

⁸⁾ See section 37, and Rectification.

⁹⁾ See p. 621.

¹⁰⁾ See above, p. 598.

¹¹⁾ See above, p. 596.

¹²⁾ So decided under earlier Acts in *Hudson's T. M.* (1886), 32 Ch. D. 311; and see the definition of a trade mark, above p. 595.

¹³⁾ Rule 9.

¹⁴⁾ Rule 17.

¹⁵⁾ Rules 10 and 17.

to objection under the Act or Rules. The Registrar may refuse the application, or accept it absolutely, or subject to conditions, amendments or modifications¹). His decision is subject to an appeal to the Board of Trade or the Court, but the Board of Trade may refer to the Court an appeal made to it²). A decision of the Board of Trade is final, but a decision of the Court is subject to the ordinary rights of appeal. When an application has been accepted, it is advertised in the Official Journal³), and any person may within one month from the date of advertisement give notice of opposition.

Opposition. The following grounds of opposition comprise those more ordinarily relied on:

- a) That the proposed mark is not a registrable trade mark, as it does not contain or consist of one of essential particulars required by section 9 of the Act;
- b) That it is deceptive or otherwise disentitled to protection;
- c) That it too nearly resembles a registered trade mark of the opponent;
- d) That it is calculated to deceive or to cause confusion between the applicant's goods or business and the opponent's goods or business by reason of its resemblance to unregistered trade marks or to the trade name of the opponent, or to marks or pictures used by him as advertisements or otherwise in connection with his business⁴);
- e) That the trade mark applied for belongs to the opponent and not to the applicant.

In practice some of these are often expanded, for instance, as to a) by objecting in the case of a word mark that it is not an invented word, or is not a word having no direct reference to the character or quality of the goods, or that it is according to its ordinary signification a geographical name or a surname.

The procedure on opposition is laid down by section 14 of the Act and by the Rules⁵). The decision of the Registrar is subject to appeal to the Court, or, with the consent of the parties, to the Board of Trade. The Registrar has the right to appear and be heard on the appeal. Full power is given to the tribunal to award costs. Security for costs may be required in the case of an opponent or appellant who does not reside or carry on business in the United Kingdom.

2. In the case of a special application under paragraph 5 of section 9, the Registrar upon receipt of the application causes a search to be made amongst the registered marks and pending applications for the purpose of ascertaining whether there are on record any marks for the same description of goods identical with the mark applied for or so nearly resembling it as to be calculated to deceive⁶), and notifies the result to the applicant⁷), who has a month from the receipt of the notification in which to send in a case in writing of the grounds upon which he relies in support of his application. He has also to elect whether he will go to the Board of Trade or to the Court⁸). In the majority of cases, applicants elect to go to the Board of Trade, one advantage of doing so being that publicity is thereby avoided at that stage, a matter of some importance where the mark is in actual use and is in danger of being refused. The Board of Trade can however refer the application to the Court. If the application is accepted, it is advertised and the subsequent proceedings are the same as if it had been accepted by the Registrar as an ordinary application⁹).

3. Traders frequently desire to register a series of marks only differing as regards the goods or trade statements of price, etc., and the Act has provided for these cases by section 26: Where a person claiming to be the proprietor of several trade marks for the same description of goods which, while resembling each other in the material particulars thereof, yet differ in respect of:

- a) statements of the goods for which they are respectively used or proposed to be used, or
- b) statements of number, price, quality, or names of places, or

¹) Section 12.

²) Section 59.

³) Section 13.

⁴) This ground of opposition is really a particular case falling under (b).

⁵) Rules 51 to 59.

⁶) Rule 36.

⁷) Rule 37.

⁸) Rule 38.

⁹) Rule 41.

- c) other matter of a non-distinctive character which does not substantially affect the identity of the trade mark, or
- d) colour,

seeks to register such trade marks, they may be registered as a series in one registration. All the trade marks in a series of trade marks so registered are deemed to be, and are registered as, associated trade marks¹⁾.

Associated trade marks are only assignable or transmissible as a whole and not separately²⁾. Association may be required by the Registrar under certain circumstances. If application be made for the registration of a trade mark so closely resembling a registered trade mark of the applicant already on the Register for the same goods or description of goods as to be calculated to deceive or cause confusion if used by a person other than the applicant, association may be required as a condition of registration. Another case of association arises on the registration of a trade mark as a whole and of a part or parts of it³⁾. Cross references are made on the Register against each mark showing with what other marks it is associated⁴⁾.

4. Applications for standardisation marks are regulated by Rules 42 to 46. They are very few in number and are too special to entitle them to further reference here.

5 & 6. Applications for Sheffield marks and Cotton marks are dealt with below under those headings.

When an application for registration of a trade mark has been accepted and has not been opposed, and the time for notice of opposition has expired, or having been opposed the opposition has been decided in favour of the applicant, the Registrar, unless the Board of Trade otherwise direct, is to register the trade mark, and the trade mark, when registered, is to be registered as of the date of the application for registration, and such date is to be deemed for the purposes of the Act to be the date of registration⁵⁾.

The power given to the Board of Trade to direct the Registrar not to register an accepted trade mark is intended to apply to exceptional cases, for instance, cases of fraudulent conduct on the part of an applicant, or of other special circumstances. The Board of Trade have directed that in cases where a mark has been accepted by error, the Registrar may withdraw his acceptance, but the applicant is to have the right to be heard and of appealing as if the mark had been refused immediately upon its receipt⁶⁾.

On the registration of a trade mark the applicant is entitled to a certificate of registration sealed with the seal of the Patent Office⁷⁾.

Where registration of a trade mark is not completed within twelve months from the date of application by reason of default on the part of the applicant, the Registrar may, after giving notice of the non-completion to the applicant in writing, treat the application as abandoned unless it is completed within the time specified in that behalf in such notice, usually fourteen days⁸⁾. It is open however to the applicant to make a fresh application for registration of the same mark.

Renewal. Registration is for a period of fourteen years, but it may be renewed from time to time in accordance with the provisions of the Act⁹⁾. The registered proprietor has to make an application for renewal, if he desires it; each renewal is for a period of fourteen years¹⁰⁾. The application should be made not less than two months and not more than three months before the expiration of the registration¹¹⁾, and must be accompanied by the prescribed fee¹²⁾. The Act and Rules provide for two warning notices to be sent by the Registrar to the registered proprietor at his registered address, not less than one month and not less than fourteen days before

1) See Rules 27 and 49 as to procedure and as to wood blocks or electrotypes.

2) Section 27.

3) Section 25; marks so registered are called combined marks.

4) Rule 65.

5) Section 16.

6) Rule 63.

7) Section 17.

8) Section 18, Rule 62.

9) Section 28.

10) Section 29.

11) Rule 68.

12) In an ordinary case £1.

the expiration of the registration¹). Further, if at the expiration of the registration, the renewal fee has not been paid, the fact is advertised in the Official Journal, and, if the fee and an additional fee²) are paid within one month, the Registrar may renew the registration. After the expiration of the month, the Registrar may remove the mark from the Register, but a discretion is given to him to restore the mark if he is satisfied that it is just to do so, and upon such conditions as he may think fit to impose³). The fact of renewal is in any case to be advertised in the Journal⁴). If the mark is removed, the fact and the cause of removal are entered in the Register⁵). The removal of a trade mark for non-payment of the renewal fee would not debar the proprietor from making a fresh application to register at any time thereafter, but the mark would be treated, at all events so far as procedure is concerned, as if it had not been registered, and it would have to run the gauntlet of advertisement and possible opposition. The proprietor is protected to some extent, however, by a provision that a mark removed for non-payment of renewal fee shall for the purpose of any application for registration during one year after the date of such removal, be deemed to be a trade mark which is already registered, unless it is shown to the satisfaction of the Registrar that there had been no *bona fide* trade user of the mark during the two years immediately preceding such removal⁶). The effect of this provision is that if another person came to register a similar mark for the same description of goods within the year, his application would have to be refused in accordance with section 19, or it would have to stand over until the year had expired. The owner of the removed mark, if he continued to use it, would in any case have the ordinary right of a user of a mark to oppose the registration of a similar mark.

Disclaimers.

Every trade mark must contain one or more of the "essential particulars" prescribed by the Act⁷), and may contain other matter. Under the system existing from 1888 to 1905 an applicant for registration was obliged to dissect, as it were, his trade mark and to state what were the essential particulars which qualified it for registration under the Act, and to disclaim all the remainder as added matter. An exception was made in the case of the applicant's name or place of business. This system was very burdensome and in some cases very unfair to traders, more especially as it was held that a disclaimer in an application for registration disentitled the applicant from relying on the disclaimed feature in an ordinary action for passing off⁸). By the Act of 1905 this system was swept away, and was replaced by provisions of a much more elastic nature, conferring on the tribunal a wide discretion to require sufficient definition to protect the rights of the public, and preserving all rights in respect of the disclaimed matter except such as arise out of registration. Section 15 of the Act of 1905 enacts that "if a trade mark contains parts not separately registered by the proprietor as trade marks, or if it contains matter common to the trade or otherwise of a non-distinctive character, the Registrar or the Board of Trade or the Court, in deciding whether such trade mark shall be entered or shall remain upon the Register, may require as a condition of its being upon the Register, that the proprietor shall disclaim any right to the exclusive use of any part or parts of such trade mark, or of all or any portion of such matter, to the exclusive use of which they hold him not to be entitled, or that he may make such other disclaimer as they may consider needful for the purpose of defining his rights under such registration; provided always that no disclaimer upon the Register shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made". It will be observed that these provisions apply not only to an application to register, but also to the case of an application to remove a trade mark from the Register. In such a case, if the Court finds that the registration, as it exists, cannot stand, but that the rights of the public or of other traders can be sufficiently protected by a disclaimer it may, instead of

¹) Section 30 and Rules 71 and 72.

²) Ten shillings.

³) Section 30 and Rule 73.

⁴) Rule 75.

⁵) Rule 74.

⁶) Section 31.

⁷) Section 9; see Registrable Trade Marks, above p. 595.

⁸) *Rosenthal v. Reynolds* [1892] 2 Ch. 301.

ordering the removal of the trade mark from the Register, allow a disclaimer to be made by the proprietor of the trade mark. An appeal from the Registrar in an application to register a trade mark may be to the Board of Trade or the Court¹), and a special application to register a distinctive word under paragraph 5 of section 9 requires an order of the Board of Trade or the Court, so that a jurisdiction as regards disclaimers is given by section 15 to the Board of Trade, in appeals which come before it, as well as to the Registrar and the Court. The intention of the Legislature was that trade marks should be registered as a whole, and that disclaimers should be the exception and not the rule, and that they should only be required so far as they should be needful for the purpose of defining the rights of the proprietor under the registration, and thereby protecting the public or rival traders from improper claims for a monopoly. The condition of disclaimer is one for the imposition of which some good reason ought to be established rather than one which ought to be imposed unless some good reason to the contrary is made out²). Three cases in which disclaimers may be required are mentioned in the section. A trade mark may be registered as a whole, and if a part of it contains an essential particular within the meaning of the Act, and the proprietor is entitled to the exclusive use of the part, he may register the whole and also the part as combined trade marks³). The first case dealt with in section 15 is that of a trade mark containing parts not separately registered as trade marks; in such a case a disclaimer may, if necessary, be required of such parts. The second case is that of matter common to the trade. This may be of a nature which is *prima facie* distinctive, but has in fact become common, or for some reason is open to the trade⁴). In regard to old marks, the Courts adopted the rule that use of a mark by more than three persons for the same or similar goods made it common to that trade; and probably a similar rule would be adopted as a test for what is common matter under section 15. It does not necessarily follow that because an applicant has made a claim to the monopoly of certain matter and failed, e.g. because it is common to the trade, that the condition of disclaimer should be imposed⁵). The third case is of matter of a non-distinctive character, that is to say, descriptive matter. But as already stated, it is not the intention of the Act, nor is it the practice now, to require disclaimers to be made of all descriptive matter. Notwithstanding that a label, for instance, contains ordinary descriptive matter, no exclusive right thereto would be conferred by the registration, and it is expressly provided that no registration under the Act shall interfere with any *bona fide* use by a person of his own name or place of business or that of any of his predecessors in business or the use by any person of any *bona fide* description of the character or quality of his goods⁶). In an action for infringement of a trade mark, no complaint could be successfully made of the use by the defendant of matter disclaimed by the plaintiff, but the disclaimer does not affect other rights of the proprietor, e.g. the disclaimed matter might under some circumstances be relied on in an action for passing off.

It is provided by Rule 34 that the Registrar may call on an applicant to insert in his application such disclaimer as the Registrar may think fit in order that the public generally may understand what the applicant's rights, if his mark is registered, will be. This Rule possibly goes beyond the terms of section 15; for the words referring to the understanding of the public⁷), appear to set up a different test from that which the section sets up, namely, what is needful for the purpose of defining the proprietor's rights. If the rule were interpreted as going beyond the section, it might be held to be *ultra vires*, for although there is power to make rules for regulating the practice under the Act⁸), disclaimers are not a mere matter of practice and are expressly dealt with in the Act itself. However, it is believed that according to the practice of the office, it is not attempted to push the requirements of the Rule beyond those of the section.

1) Section 12 (4) and section 14 (5).

2) *Albert Baker & Co's Application* [1908] 2 Ch. 86.

3) Section 25.

4) *Burland v. Broxburn Oil Co.* (1889), 42 Ch. D. 274; *Albert Baker & Co's Application*, [1908] 2 Ch. 86.

5) See the last case cited.

6) Section 44.

7) The disclaimers appear only on the Register.

8) Section 69.

IV. Restrictions on Registration.

a) Marks disentitled to protection.

A mark may possess the attributes required by the Act for a registrable trade mark, but yet may be disqualified for registration. The disqualification may arise from its conflicting with a mark already on the Register or with respect to which an application to register is pending, or it may be of a more general nature, namely, that it offends against the provision that "it shall not be lawful to register as a trade mark, or part of a trade mark, any matter the use of which would, by reason of its being calculated to deceive or otherwise, be disentitled to protection in a Court of Justice, or would be contrary to law or morality, or any scandalous design"¹⁾. The section quoted might have been construed so as to be confined to what is to be found in the mark itself without comparison with other marks or with words or marks used by other traders, for instance to some inherent falsity such as to disentitle it to recognition in a Court of Justice. It has however been applied more widely²⁾, so that there is some overlapping with the sections prohibiting the registration of identical or resembling marks, which are set out below. But under section 11 the main object of the Legislature appears to be the protection of the public from deception rather than of the rights of rival traders, although incidentally these may be guarded, and in fact the section is very often relied on in oppositions to registration. Deceptiveness may arise from other causes than resemblance to a registered trade mark, e.g. resemblance to an unregistered mark, or to a trade name, or by reason of the mark containing a prominent feature of another trade mark³⁾, or by reason of its containing the words "trade mark" in such a position as to lead to the belief that a particular part only of the mark is the trade mark⁴⁾. Whatever may be covered by the words "or otherwise" in section 11, the presence of matter not capable of protection by reason of being descriptive does not "disentitle" the mark to protection; the word "disentitled", is not equivalent to "not entitled"⁵⁾. An instance of the operation of section 11 is the refusal of registration of the word "Shamrock" for goods not of Irish origin⁶⁾. In another case the Court refused registration of the word "motricine" for petrol spirit, there being already on the Register the word "motorine" for lubricating oil, the refusal being based on the possibility of the public confusing the two words, and of the serious consequences that might ensue owing to the explosive properties of the petrol spirit⁷⁾.

Where any doubt really arises whether a trade mark is prohibited from being registered, either by section 11 or by reason of resemblance to another registered trade mark, the onus falls on the applicant. This was clearly laid down in the "Fruit Salt" case⁸⁾, where Lord Watson said "These prohibitory clauses⁹⁾ cast upon the applicant the duty of satisfying the Comptroller, or the Court, that the trade mark which he proposes to register does not come within their scope. In an inquiry like the present, he does not hold the same position which he would have occupied if he had been defending himself against an action for infringement. There the onus of showing that his trade mark was calculated to mislead rests, not on him, but upon the party alleging infringement; here he is *in petitorio*, and must justify the registration of his trade mark by showing affirmatively that it was not calculated to deceive. It appears to me to be a necessary consequence that, in *dubio*, his application ought to be disallowed". And quite apart from these prohibitory sections, the Registrar has a discretion to refuse registration, which must, of course, be reasonably and not capriciously exercised¹⁰⁾.

¹⁾ Section 11.

²⁾ See *Albert Baker & Co's Application* [1908] 2 Ch. 86.

³⁾ This was the case in *Eno v. Dunn* (1890), 15 App. Cas. 252, where the mark was applied for in respect of baking powder and contained the words "fruit salt" the opponents' goods being known as "Eno's Fruit Salt". The case was decided under the corresponding section of the Act of 1883, namely, section 73.

⁴⁾ *Apollinaris Co's T. M.* [1891] 2 Ch. 186, cf. *Bass's T. M.* [1902] 2 Ch. 579.

⁵⁾ *Faulders T. M.* (1901) 18 R. P. C. 37.

⁶⁾ *McGlennon's Application*, (1908) 25 R. P. C. 797.

⁷⁾ *Price's Patent Candle Co's T. M.* [1907] 2 Ch. 435.

⁸⁾ *Eno v. Dunn*, (1890), 15 App. Cas. 257.

⁹⁾ The corresponding sections of the Act of 1883.

¹⁰⁾ See *Eno v. Dunn*, *supra*, and Section 12 (2); see also *Du Cros' Application* [1912] 29 R. P. C. 65.

b) Identical Trade Marks.

Section 19 of the Act of 1905 provides as follows: "Except by order of the Court or in the case of trade marks in use before the thirteenth day of August 1875, no trade mark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the Register with respect to such goods or description of goods, or so nearly resembling such a trade mark as to be calculated to deceive". And by section 20: "Where each of several persons claims to be proprietor of the same trade mark, or of nearly identical trade marks in respect of the same goods or description of goods, and to be registered as such proprietor, the Registrar may refuse to register any of them until their rights have been determined by the Court, or have been settled by agreement in a manner approved by him or (on appeal) by the Board of Trade".

Section 19 deals with the case of a mark applied for resembling a registered trade mark. Section 20 deals with the case of concurrent applications to register similar marks.

Other cases in which deception may occur are provided for by the general provisions of section 11, quoted above, prohibiting the registration of a deceptive mark or deceptive matter.

In section 19 an exception is made in favour of old marks, that is to say, marks used before the passing of the first Registration Act; in regard to such marks the practice has been, under what is known as the "Three mark rule", to allow registration of not more than three similar marks for the same goods; if more than three persons used the mark, it was treated as common. The Registrar has no discretion conferred on him to allow the registration of a new mark which nearly resembles a trade mark already on the Register for the same description of goods; he must refuse the application, and the Court alone can allow registration. The Court, however, would presumably not do so, unless the case should fall within one of the express provisions of the Act allowing double registration, for instance in a case of honest concurrent user or other special circumstances¹), or under section 20, quoted above, or possibly in special circumstances, e.g. a case of opposition in which conditions can be imposed on the applicant to protect the opponent, for instance, a condition limiting the use of a mark to a particular district²). If a person applies to register a mark resembling his own registered trade mark, the case does not fall under section 19, but under section 24, and association on the Register of the two marks may be required³). The registration of duplicate trade marks is not prohibited by section 19 or section 20, unless the goods in respect of which they are proposed to be registered are the same or of the same description. For the purpose of registration, goods are divided into 50 classes, but on the one hand goods may not be of the same description, although included in the same class, for instance, boots and bonnets are both included in class 38, and playing cards and copying presses in class 39. On the other hand, goods may be of the same description, although inserted in different classes, e.g. rubber boots and shoes come within class 38, while class 40 includes goods manufactured from india-rubber and gutta-percha not included in other classes⁴). The question whether, for the purposes of registration, goods are of the same description must be judged of and decided from the business point of view; so that it is of importance to know whether or not the goods are usually dealt in at the same establishments⁵).

In a recent case⁴) the applicants, a Canadian company, were applying for the registration of a trade mark of which the distinctive feature was a Maltese cross, the goods being boots and shoes made partly or wholly of india-rubber. They had used the mark largely in Canada on various goods, and had done some business in England in goloshes and rubber soled shoes. The opponents did not manufacture or deal in boots or shoes, but manufactured and dealt in a variety of rubber goods, and had a registered trade mark of which the distinctive part was a Maltese cross in class 40 in respect of goods manufactured from india-rubber and gutta-percha not

¹) Section 21; see below.

²) Section 14 (4).

³) Section 24.

⁴) *Gutta Percha and India Rubber Co. of Toronto's Application* [1909] 2 Ch. 10.

⁵) *Australian Wine Importers Application*, (1889) 41 Ch. D. 278, and *Price's Patent Candle Co's T. M.* [1907] 2 Ch. 435. In the former case the view was expressed that wine and spirits were goods of the same description.

included in other classes. It was held that the goods included in the application were the same description of goods as those included in the opponent's registration, although in different classes, and the application was refused by the Registrar, and on appeal by the Court of first instance, and subsequently by the Court of Appeal¹). The following passage from the judgment of the Master of the Rolls explains the meaning of the phrase "same description of goods". "It was apparently felt by the Legislature to be desirable, having regard to the fact that the classes, which are fifty in number, overlap to a considerable extent, not to limit the protection as was originally done to cases where an applicant applied to register in that class in which the opponent was already registered, but to give a wider protection. If it can be made out that the "description of goods" for which a mark is registered is substantially of the same character as that for which a new mark is proposed, the newcomer shall not be entitled to claim registration, except by leave of the Court, if it appears that the new mark so nearly resembles the old as to be calculated to deceive, or, to use language which is to be found in many of the judgments, to create confusion. It has also been decided that the words "description of goods" are not to be read solely with reference to the class in which the registration is effected. "Description of goods" may be narrower than the whole class, but it may also be wider, in this sense, that it may include articles in a different class. The matter should be looked at from a business and commercial point of view, and if the Court is satisfied that the goods, although in different classes, are really the same description of goods, the opponent is entitled to claim the benefit of section 19."

In practice many cases occur in which it is difficult to say whether one trade mark so nearly resembles another as to be calculated to deceive. Generally it may be said that the Court is anxious to safeguard the owner of a registered trade mark from having his domain invaded by a rival trader who comes to register a new mark, and it is well settled that an opposition may be successful, although the proposed mark is not so like the registered trade mark as to be an infringement of it. But the general rules of comparison are the same in both cases. In the case of word marks, the resemblance to the ear as well as to the eye must be considered. And where the registered trade mark contains some prominent pictorial feature, which in use has given a name to the mark or the goods, then another mark may be considered deceptive by reason of including that name. Or conversely the registered mark may contain the name and the proposed mark conflict with it by suggesting the same name²). This kind of deception sometimes occurs where the trade is largely in foreign countries or among native races. In a well-known case³) the plaintiffs' mark had become known in India by words meaning "two elephants", owing to the presence in it of two elephants, which were depicted with a banner between them; the defendant's label also had two elephants with a banner between them but there were considerable differences between the labels. It was held that the defendants had infringed, and Lord Selborne said "although the mere appearances of those two tickets could not lead anyone to mistake one for another, it might easily happen that they might both be taken by natives of Aden or of India, unable to read and understand the English language, as equally symbolical of the plaintiffs' goods".

In comparing two marks, it must be borne in mind that the ultimate purchaser will in all likelihood not see them side by side; one has to consider the case of an ordinary purchaser, or even an unwary purchaser, who has in his mind only the main features of the registered mark and has goods bearing the proposed mark put before him. The fact that each mark bears the owner's name will have a bearing in a doubtful case, but the evidence may show that the purchasers of the goods of the registered owner are accustomed to look to features other than the name. Thus in the "Yorkshire Relish" case⁴) it was established that a considerable proportion of the customers did not know the name of the manufacturers of the sauce, and many of them were persons of the illiterate class. But the Court will not, in ordinary cases at all events, give much thought to the stupid customer⁵). If the goods are of an expensive nature, e. g. a mechanical piano-player, the customer will be presumed

¹) *Gutta Percha and India Rubber Co. of Toronto's Application* [1909] 2 Ch. 10.

²) *Anglo-Swiss Condensed Milk Co. v. Metcalf* (1886), 31 Ch. D. 454 (Dairy-maid milk).

³) *Johnston v. Orr-Ewing*, (1882) 7 App. Cas. 219.

⁴) *Powell v. Birmingham Vinegar Brewery Co.* [1897] A. C. 710.

⁵) *Payton & Co. Ltd. v. Titus Ward & Co. Ltd.* (1900) 17 R. P. C. 58.

to exercise more care in his purchase than in the case of an article usually bought by servants or persons of a poor class. If there are material differences between the goods on which the two marks will be placed, that is a fact to be taken into account in considering whether there is likely to be deception or confusion.

Before the Act of 1905, registration always conferred on the registered owner the exclusive right to use the mark in any colour, so that the comparison between two marks had to be on this footing¹). And this will still be so under the Act of 1905, unless the registered mark is under section 10 registered with a limitation in respect of colour. If it is registered with such a limitation, it might be that the proposed mark if limited to other colours or to exclude the colours of the registered mark, would not be deceptive, although apart from such limitation it might be.

The Court will, in the absence of evidence of intention to use a mark in an improper manner, assume that an applicant will make a fair and proper use of his mark when registered²). But it will have regard to the possibility of the mark or portions of it becoming indistinct by reason of wear.

The mere occurrence in the applicant's and opponent's mark of a feature which is common will not of itself be a sufficient ground of opposition³), but the marks should be compared as a whole, and the existence in each of similar common features may, if there is some similarity in the distinctive features, lead to the application being rejected⁴). And it is conceivable that a particular arrangement of common features might be distinctive. And although the use of marks of the same general type as the mark in question (e.g. diamond marks) may be common in the trade, the particular form of that mark adopted may be distinctive⁵).

Section 20, which is set out above, provides for cases of concurrent applications for the same or nearly identical trade marks in respect of the same goods or description of goods. The practice under previous Acts was not to allow the registration of similar marks for the same description of goods, except in the case of old marks, that is, marks used before the 13th of August, 1875. As a general rule, this practice would be followed under the present Act. Instances sometimes occur however of similar marks being used by traders without the marks coming into conflict and perhaps even without knowledge on the part of the respective proprietors of the other marks; such instances usually occur by reason of the trade being local and in different districts. The Act, in order to meet such cases, provides that in case of honest concurrent user or of other special circumstances, which, in the opinion of the Court, make it proper so to do, the Court may permit the registration of the same trade mark, or of nearly identical trade marks, for the same goods or description of goods by more than one proprietor, subject to such conditions and limitations, if any, as to mode or place of user or otherwise, as it may think right to impose⁶). Where one of the marks in question is already registered, the other can only be registered by permission of the Court under this section; but where neither is registered, the rights of the parties may be determined by the Court, or may be settled by agreement between the proprietors in a manner approved by the Registrar or (on appeal) by the Board of Trade⁷). If one only of the marks has been in actual use, it is presumed that the Court would as a general rule determine the rights by allowing registration of that one only; at all events where a reputation has been acquired under it⁸). Where both have been in use, then the Court has to decide whether one of them and which has the right to be registered. In a recent case, registration was allowed of a mark which had been used for 20 years although the opponent had used it for five or six years⁹). In the case of honest concurrent user or of other special circumstances the Court may permit the registration of both marks, either subject to conditions and limitations or not. Limit-

¹) *Société Anonyme des Verreries de l'Etoile* [1894] 2 Ch. 26 (Red Star Brand for glass).

²) *Kutnow's T. M.* [1893] 10 R. P. C. 401.

³) *Jamieson v. Jamieson*, 15 R. P. C. 169; *Payton v. Snelling Lampard & Co.* 17 R. P. C. 48, 628; and see *Albert Baker & Co's Application* [1908] 2 Ch. 86.

⁴) *Christiansen's T. M.* (1886) 3 R. P. C. 54.

⁵) *Bass Ratcliff & Grettons T. M.* (1902) 19 R. P. C. 529.

⁶) Section 21.

⁷) Section 20, *supra*, p. 607.

⁸) *Kenrick & Jefferson's Application*, [1909] 26 R. P. C. 641.

⁹) *Southall Bros. & Barclay's T. M.* (1911) 28 R. P. C. 481; the opponent was not applying for registration; if he had, a case under section 21 for concurrent registration might have arisen.

ations as regards colour are amongst those which the Court might in a particular case impose¹). Cases of apportionment of trade marks on the dissolution of a partnership or under other circumstances causing a division of goodwill are specially provided for under another section²).

V. Assignment.

The registered proprietor of a trade mark has power to assign it subject to any rights appearing from the Register to be vested in any other person³). No trust is allowed to be entered in the Register⁴). But notifications of assignments (whether absolute or by way of security) and transmissions⁵), notifications of agreements affecting the mark, e.g. of a contract for sale, or limitations placed on the Register to protect another trader, may appear on the Register, and, if so, the assignee of a trade mark takes subject to the rights appearing to be conferred. Moreover if the assignee has at the date of his assignment notice of any equitable right in a person other than the assignor, although no notice of it appears on the register, the ordinary rule in the case of other property applies, and the assignee takes subject to such right. It is expressly provided that equities in respect of a trade mark may be enforced in like manner as in respect of any other personal property⁶). The power of the owner of a trade mark to assign it was, even before the Registration Acts, held to be subject to a qualification, namely, that it must be assigned together with the goodwill of the business of the assignor or of such part of the goodwill as exists in respect of the goods in connection with which the mark is used. This qualification is not a merely artificial or technical one; it arises directly from the nature of a trade mark, as indicating a trade connection between the goods upon which it is used and the owner of the mark. If a mark, when seen on goods of a particular kind, would lead persons to believe that they emanate from a particular trader, then it would be a fraud on the public if the law allowed the trader to assign his mark without at the same time assigning the goodwill of his business as a whole or at all events of that part relating to the particular kind of goods. And in special cases, where the goods are the production of a particular person and involve the exercise of particular skill on his part and a mark used by him on them thus indicates his personal work, it may be unassignable⁷). So if a trade mark indicates that the goods emanate from a particular factory, it can only be assigned so as to go with the factory. And if it indicates goods made according to a secret recipe or process it is only assignable with the secret⁸). It is not necessary that the goodwill and trade mark should be assigned by the same instrument or precisely at the same time; nor is it necessary that goodwill should be described by that term; the assignment may leave the matter to be inferred.

The general principle above stated has been incorporated in the Act of 1905, (as it was in the previous Acts), section 22 of which provides that "a trade mark when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in the goods for which it has been registered and shall be determinable with that goodwill". So intimate is the connection between goodwill and trade marks, that if the goodwill of a business is assigned without any express mention of the trade marks used in it, they will nevertheless pass by implication⁹).

If a trade mark is registered in respect of several distinct kinds of goods included in one class, and is expressed to be assigned with the goodwill of the business, but in fact there is no goodwill at the date of the assignment in respect of certain of the goods, e.g. owing to the owner of the business not dealing in such goods, the assignment will only be effective in respect of those goods in which goodwill exists¹⁰). So where the assignors were manufacturers of sheet iron but the mark assigned was

¹) Section 10.

²) Section 23.

³) Section 38. The section is set out in full below; see Effect of Registration, p. 616.

⁴) Section 5.

⁵) Section 4.

⁶) Section 38 (2).

⁷) See the judgments in *Leather Cloth Co. v. American Leather Cloth Co.* (1864), 4 D. J. & S. 510; 11 H. L. C. 523, and *Thorneloe v. Hill*, (1894) 11 R. P. C. 61.

⁸) See the *Chartreuse Case*, *Lecouturier v. Rey* [1910] A. C. 262.

⁹) *Shipwright v. Clements* (1871), 19 W. R. 599.

¹⁰) *Edwards v. Dennis* (1885), 30 Ch. D. 454.

registered for unwrought and partly wrought metals used in manufacture, the assignee only acquired rights in the mark so far as related to sheet iron.

On the dissolution of a partnership, unless the goodwill and trade marks belong by agreement to some only of the partners, they are partnership property and should be realised for the benefit of the partners¹⁾. It has been decided that where a dissolution occurs without any sale or assignment of the goodwill, each of the partners may continue to use the trade name, so long as such use is not of such a nature as to involve the other partner in liability or to mislead the public²⁾, and probably the rights are similar as regards the firm's trade marks.

A section was introduced into the Act of 1905 to meet certain difficulties that had previously arisen in apportionment of trade marks on a dissolution of partnership³⁾. It provides as follows: "In any case where from any cause, whether by reason of dissolution of partnership or otherwise, a person ceases to carry on business, and the goodwill of such person does not pass to one successor, but is divided, the Registrar may (subject to the provisions of this Act as to associated trade marks), on the application of the parties interested, permit an apportionment of the registered trade marks of the person among the persons in fact continuing the business, subject to such conditions and modifications, if any, as he may think necessary in the public interest". Associated trade marks cannot however be separately assigned or transmitted. The Registrar would probably object to an apportionment which resulted in similar marks being registered in the names of different proprietors in respect of the same description of goods. The application for an apportionment has to be accompanied by a case, that is to say, a written statement setting out fully all the material facts⁴⁾. There is a right of appeal from the decision of the Registrar to the Board of Trade. Upon an apportionment being made, a note of it is entered in the Register in connection with each of the registered trade marks together with the date of the decision⁵⁾.

On the death of a sole trader his trade marks pass or devolve with the goodwill of his business, that is to say, in the absence of any disposition by will, to his legal personal representative or representatives. Any attempt by a testator to divorce the trade marks from goodwill would, in accordance with the principle above stated, result in no rights in them passing to the person to whom they were purported to be given.

Subject to the provisions of the Act, where a person becomes entitled to a registered trade mark by assignment, transmission, or other operation of law, the Registrar, on request made in the prescribed manner, and on proof of title to his satisfaction, is to cause the name and address of such person to be entered on the Register as proprietor of the trade mark⁶⁾. There is an appeal from the Registrar to the Court, or with the consent of the parties to the Board of Trade⁶⁾. The request to the Registrar may be jointly by the assignor and assignee, or by the assignee or person entitled⁷⁾. In the case of an assignment, it is advisable that the signature of the assignor to the appropriate form should be obtained when he executes the assignment. The Registrar may require the facts to be proved by statutory declaration. In the case of a firm or partnership, the request must be signed by one or more members, and in the case of a body corporate by a director or by the secretary or other principal officer⁸⁾.

VI. Correction and Rectification of the Register.

a) At the instance of the registered proprietor.

Circumstances may occur in which corrections or alterations of the entry of a trade mark in the Register may become necessary or at all events advisable, e.g. there may have been an error in the original entry, or the registered proprietor

¹⁾ *Hall v. Burrows* (1864), 33 L. J. Ch. 204.

²⁾ *Burchell v. Wilde* [1900] 1 Ch. 551.

³⁾ Section 23.

⁴⁾ Rule 87.

⁵⁾ Rule 89.

⁶⁾ Section 33.

⁷⁾ See Rules 76 to 81.

⁸⁾ Rule 79.

may make some change in his name or his address¹). Furthermore the proprietor of a trade mark may desire, in the course of or for the purpose of avoiding litigation, to renounce or to limit his registration rights. Power is accordingly conferred on the Registrar, on request by the registered proprietor or by some person entitled by law to act in his name to do any of the following acts, namely:

1. Correct any error in the name or address of the registered proprietor of the trade mark.
2. Enter any change in the name or address of the person who is registered as proprietor of the trade mark.
3. Cancel the entry of the trade mark.
4. Strike out any goods or classes of goods from those for which a trade mark is registered.
5. Enter a disclaimer or memorandum relating to the trade mark which does not in any way extend the rights given by the existing registration of the trade mark²).

The object of an application under 3, 4, or 5 would generally be to avoid a hostile application for rectifying the Register by removing the trade mark or cutting down the registration³), which, if successful, might entail the payment of the costs of it by the registered proprietor. A trade mark must be registered for particular goods or classes of goods⁴). Under the present Rules applications for goods in different classes are separate and distinct applications, but this was not always the case. Some of the classes are very wide, and it often happens that a trade mark, although rightly on the Register in respect of some of the goods in a class, is also registered for other goods in the same class, in respect of which the registration cannot be maintained⁵). In such cases, paragraph 4 affords an opportunity to the proprietor to extricate himself from his difficulty. Paragraph 5 is applicable where, for instance, the proprietor wishes to disclaim a part of the mark which is common to the trade, or in which a rival trader is entitled to rights⁶).

An appeal lies to the Board of Trade from a decision of the Registrar. Applications may be made by the registered proprietor, or by his trustee in bankruptcy, or by the liquidator of a company which is registered proprietor, and in other cases by such person as the Registrar may decide to be entitled to act in the name of the registered proprietor⁷). An application for the entry on the Register of a disclaimer or memorandum is advertised in the Official Journal for one month to enable any person desiring so to do to state any reasons in writing against the proposed disclaimer or memorandum⁸).

The powers of the Registrar above referred to relate to the entries in the Register respecting a trade mark, and not to alterations in the trade mark itself. Alterations of the latter kind may be desired by the proprietor where there has been a change of proprietorship or a change in the name or address of the proprietor, and the trade mark contains the old name or address; or there may be other reasons for an alteration. An alteration frequently desired is the addition of the word "limited" on the incorporation of a company to acquire the business of a firm owning registered trade marks. In order to effect an alteration in a trade mark, application must be made by the registered proprietor to the Registrar, who has power to allow additions to or alterations of a trade mark not substantially affecting its identity and on such terms as he may think fit⁹). Any refusal or conditional permission is subject to an appeal to the Board of Trade⁹). There is power to allow an alteration even in an "essential particular"¹⁰), subject to the limitation that the identity of the trade mark is not substantially affected; but some good reason would be expected to be supplied for

¹) Alterations in the Register in consequence of change of proprietorship are dealt with in section 33, which has already been referred to under the head of "Assignment".

²) Section 32.

³) The grounds on which an application for rectification may be based are referred to below.

⁴) Section 8.

⁵) See Rule 24.

⁶) For instance, because the proprietor has no intention of dealing in such goods or because of non-user of the trade-mark.

⁷) Rule 90.

⁸) Rule 92.

⁹) Section 34.

¹⁰) Every trade mark must contain an essential particular, see section 9.

an alteration of such a character, and it may be taken generally that it is easier to obtain leave for alterations in non-essential matter than in an essential particular. Old marks, that is trade marks registered as used before the 13th of August, 1875, are in a position of special privilege under the Act, and, although they come within the provisions as to alterations, the practice has always been to discourage applications for alterations in them, unless such alterations are really necessary. On an application for an alteration in a trade mark the Registrar may advertise the proposed alteration in the Official Journal, and may require to be furnished with a suitable block¹). If leave be granted to alter the trade mark, it is advertised as altered²).

b) At the instance of a person aggrieved.

Alteration of the Register at the instance of persons other than the proprietor or a person entitled to act in his name can only be made by the Court. Subject to the provisions of the Act, the Court may on the application in the prescribed manner of any person aggrieved by the non-insertion in or omission from the Register of any entry, or by any entry wrongly remaining on the Register, or by any error or defect in any entry in the Register, make such order for making, expunging, or varying such entry, as it may think fit³). It is under this clause of the Act that hostile applications are made for the removal of marks from the Register or for limiting the scope of the registration. Such an application must be made by a "person aggrieved", who is commonly a person sued or threatened with proceedings for infringement of the mark. The phrase "person aggrieved" has, however, been construed very widely. The question whether an applicant is a "person aggrieved" is merely one of *locus standi*, and the words were apparently introduced into the Statute to prevent the action of common informers, or of persons interfering from merely sentimental motives; serious damage is not a condition precedent to a right to apply⁴). In one of the cases on the subject⁵), the Court of Appeal stated the law thus. "We are of opinion that whenever one trader, by means of his wrongly registered trade mark, narrows the area of the business open to his rivals, and thereby either immediately excludes, or with reasonable probability will in the future exclude, a rival from a portion of that trade into which he desires to enter, that rival is an "aggrieved person". Again if the effect produced, or likely to be produced, by the wrongful trade mark, is not the exclusion but the hampering of a rival trader, that rival trader, again, is in our opinion a person aggrieved. A man in the same trade as the one who has wrongfully registered a trade mark and who desires to deal in the article in question is *prima facie* an "aggrieved person". This may be rebutted by showing that, by reason of some circumstances entirely independent of the trade mark, the person complaining never could carry on any trade in the article; but the burden of tendering such proof is on the man who claims the mark, and here that burden has not been discharged".

And in another well-known case⁶), Lord Herschell said: "Wherever it can be shown, as here, that the applicant is in the same trade as the person who has registered the trade mark, and wherever the trade mark if remaining on the Register would or might limit the legal rights of the applicant so that by reason of the existence of the entry upon the Register he could not lawfully do that which but for the appearance of the mark upon the Register he could lawfully do, it appears to me that he has a *locus standi* to be heard as a "person aggrieved".

The following are the principal grounds on which the registration of a trade mark may be attacked:

1. That it is not a trade mark at all, but is, for instance, a quality mark⁷).
2. That it is not a registrable trade mark⁸).

¹) See Rules 93 and 94 for the procedure.

²) Section 34.

³) Section 35 (1). An application for an alteration in a trade mark itself does not come under this section.

⁴) See the judgment of Fry. L. J. in the *Apollinaris* case [1891] 2 Ch. 186.

⁵) The *Apollinaris* Case, cited *supra*, at p. 225.

⁶) *Powell's T. M.* [1894] A. C. 8 (Yorkshire Relish). The applicant for rectification was subsequently restrained in a passing-off action from using the words "Yorkshire Relish" without distinguishing.

⁷) See definition of trade mark, p. 595.

⁸) See section 9 and Registrable Trade Marks.

3. That it contains matter calculated to deceive or otherwise disentitled to protection¹⁾).
4. That the applicant could have successfully opposed the registration, because the trade mark too nearly resembles his trade mark registered or unregistered, or is otherwise likely to cause confusion between the goods or business of the applicant and the goods or business of the registered proprietor²⁾).
5. That the goodwill of the business concerned in the goods for which the trade mark is registered has determined or is not vested in the registered proprietor³⁾).
6. Non-user⁴⁾).
7. Abandonment.

The validity of the original entry of a trade mark on the Register is to be determined in accordance with the Statutes in force at the date of such entry⁵⁾; but this is subject to two qualifications. The first is that no trade mark which was upon the Register at the commencement of the Act of 1905⁶⁾ and which under that Act "is a registrable trade mark" is to be removed from the Register on the ground that it was not registrable under the Acts in force at the date of registration. But one must not take the facts at the date of registration and apply to them the Act of 1905 as if it had been then in force⁷⁾. The words "is a registrable trade mark" may refer to the date when the Court is asked to give its decision⁷⁾, or they may possibly refer to the date of the commencement of the Act⁸⁾. But whichever of these dates is intended, the provisions of the Act of 1905 must be applied to the facts at that date. The second of the qualifications is that the original registration is conclusive, subject to certain exceptions, after seven years from its date or from the date of the passing of the Act of 1905, whichever be the later⁹⁾.

A discretion is conferred on the Court by section 35; but if a trade mark was of such a nature as to have been incapable of registration when registered, for instance as not being a registrable trade mark, and if it is not saved by one of the two qualifications above mentioned, the rule which prevailed under the previous Acts, namely to remove the mark from the Register, will probably be followed under the present Act. "The purity of the Register is of much importance to trade in general, quite apart from the merits or demerits of particular litigants"¹⁰⁾. But the matter is wholly different when the trade mark is not in itself illegal or improper, although at the date of registration its registration might perhaps have been successfully opposed on the ground of its conflicting with rights of some particular trader. In such cases the Court will exercise its discretion¹¹⁾, and will take into consideration such a matter as delay on the part of the applicant for rectification. The Court may, instead of expunging the trade mark from the Register, vary the entry, e.g. by striking out some of the goods for which the mark is registered or by entering on the Register a limitation or condition or by entering a disclaimer of matter in which the right to exclusive use cannot be properly claimed by the registered proprietor¹²⁾. But the registered proprietor may elect to have the trade mark expunged¹³⁾. The Court has power under Section 35 to make an entry on the Register to correct the non-insertion or omission of an entry, but it is doubtful in what cases this power would be exercised, except by the entry of a disclaimer or limitation. It has also power to remedy an error or defect in the Register. Probably where an application to register a trade mark had been made by mistake by an agent in his own name instead of in that of the principal, the error could be remedied under this section. The Court has power to decide any question that it may be necessary or expedient to decide in connection

¹⁾ See section 11 and Restrictions on Registration,

²⁾ Section 19 and section 11.

³⁾ Section 22.

⁴⁾ Section 37; see below p. 615.

⁵⁾ Section 6.

⁶⁾ April 1st, 1906.

⁷⁾ *Gestetner's T.M.* [1908] 1 Ch. 513.

⁸⁾ *Philippart v. Whiteley*, [1908] 2 Ch. 274.

⁹⁾ Section 41, stated and considered more fully under the heading "Effect of Registration".

¹⁰⁾ Per Bowen, L. J. in *Paine v. Daniells & Sons' Breweries*, [1893] 2 Ch. 567.

¹¹⁾ S. C.

¹²⁾ Section 15; see above: Disclaimers.

¹³⁾ This course has been taken under the previous Acts, but in view of section 45 is not a probable one under the present Act.

with the rectification of the Register¹). In the case of fraud in the registration or transmission of a registered trade mark, the Registrar may himself apply to the Court for rectification²). Applications to the Court for rectification are made by originating motion, and the Registrar must be served³). When an order for rectification is made the Court directs that it shall be served upon the Registrar, who thereupon rectifies the Register accordingly⁴).

In an application for rectification of the Register the onus is on the applicant⁵); whereas on an application to register a trade mark the onus of showing that it is entitled to registration is on the person applying for registration. And where the registration of a trade mark is attacked after it has been on the Register for a long period, and it has been extensively used, the registered proprietor is entitled to the benefit of any doubt as to its validity⁶). This rule has been applied in the cases of "old marks", where from the nature of the case it may be difficult to procure evidence of user before 1875.

Before the Registration Acts a trade mark could only be acquired by actual use; and although those Acts introduced a new mode of acquisition, namely, by registration, it was not intended that traders should register marks merely to prevent others doing so, and without the intention of using them. Therefore it was held that where it was shown from the registered proprietor not having used his mark for several kinds of goods for which it had been registered for a long period, that it was registered without a *bona fide* intention to use it for such goods, it should be ordered to be removed from the Register⁷). The matter is now regulated by special provisions contained in the Act of 1905, enacting that a trade mark may, on the application of any person aggrieved, be taken off the Register in respect of any of the goods for which it is registered on the ground:

1. That it was registered by the proprietor or a predecessor in title without any *bona fide* intention to use the same in connection with such goods, and there has in fact been no *bona fide* user of the same in connection therewith; or
2. On the ground that there has been no *bona fide* user of such trade mark in connection with such goods during the five years immediately preceding the application,

unless in either case such non-user is shown to be due to special circumstances in the trade, and not to any intention not to use or to abandon such trade mark in respect of such goods⁸).

The two grounds are quite distinct: the second might apply where a trade mark has been used but has been abandoned⁹). The applicant must be a "person aggrieved" by the mark being on the Register¹⁰) and not a mere common informer; and the Court has a discretion in the matter. The Court may accept user of an associated trade mark¹¹), or of the trade mark with additions or alterations not substantially affecting its identity¹²), as an equivalent for user of the trade mark in question¹³).

Traders are apt to register their trade marks so as to extend to goods for which they do not use them, or even to goods in which they do not deal; and the provisions above set forth will probably be made use of chiefly for the purpose of limitation of the goods rather than for total removal. The assignee of a registered trade mark only obtains a good title so far as the assignor has a goodwill to assign, and if the assignor had no goodwill in respect of some of the goods for which the trade mark is registered, the assignee is exposed to an application to rectify the Register by striking out such goods, although the case may not fall within the provisions above set forth as to non-user.

¹) Section 35 (2).

²) Section 35 (3).

³) Rule 129.

⁴) Section 35 (4) and Rule 129.

⁵) Section 40.

⁶) *Burroughs, Wellcome & Co's T. M.* [1904] 1 Ch. 736.

⁷) *Batt v. Dunnett* [1899] A. C. 428.

⁸) Section 37.

⁹) *Ramsay's Trade Mark* (1911), 28 R. P. C. 497. In this case the trade mark was struck off the Register on the first ground.

¹⁰) See above as to the meaning of this expression.

¹¹) As to what are associated trade marks, see above p. 603.

¹²) Cf. Section 34 as to alteration of a trade mark, above p. 612.

¹³) Section 27.

VII. The Effect of Registration.

This subject may be considered under three heads:

- a) The power of the registered proprietor to assign;
- b) Registration as evidence of validity; and
- c) The right of the proprietor to prevent infringement or to obtain redress for it.

a) **Section 38 of the Act of 1905 provides as follows:** "Subject to the provisions of this Act¹⁾,

1. The person for the time being entered in the Register as proprietor of a trade mark shall, subject to any rights appearing from such Register to be vested in any other person, have power to assign the same, and to give effectual receipts for any consideration for such assignment;
2. Any equities in respect of a trade mark may be enforced in like manner as in respect of any other personal property". The provisions of this section have already been discussed under the head of "Assignment".

b) **Registration as evidence of validity.** The fact that a person is registered as proprietor of a trade mark is *prima facie* evidence of the validity of the original registration of such trade mark and of all subsequent assignments and transmissions of the same²⁾. This rule applies in all legal proceedings relating to the trade mark, including applications for rectification of the Register. The practical effect of the rule is that in proceedings for infringement the registered proprietor has only to produce a proper certificate of registration under the seal of the Patent Office³⁾ in order to throw on the defendant the burden of showing that the mark is improperly registered. And in proceedings for rectification the onus is from the first on the person asking for rectification. Before the Registration Acts a trade mark could only be acquired by user, and in every action which the owner brought for infringement he had to prove afresh that the trade mark indicated his goods. This was generally an expensive matter entailing the calling of a large number of witnesses. Registration relieves the proprietor from this burden, unless his *prima facie* title is displaced.

Under the Acts previous to that of 1905 a trade mark might on an application to rectify the Register be removed from the Register, if not validly registered, however long it had been registered⁴⁾. Under the Act of 1905 the original registration of a trade mark is, after the expiration of seven years from the date of such original registration or from the passing of the Act, whichever shall last happen, to be taken to be valid in all respects⁵⁾, subject to two exceptions referred to below. The date of the passing of the Act was August 11th, 1905, therefore the section did not begin to operate until August 11th, 1912, and then only immediately as regards trade marks registered at the date of the passing of the Act. In the case of any other trade mark the period of seven years runs from the date of the registration. The provision applies in all legal proceedings relating to a trade mark, including applications to rectify. Where the period of seven years has run, therefore, the provision will afford a complete answer to an application to rectify, unless:

1. Such application is based on some matter subsequent to the original registration, for instance, the validity of an assignment, or non-user⁶⁾, or
2. The case falls within one of two qualifications⁷⁾ of the general rule, namely:
 - a) where the original registration was obtained by fraud; or
 - b) the trade mark offends against the provisions of section eleven of the Act, that is, contains matter the use of which would by reason of its being calculated to deceive or otherwise be disentitled to protection in a Court of justice, or would be contrary to law or morality or is a scandalous design⁸⁾.

¹⁾ Principally the provision that a trade mark must be assigned together with goodwill: section 22. And as to associated trade marks, that they can only be assigned as a whole and not separately: section 27.

²⁾ Section 40.

³⁾ Sections 50 & 51. Request for certificate: Form T. M. No. 34.

⁴⁾ *Verity's T.M.*, (1902) 19 R. P. C. 58.

⁵⁾ Section 41.

⁶⁾ Section 37.

⁷⁾ See Section 41.

⁸⁾ Section 11 is discussed above, p. 606.

In view of the rather wide construction which has been put upon Section 11, the exceptions cover fairly wide ground. The words "obtained by fraud" appear to be wide enough to extend to an application to register, fraudulent in itself, as well as fraudulent conduct in the proceedings for registration; they would probably cover the case of a person in a fiduciary relationship, e.g. an agent, wrongfully registering a trade mark belonging to the person with regard to whom he stands in such relationship.

The provisions now being considered¹⁾, which make registration conclusive after seven years, have a proviso annexed to them, which, however, is really a general proviso; it is as follows: "Provided that nothing in this Act shall entitle the proprietor of a registered trade mark to interfere with or restrain the user by any person of a similar trade mark upon or in connection with goods upon or in connection with which such person has, by himself or his predecessors in business, continuously used such trade mark from a date anterior to the user of the first-mentioned trade mark by the proprietor thereof or his predecessors in business, or to object (on such user being proved) to such person being put on the Register for such similar trade mark in respect of such goods under the provisions of section 21²⁾ of this Act". This proviso effectually protects a prior user, provided that he has continued to use his mark. But for the proviso, a prior user continuing to use his mark after the registration of it by another person would have been subject to an action for infringement, and, after the lapse of seven years, without being able to successfully attack the registration. The provisions of section 21 only apply in the case of honest concurrent user or of other special circumstances. Where the prior use set up by a defendant in an infringement action is subsequent to the application to register the plaintiff's trade mark, the proviso probably does not protect the defendant; moreover the prior use contemplated by the proviso must probably be a substantial use³⁾. The general intention of the Act may be said to be that the first person using a mark should have the superior right⁴⁾.

e) The right of the registered proprietor to prevent infringement or to obtain redress for it. No person is entitled to institute any proceeding to prevent or to recover damages for the infringement of an unregistered trade mark, unless it was in use before August 13th, 1875, and has been refused registration under the Act of 1905⁵⁾. A trade mark may exist apart from registration, but the proprietor cannot, except in the case mentioned, sue for infringement of it. The rule does not prohibit the bringing of a passing off action⁶⁾.

The assignee of a registered trade mark can probably institute proceedings for infringement, although he himself has not been registered as proprietor of it⁷⁾.

Subject to the provisions of section 41 of the Act (preserving the rights of prior users of the trade mark) and to any limitations and conditions entered on the Register, the registration of a person as proprietor of a trade mark, if valid, gives such person the exclusive right to the use of such trade mark upon or in connection with the goods in respect of which it is registered⁸⁾. The right conferred by the Act is not a copyright, but a right given for the protection of the trade of the proprietor; the exclusive right conferred by the Act is only upon or in connection with goods for which the mark is registered. The proprietor's rights under other provisions of the Act are wider; for instance, he has the right to prevent the registration of the same mark for the "same description" of goods, although they are not the same goods as those for which he is registered⁹⁾. It is not only use upon the goods that is protected, but in connection with them, for instance, on boxes, coverings, and other envelopes, and labels. And probably the words "in connection with" will be interpreted widely, and be held to extend to show cards and advertisements, at all events, if used to indicate the goods, as for instance in a shop window, where they are displayed¹⁰⁾. But probably the verbal use of a word trade mark in selling

¹⁾ Section 41.

²⁾ The provisions for concurrent registration. See above p. 609.

³⁾ *Williams's Ltd. v. Massey Ltd.* (1911), 28 R. P. C. 512.

⁴⁾ *Southall's T. M.* (1911) 28 R. P. C. 481.

⁵⁾ Section 42; the exception is practically of little, if any, importance.

⁶⁾ Section 45, and below "Passing off".

⁷⁾ *Ihlee v. Henshaw*, (1886), 31 Ch. D. 323.

⁸⁾ Section 39.

⁹⁾ Section 19.

¹⁰⁾ And see above p. 596.

goods over a counter would not be held to be infringement of the trade mark¹⁾, but the proprietor might have a remedy in a common law action for passing off; the right to prevent passing off is preserved by the Act²⁾. There may be duplicate registrations by different proprietors in certain cases, for instance, in the case of old marks, and in cases of honest concurrent user, and it is accordingly provided that where two or more persons are registered proprietors of the same (or substantially the same) trade mark in respect of the same goods, no rights of exclusive user of such trade mark shall (except so far as their respective rights shall have been defined by the Court) be acquired by any one of such persons as against any other by the registration thereof, but each of such persons shall otherwise have the same rights as if he were the sole registered proprietor thereof³⁾. If the trade mark is entered on the Register subject to any limitation or condition, e.g. a limitation as to colour or as to district, the proprietor could not maintain an action for infringement for anything done outside the limit, for instance, for use in different colours or in a different district. Ordinarily, however, registration is for all colours⁴⁾. Where there is a limitation to use in certain colours, the use in other colours by a person other than the proprietor may constitute passing off.

Mere descriptive matter cannot constitute an essential particular of a trade mark; but a trade mark may contain such matter and the Act accordingly contains restrictions on the rights of a registered proprietor for the protection of other traders in the use of descriptive matter as well as of their names and addresses. Section 44 provides that "no registration under the Act shall interfere with any *bona fide* use by a person of his own name or place of business or that of any of his predecessors in business, or the use by any person of any *bona fide* description of the character or quality of his goods". The Courts have never restrained the *bona fide* use by a person of his own name. Numerous cases are to be found in the reports of a man of straw, possessing the same name as a prominent trader, being given some nominal interest in a business as an excuse for the use of his name in order to trade on the reputation of the well-known trader. The Court has always been found ready to restrain any such fraudulent user⁵⁾. And where a person having the same name as a well-known trader has, to use the phrase of an eminent judge⁶⁾, "garnished the use of his name", so that his goods may be confused with those of his rival, he will be restrained from such deceptive use of it⁷⁾. Whether the operation of the section extends to a trading style is doubtful. A person is entitled to adopt and trade under any name that he pleases, provided that he does not choose one to conflict with the rights of other persons in the trade, and the protection of the Courts has been extended to names of repute so acquired. But having regard to the wording of section 44 it is not certain that such names fall within it.

The provisions protecting *bona fide* description of goods have been relied on by applicants seeking to register descriptive words which are alleged to have acquired a secondary meaning and thereby to have become distinctive of their goods. It has been contended that the section sufficiently protects the public. But it is now settled that words of mere ordinary description or commendation cannot be separately registered.

What constitutes infringement. The Act confers on the registered proprietor, subject to certain provisions which have already been noticed, the "exclusive right to the use of the trade mark" upon or in connection with the goods in respect of which it is registered⁸⁾. Where a defendant is using the mark, or substantially the same mark, on goods which are included in those for which the mark is registered, he infringes the proprietor's right, unless he has a special defence, e.g. a concurrent right by virtue of being a prior user⁹⁾, or acquiescence by the registered proprietor.

¹⁾ Supplying goods in response to a written order for them by their registered name has been held not to be infringement of trade mark, *Peters Ltd. v. Domestic Inventions Co.* (1908) 25 R. P. C. 387.

²⁾ See section 45.

³⁾ Proviso to section 39.

⁴⁾ Section 10.

⁵⁾ *Croft v. Day* (1846), 7 Beav. 84 (Day and Martin).

⁶⁾ *Cotton L.J. in Turton v. Turton* (1889), 42 Ch. D. 128.

⁷⁾ The subject is further dealt with below under the heading Trade Name.

⁸⁾ Section 39.

⁹⁾ See the proviso to section 41.

But where the plaintiff's trade mark is not copied as a whole, then the test of infringement is whether the defendant's mark is calculated, by its resemblance to the plaintiff's mark, to lead persons to believe that the goods to which it is applied are the plaintiff's goods. The test is the same as in an action for passing off goods not those of the plaintiff as his goods¹); and the question to be decided is also similar to that which arises where the registration of a new mark is opposed on the ground of its resemblance to the opponent's mark²). But there is this difference, that in the circumstances last mentioned the onus is on the applicant for registration to show that his mark is one that ought to be registered, whereas in an action for infringement, where the registered mark is not actually taken as a whole, the onus is on the plaintiff to show that what the defendant is doing is calculated to deceive. So that a resemblance which would be sufficient for the purpose of an opposition may not be sufficient to constitute infringement. Where however the defendant has taken one or more of the principal features of the plaintiff's mark, the onus may be very easily discharged. It is not necessary for a plaintiff to prove that persons have actually been deceived; although if the defendant's mark has been used for any considerable time under such circumstances that it has come into a market where the plaintiff's goods and mark are known, the absence of evidence of actual deception is a matter of strong comment as tending to show that there is no reasonable probability of deception³).

It is well settled also that the plaintiff need not prove any intention on the part of the defendant to deceive by the use of his mark⁴). But where such an intention is present or where fraudulent conduct on the part of a defendant is shown, the Court will the more readily infer the probability of deception; in other words the Court will easily presume that an attempt to steal the plaintiff's trade has been or would, if not restrained, be attended with success. On the other hand it may be that there is no infringement although part of the plaintiff's mark has been actually copied⁵), but such cases are rare. The fact that an infringer has acted innocently will, however, affect the relief which the Court will award to the plaintiff⁶).

The Court will not allow questions to be put to a witness as to whether in his opinion the defendant's mark is calculated to deceive⁷). But the nature of the trade in the goods and the class of persons who purchase them may be material, and evidence may be given on such points. For instance, a mark that would not be deceptive in the English market might be so in the Indian market; and a resemblance that might be sufficient to deceive in the case of inexpensive goods usually sold over the counter to uneducated or not very intelligent persons might not be sufficient in the case of expensive goods generally sold to more intelligent or more critical persons.

Evidence is admissible of the usages of the trade in respect of the get-up of the goods for which the trade mark is registered, and of any trade marks or get-up legitimately used in connection with such goods by other persons⁸). The marks used by other traders may have an important bearing on a plaintiff's rights. For instance, if he is registered for a diamond mark, and the defendant is also using a diamond mark, it is important if it be shown that various diamonds other than the plaintiff's are in use in the trade, so that the distinctiveness of the plaintiff's mark depends on his diamond being a special kind of diamond⁹).

Besides the defence of non-infringement, it may be open to a defendant to attack the validity of the plaintiff's registration, and in that case he should make an application for rectification of the Register by the removal of the plaintiff's trade mark therefrom or such other relief as he may be entitled to. Special defences may

¹) *Edwards v. Dennis* (1885), 30 Ch. D. 454.

²) Above p. 607.

³) See for instance the recent case of *Claudius Ash Sons & Co. Ltd. v. Invicta Manufacturing Co. Ltd.* (1912), 29 R. P. C. 465, where the defendants had for 13 years been doing what was complained of and no deception was proved.

⁴) *Millington v. Fox* (1837), 3 My. & C. 338.

⁵) As in *Lever v. Beddingfield* (1899), 16 R. P. C.

⁶) See below p. 620.

⁷) *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.* [1899] A. C. 13; and *Bourne v. Swan & Edgar* [1903] 1 Ch. 211.

⁸) Section 43.

⁹) *Bass Ratcliff & Gretton's T. M.* (1902), 19 R. P. C. 529.

also be available to him, for instance, acquiescence by the plaintiff or that the plaintiff is debarred from relief by some misrepresentation in the mark itself or by his carrying on a fraudulent trade.

The relief to which a successful plaintiff is entitled. The full relief to which a plaintiff may be entitled consists of an injunction, damages or an account of profits, delivery up, costs, and a certificate as to the validity of his trade mark. Where a defendant has claimed the right to do what the Court finds to be an infringement, or threatens or intends to continue his wrongful acts, the plaintiff will generally be entitled to an injunction restraining the defendant from infringing the trade mark. But where a defendant has acted innocently, that is to say, in ignorance of the plaintiff's rights, and has, on their being brought to his notice discontinued them, and there is no reason to apprehend a further infringement, an injunction will generally not be granted, at all events where the defendant has offered or offers an undertaking not to infringe. In addition to a general injunction against infringement, an injunction is often granted against the doing of the specific thing which is found to be an infringement, and this is of considerable importance to the plaintiff, if it becomes necessary for the plaintiff to apply to the Court for the enforcement of the injunction by committal or by sequestration. Where a plaintiff proves that acts of infringement have taken place, he is generally entitled at his option to an inquiry what damages (if any) he has sustained by the wrongful acts of the defendant or an account of the profits made by the defendant by the wrongful use of the trade mark. But where the defendant has infringed the trade mark in ignorance of the plaintiff's rights and, on becoming aware of them, has discontinued the infringement, neither an inquiry nor an account of profits will be ordered¹; and if the infringement has been continued, the inquiry or account will only be granted in respect of infringements after the defendant has become aware of the use or existence of the plaintiff's trade mark²). Where it appears that the infringement has only been trivial, the Court will as a rule refuse an inquiry or an account, although nominal damages may be awarded. And where there has been only an isolated instance of infringement, for instance, by inadvertence or by the act of a servant, and there is no reason to apprehend a repetition of it, the plaintiff's action may be dismissed³). The conduct of the plaintiff, e.g. delay on his part in taking proceedings, may affect the relief which he obtains.

A successful plaintiff is as a rule entitled to an order for delivery up of goods, wrappers etc. in the possession of the defendant bearing the infringing mark for the purpose of destruction, or (if that be possible) of deletion or removal of the mark.

As a general rule the defendant is ordered to pay the costs of the successful plaintiff. But if a defendant has before action offered the plaintiff full redress, the plaintiff will generally be ordered to pay costs, or at all events be refused his costs, although this will not necessarily be so where the defendant has not been acting *bona fide*, for a plaintiff is not bound to accept an undertaking instead of an injunction in such a case. But even where the plaintiff is entitled to an injunction, if the defendant offers to submit to one and to such other relief as the plaintiff is entitled to, and to pay the costs of obtaining an order, and the plaintiff claims relief to which he is eventually held not to be entitled, he may be ordered to pay all the extra costs incurred by the defendant.

In any legal proceeding in which the validity of the registration of a registered trade mark comes into question, and is decided in favour of the proprietor of such trade mark, the Court may certify the same, and if it so certifies, then in any subsequent legal proceeding in which such validity comes into question, the proprietor of the trade mark, on obtaining a final order or judgment in his favour, is to have his full costs, charges, and expenses as between solicitor and client, unless in such subsequent proceeding the Court certifies that he ought not to have the same⁴). If, therefore, the plaintiff in an action for infringement holds such a certificate granted in a previous proceeding, and the defendant unsuccessfully raises a question of the

¹ *Edelstein v. Edelstein* (1863), 1 D. J. & S. 185, followed in *Slazenger v. Spalding* [1910] 1 Ch. 257.

² *Horsfield v. John Walkden & Co. Ltd.* [1911], 28 R. P. C. 175.

³ *Leahy v. Glover*, (1893), 10 R. P. C. 141; *Knight v. Crisp & Co. Ltd.* (1904), 21 R. P. C. 671, are cases of passing off of this nature. Although infringements of trade mark stand on a somewhat different footing, probably the result would under similar circumstances be the same.

⁴ Section 46.

validity of the trade mark, the plaintiff, if successful, will *prima facie* be entitled to costs of the proceeding in which the validity is attacked, as between solicitor and client instead of as between party and party.

VIII. Sheffield Marks.

A local Register is kept by the Cutlers' Company for the registration of what are known as Sheffield Marks, that is to say, for trade marks applied for in respect of "metal goods" by persons carrying on business in Hallamshire or within 6 miles thereof¹). The expression "metal goods" in this connection means all metals, whether wrought, unwrought, or partly wrought, and all goods composed wholly or partly of any metal. The Sheffield Register of corporate marks existed long before the time when the general Register of Trade Marks was established by the Act of 1875. The Cutlers' Company was incorporated early in the 17th century²) and its powers were subsequently extended and regulated by later Acts³). Its principal power in regard to trade marks was that of assigning marks to manufacturers of cutlery within the district before mentioned. Marks so assigned before the 1st of January 1884, are known as old corporate marks, and they are, or can be, registered in the Sheffield Register⁴). That Register is continued under the Act of 1905, and it also contains the new marks registered under the Acts of 1883 to 1905 in respect of metal goods by persons carrying on business in the above-named district. Applications for trade marks in respect of such goods by other persons are made to the Registrar of Trade Marks at the Patent Office in the usual way. The provisions of the Act and Rules apply *mutatis mutandis* to applications made to the Cutlers' Company. The Act provides for notices by the Cutlers' Company to the Registrar of such applications, and for notices by the Registrar to the Cutlers' Company of applications made to the Registrar. If the Registrar objects to an application made to the Cutlers' Company, such application is not to be proceeded with by the Company, but a person aggrieved may appeal to the Court. There is also an appeal to the Court from a decision of the Company⁵).

IX. Cotton Marks.

The Manchester Register differs from the Sheffield Register in this, that it is not merely a local Register, but is a Register for all trade marks in the cotton classes, whether the applicant is carrying on business at Manchester or elsewhere. The Registry is known as the Manchester Branch⁶), and is under the Keeper of Cotton Marks, who acts under the direction of the Registrar. The Register is kept in duplicate at the Patent Office and the Manchester Branch.

Cotton marks have under the Registration Acts always stood on a special footing. When the first Registration Act of 1875 was passed, the number of such marks in use was very considerable, and owing to this, and to the facts that many of them were composite marks and included features in common use, and that the trade in cotton goods was largely with countries, such as India, where the ultimate purchasers were of native races, it was realised that there were special difficulties in dealing with them, and a special committee was then appointed to examine and report on applications for registration of cotton marks. After this committee ceased to exist, there was a practice in the Manchester Branch of consulting the Trade and Merchandise Marks Committee appointed by the Manchester Chamber of Commerce upon questions of novelty or difficulty arising on such applications, and this practice is recognised by the Act of 1905⁷).

The Cotton Classes are 23, a) cotton yarn, b) sewing cotton, 24, cotton piece goods of all kinds, and 25, cotton goods not included in classes 23, 24 or 38 (articles of clothing). Application for registration of a trade mark in any of these classes is made to the Manchester Branch⁸), and is notified to the Registrar by the Keeper

¹) Section 63.

²) 21 Jac. I, c. 31.

³) The latest Act was passed in 1860, 23 Vict. c. 43.

⁴) Section 63, subsection 2.

⁵) The procedure as to applications to the Cutlers' Company is regulated by Rules 107 to 112.

⁶) The office is at 48 Royal Exchange, Manchester.

⁷) Section 64 deals with cotton marks. Sub-section 14 is the sub-section recognising the practice referred to.

⁸) The Rules applicable are Nos. 113 to 120.

of Cotton Marks, who also reports thereon. The Registrar may object to the application, in which case the application is not to be proceeded with, but any person aggrieved may appeal to the Court or to the Board of Trade. If the mark has been used by the applicant or his predecessors, the application must state the length of time of such user¹⁾. An applicant has the right on production of a facsimile of his mark and payment of a fee to obtain from the Keeper of Cotton Marks a certified copy of his application, setting forth the length of time of user (if any) and any other particulars which the Keeper may deem necessary²⁾. The object of this provision is to enable owners of trade marks, even if not registrable, to put them on record at the Registry, and the right to inspection of the Registry includes the right to inspect all applications made since the passing of the Trade Marks Registration Act, 1875, whether registered, refused, lapsed, expired, withdrawn, abandoned, cancelled or pending³⁾.

Besides the special procedure in regard to Cotton Marks, the Act of 1905 contains some restrictions on registration applicable only to such marks, namely:

- a) That in respect of cotton piece goods and cotton yarn, no mark consisting of a word or words alone (whether invented or otherwise) shall be registered, and no word shall be deemed distinctive in respect of such goods;
- b) That in respect of cotton piece goods no mark consisting of a line heading⁴⁾ alone shall be registered, and no line heading shall be deemed distinctive in respect of such goods;
- c) No registration of a cotton mark shall give any exclusive right to the use of any word, letter, numeral, line heading, or any combination thereof⁵⁾.

X. International and Colonial Arrangements.

Although Great Britain became a party to the International Convention for the Protection of Industrial Property⁶⁾, that Convention has only become law in the United Kingdom so far as its provisions have been enacted by statute. The existing statutory provisions relating to International and Colonial Arrangements with respect to patents, designs and trade marks are contained in Section 91 of the Patents and Designs Act, 1907⁷⁾.

Under this enactment and that which it replaced Orders in Council have been made applying its provisions to practically all civilised countries, except Russia, and to certain British Possessions, including Australia and New Zealand. The statute has not, however, fully carried out the intention of the convention, which was that, if a trade mark was registered in the country of origin, it should be qualified for registration in all other countries of the Union. It has been decided in the English Courts that an applicant, although applying under the International Convention, or rather under the statutory provisions above quoted, must show that his mark is registrable as a trade mark according to the provisions applicable in the case of any ordinary application⁸⁾. The practical effect of the convention and statute is only therefore to give to a foreign applicant for registration in England priority for four months after the application in his own country; a foreign applicant has always had under the Registrations Acts the same right to register a trade mark in this country and to protection against infringement as a British subject has had.

Great Britain did not become a party to the Arrangement⁹⁾ relating to the establishment and endowment of the International Bureau at Berne for Registration of Trade Marks. It was however a party to the Madrid Arrangement of 1891 for the prevention of false indications of origin of goods.

¹⁾ Sub-section 9.

²⁾ Sub-section. 12

³⁾ Sub-section 11.

⁴⁾ That is to say, the pattern or marking woven at the end of the piece.

⁵⁾ Sub-section 10.

⁶⁾ Ratified at Paris, June 6th, 1884. Amended by the Brussels Act, December 14th, 1900, also, subject to ratification before April 1st, 1913 at Washington, June 2nd, 1911.

⁷⁾ These provisions will be found in the Appendix, *infra*. They are substantially the same as those previously in force under the Patents, Designs and Trade Marks Acts, 1883 and 1886. Section 98 of the Patents and Designs Act 1907 contains a saving in favour of conventions and Orders in Council made under the Acts of 1883 and 1886 now repealed.

⁸⁾ *Californian Fig Syrup Co's T. M.* (1889), 40 Ch. D. 620; *Carter Medicine Co's T.M.* [1892] 3 Ch. 472.

⁹⁾ Madrid, 1891. Revised at Washington, 1911.

XI. Passing Off.

"No man can have any right to represent his goods as the goods of another person"¹). How far the use of particular words, signs, or pictures, does or does not amount to such a representation must be a question of evidence²).

The right of one trader to prevent another from passing off as his goods what are not in fact his goods, is not given by any statute. At common law the wrongful act gave a right to damages, whilst in a Court of equity an injunction could be obtained. Now, since the fusion of law and equity, complete redress is obtainable in one proceeding. The Trade Marks Act, 1905, expressly preserves the action for passing off; for section 45 provides that nothing in the Act shall be deemed to affect rights of action against any person for passing off goods as those of another person or the remedies in respect thereof. An unregistered trade mark can be practically protected by a passing-off action³); and in an action for infringement of a registered trade mark a claim for passing off is almost invariably added.

The means by which the goods of one trader are passed off as those of another are immaterial if that is being done, whether it be by direct statement that they are the plaintiff's goods, or by imitation of the labels or marks used by the plaintiff, or of the boxes or wrappers in which the plaintiff puts them on the market, or of what is known as the "get up" of the plaintiff's goods, or by taking or imitation of the plaintiff's trade name, or the name which denotes his goods⁴). The plaintiff in such an action must however show that the features which he relies on and complains of being adopted or imitated, are individually or collectively distinctive of his goods⁵). He must also show that what the defendant is doing is, by reason of resemblance to such distinctive features of the plaintiff's goods, calculated to pass off the defendant's goods as those of the plaintiff. But the plaintiff is not bound to show fraudulent intention on the part of the defendant⁶), although the absence of such intention may affect the extent of his remedies. If the Court is satisfied that the conduct of the defendant has not been *bona fide*, that fact may assist the plaintiff in a case otherwise doubtful, for in such a case the Court will be ready to find that the defendant's efforts to annex the plaintiff's trade are likely to be attended with success. It has been said that, although the defendant has not knowingly imitated the features distinctive of the plaintiff's goods, if when the matter is called to his attention he continues or threatens to continue putting his goods on the market with those features, that would be evidence of fraud. Thus in a trade name case⁷): "All that the Court requires is to be satisfied that the names are so similar as to be calculated to produce confusion between the two companies, so calculated to do it that when it is drawn to the attention of those adopting the name complained of, that that would be the result, it is not honest for them to persevere in their intention, although originally the intention might not have been otherwise than honest". Some judges have, however, protested against an imputation of dishonesty without clear evidence of it⁸); and the principle would seem at all events to be only applicable where the defendant must know, when he considers the matter, that the result of what he is doing will be likely to result in passing off his goods as those of the plaintiff. However, as already stated, it is now established that intention to defraud the plaintiff is not a necessary element in an action for passing off⁹). Neither is it necessary to show that anyone has in fact been deceived; but if the plaintiff's and defendant's goods have been circulating for some time in the same market and no deception or confusion has resulted, this tends to negative probability of deception. There may be no probability of deceiving an immediate purchaser of the defendant's goods, yet they may be so got up as to deceive the ultimate purchaser; as a general rule the public

¹) Per Lord Justice Turner in *Burgess v. Burgess* (1853), 3 D. M. & G. 204.

²) See Lord Halsbury's judgment in *Reddaway v. Banham* [1896] A. C. at p. 204.

³) Section 42 is no bar to this.

⁴) See Lord Kingsdown's judgment in *Leather Cloth Co. v. American Leather Cloth Co.* (1865), 11 H. L. C. 538.

⁵) See *Payton v. Snelling* (1901) 17 R. P. C. at p. 52.

⁶) *Millington v. Fox*, (1838) 2 My. & Cr. 338.

⁷) Per James L. J. in *Hendriks v. Montagu* (1881), 17 Ch. D. 638, at p. 646.

⁸) See the judgment of Brett L. J. in the same case.

⁹) A modern authority is *Cellular Clothing Co. v. Maxton & Murray* [1899] A. C. 326, judgment of Lord Halsbury, at p. 334.

is much more likely to be misled than the trade. Questions to witnesses as to whether in their opinion the defendant's goods are calculated to deceive are inadmissible¹⁾ but witnesses may be asked as to the class of persons who buy the goods, e.g. whether they are illiterate, or whether the goods go to purchasers, (e.g. in the East), who cannot generally read English. The general principles of comparison of trade marks in infringement cases apply also in cases of passing off.

The contest in a passing off case very often turns on the question whether a word which the defendant is applying to his goods is the trade name of the plaintiff's goods, that is to say, whether it indicates, not goods of the kind in question by whomsoever made, but goods of that kind made or dealt in by the plaintiff. Where the word in question is what is known as a "fancy name", that is to say, a non-descriptive name made up or arbitrarily chosen and not used by anyone else, then the answer is easy. "Where the trade mark is a word or device never in use before, and meaningless, except as indicating by whom the goods in connection with which it is used were made, there could be no conceivable legitimate use of it by another person. His only object in employing it in connection with goods of his manufacture must be to deceive²⁾". Many cases are not of this simple nature, but relate to the use of a word of a descriptive nature, which the plaintiff alleges has acquired a secondary meaning indicating his goods³⁾. "The name of a person, or words forming part of the common stock of language, may become so far associated with the goods of a particular maker that it is capable of proof that the use of them by themselves without explanation or qualification by another manufacturer would deceive a purchaser into the belief that he was getting the goods of A, when he was really getting the goods of B. In a case of this description the mere proof by the plaintiff that the defendant was using a name, word, or device which he had adopted to distinguish his goods would not entitle him to any relief. He could only obtain it by proving that the defendant was using it under such circumstances or in such manner as to put off his goods as the goods of the plaintiff⁴⁾". Where a word, which was originally merely descriptive, has acquired such a secondary meaning, the defendant cannot successfully set up that he is merely stating by its use the true description of his goods, for the word possesses a meaning beyond its merely descriptive one. It is probably more accurate to state that the word must have acquired an additional meaning limiting its original one than to state that the original meaning must have been lost. The matter is put thus in a recent judgment⁵⁾: "Though I do not agree with the argument that a word cannot be at the same time descriptive and distinctive, I think the fact that it retains its *prima facie* descriptive signification increases the difficulty of proving that it is distinctive of the goods of any particular manufacturer. If a word is *prima facie* the name of or description of an article, evidence that it is also generally associated with the name of a particular manufacturer is, in my opinion, by no means conclusive that it has become a distinctive word which cannot be used of the same article when made by others without risk of deception. If the article in question is made exclusively or mainly by a particular manufacturer, it is almost bound to be associated with the name of that manufacturer by the trade and public, for each trader and each member of the public will naturally associate the article with the name of the manufacturer who supplies it to him, and who may possibly be, in his opinion, the only person who supplies it at all". And again in another case⁶⁾ — "Much of the argument before us was based on an assumption that there is a natural and innate antagonism between distinctive and descriptive as applied to words, and that if you can show that a word is descriptive you have proved that it cannot be distinctive. To my mind this is a fallacy. Descriptive names may be distinctive and *vice versa*. No class of words are more directly and intentionally distinctive than proper names, and yet

¹⁾ *North Cheshire and Manchester Brewery Co. v. Manchester Brewery Co.* [1899] A. C. 83; *Bourne v. Swan & Edgar* [1903] 1 Ch. 211.

²⁾ Per Lord Herschell in *Reddaway v. Banham* [1896] A. C. p. 210.

³⁾ Such as "Camel hair", the name of the plaintiffs' belting in the well-known leading case of *Reddaway v. Banham*, *supra*. See also *Cellular Clothing Co. v. Maxton*, [1899] A. C. 326.

⁴⁾ Per Lord Herschell in *Reddaway v. Banham*, [1896] A. C. p. 210.

⁵⁾ *Burberrys v. Cording* [1910], 26 R. P. C. 693 at p. 704, (Slip-on coats). The plaintiffs failed in their action.

⁶⁾ The judgment of Fletcher Moulton L. J. in *Crosfield's Application for a trade mark* [1910] 1 Ch. 118, (Perfection.) The application failed.

originally they were usually, if not invariably, descriptive in all languages. They still are so among savage peoples, and although among civilized nations the original significations of proper names are not remembered, or regarded, we see that the natural tendency to use descriptive words as names still exists, since nick-names, the only names that are now invented, are usually descriptive. There is therefore no natural or necessary incompatibility between distinctiveness and descriptiveness in the case of words used as trade marks. The notion that there is such an incompatibility is confined to lawyers, and is in my opinion due to the influence of the earlier Trade Mark Acts. By those Acts, which are now repealed, the fact that words were descriptive of the goods was fatal to their registration as trade marks, and thus becoming in the eye of the law distinctive of the goods of a particular maker. But the question whether a word is or is capable of becoming distinctive of the goods of a particular maker is a question of fact, and is not determined by its being or not being descriptive".

In the case, however, of a word which is in the ordinary and natural meaning descriptive, the burden on a plaintiff who seeks to show that it has acquired a secondary meaning as distinctive of his goods, is very great¹).

Where a person invents a new article and patents it and gives it a name, on the expiration of the patent anyone may manufacture the article and may use for it the name which the patentee has attached to it during the time when he had the legal monopoly of the manufacture²). This is an absolute rule in the case of a patented article, the name becoming *publici juris*, for otherwise the patentee would have a practical monopoly after the expiration of the patent, and the same principle applies where, by means of the manufacture having been secret or of other circumstances, a plaintiff has in fact been the sole manufacturer of or dealer in the article²).

The form of injunction granted in a passing off action is generally to restrain the defendant from doing the specific things which are held to constitute a passing off of the plaintiff's goods (e.g. the issue of a particular label or wrapper) and from otherwise passing off his goods as those of the plaintiff. But where the passing off has been by the use of a word which has acquired a secondary meaning indicating the plaintiff's goods, the injunction should be limited to restraining the defendant from using it "without clearly distinguishing" his goods from those of the plaintiff³). The principles as to damages and an account of profits in a passing off action are the same as those in an action for infringement of trade mark⁴).

There is a form of fraud which consists in passing off goods of a cheaper or inferior nature emanating from a manufacturer as being goods of a dearer or superior quality made by him. Such conduct is an actionable wrong, and the Court will interfere to restrain the offender⁵).

XII. Trade Name.

The trade name of a person is the name under which he is carrying on a business⁶). It need not be, and frequently is not, his own name, for instance, it may be that of a predecessor in business, or merely a name adopted for the purposes of business. In the form of a signature, or if represented in a special or particular manner, it is registrable as a trade mark⁷). But, even if it be not so registered, the law affords protection to a trader against the wrongful use of his trade name by others. The law relating to this subject is a branch of the law as to "passing off", for the ground on which a trade name is protected is that its wrongful use by another person is liable to lead to the belief that his business is the business of the lawful owner of the name, whereby the latter may, directly or indirectly, be deprived of trade that properly belongs to him. Damage or the apprehension of damage to trade lies at the foundation of the matter. Mere inconvenience, such as errors in the delivery of letters, is not of itself a ground of action.

¹) See *Cellular Clothing Co. v. Maxton* [1899] A. C. 326, (Cellular cloth). The plaintiffs failed.

²) See the last case cited.

³) *Reddaway v. Banham* [1896] A. C. 199.

⁴) See above p. 620, as to this and other relief of a consequential nature.

⁵) *Teacher v. Levy*, (1906) 23 R. P. C. 117.

⁶) "Trade name" is sometimes used to mean the distinctive name of goods manufactured or dealt in by a particular trader, that is to say, the trade name of his goods, not his trading name.

⁷) T. M. Act, 1905, section 9 (1) and (2).

"The question is simply whether the name they (that is the defendants in the action) have adopted for a business of the same kind and in the same city¹) is so like the name of the plaintiffs, which they have used as their trade name for so long a period, as in fact to enable the defendants to appropriate or to result in the defendants in fact appropriating, a material part of the business of the plaintiff company, by misleading people to suppose that they were dealing with the plaintiffs when, in fact, they were dealing with the defendants²)."

The principles, therefore, of the law of passing off apply generally to trade name³). Thus, it is essential for a plaintiff to prove that he has established a reputation under the trade name⁴), so that persons seeing or hearing that name used in connection with a business of the kind in question will think that it indicates the plaintiff's business. Therefore, as in passing off cases, where the name is of an uncommon character or is of the nature of a fancy name⁵), the plaintiff has an easier task in showing that it is distinctive than he has where the name is a very ordinary one or is a trading style composed of ordinary English words⁶). Where an invented word is used and registered by manufacturers as a trade mark for their goods, they very often, especially if they are a registered company, include the word in their trading title, and this is a very convenient course, as it renders the trading title easy of protection. But, provided that a plaintiff can show that the name distinguishes his business from other business, it does not matter how descriptive or how ordinary the name is⁷). But no one can exclude other persons altogether from the use of an ordinary English word as part of a trading style⁸); the right of the first trader is at the most to prevent its use in such a collocation or in such a manner as will lead to the belief that his business is indicated by its use. A plaintiff does not necessarily fail because he is not the only person using the name in the particular trade⁹); it may be that each of two persons using it may have a right to stop its use by a third person, but where there are two persons denoting their business by the same name, there is a considerable difficulty in one of them showing that the name indicates his business¹⁰).

The ground of the jurisdiction being the probability of the appropriation of the plaintiff's business, it follows that, unless there is competition by reason of similarity of business between the plaintiff and the defendant or probability of competition, no jurisdiction based on trade name arises, apart from statute¹¹). If one company was dealing in manure and another with an identical name in hardware, an injunction would not be granted¹²). For the same reason locality is or may be important, for unless the areas of trade overlap or are likely to do so, the element of competition will be absent¹³).

It is no more necessary in trade name cases than in passing off cases to show fraudulent intent¹⁴), except possibly where the defendant is using his own name¹⁵),

¹) This of course is not necessary; it is sufficient if the business areas overlap.

²) Per Brett L. J. in *Hendriks v. Montagu* (1881), 17 Ch. D. 638 at p. 648 (Universal Life Assurance Society and Universe Life Assurance Association).

³) *Aerators Ltd. v. Tollit*, [1902] 2 Ch. 319, *British Vacuum Cleaner Company Ltd. v. New Vacuum Cleaner Co. Ltd.* [1907] 2 Ch. 312.

⁴) *Levy v. Walker* (1879), 10 Ch. D. 447.

⁵) E. g. Such a name as "The Hercules Iron Company".

⁶) *Electromobile Co. Ltd. v. British Electromobile Co. Ltd.* (1908) 25 R. P. C. 149; the plaintiffs failed. See also *Aerators Ltd. v. Tollit* [1902] 2 Ch. 319. and the *Vacuum Cleaner* case, above cited.

⁷) Thus "Universal Life Assurance Society" in *Hendriks v. Montagu* (1881), 17 Ch. D. 638. *Manchester Brewery Co. Ltd. v. North Cheshire and Manchester Brewery Co. Ltd.* [1899] A. C. 83.

⁸) Thus in *Colonial Fire Assurance Co. v. Home and Colonial Assurance Co. Ltd.* [1864] 33 Beav. 548, the plaintiffs failed; see also *Aerators Ltd. v. Tollit* [1902] 2 Ch. 319.

⁹) *Dent v. Turpin* (1861), 30 L. J. Ch. 495; the name was here used as a trade mark.

¹⁰) *Jamieson v. Jamieson*, (1898) 15 R. P. C. 169, and see *Claudius Ash v. Invicta Manufacturing Co.* (1911) 28 R. P. C. 597.

¹¹) There may be jurisdiction based on libel or, as in *Walter v. Ashton* [1902] 2 Ch. 282, (*Times Newspaper and Times Cycles*) on the plaintiff being subjected to financial risk by being held out as connected with the defendant's business, but this is a different matter.

¹²) Per Jessel M. R. in *Hendriks v. Montagu* (1881), 17 Ch. D. 638.

¹³) See for instance the case of *George Outram & Co Ltd. v. London Evening Newspaper Ltd.* (1911) 28 R. P. C. 308, in which the proprietors of the Evening Times published in Glasgow failed against the Evening Times published in London.

¹⁴) *North Cheshire & Manchester Brewery Co. Ltd. v. Manchester Brewery Co. Ltd.* [1899] A. C. 83.

¹⁵) See below, as to this possible exception.

nor is it necessary to show that deception has actually occurred. Many of the trade name cases are, however, cases in which fraud has been present; for instance, in some a person, in order to afford an excuse for the use of the name of a well known trader, has taken another person with that name or a similar name into partnership or has purported to buy the goodwill of a pretended business, of such a person. In other instances a company has been formed having such a person as one of its directors or managers; mere devices of this kind, however, afford no defence. And, quite apart from fraud, a person who is not transferring to a company an existing business, cannot confer on it a title to use his name as against persons who would be damaged thereby¹).

Where a person has established a reputation under his name in a particular trade, and another person not bearing that name enters that trade and adopts the name for the purpose of it, there is a *prima facie* case of an interference with the plaintiff's rights by passing off the business as that of the established trader²). But where a person is using his own name, he is doing that which he has a *prima facie* right to do³). A person cannot get a monopoly of the use of a name in a trade by being the first to use it in that trade, and get a reputation under it. If, however, a defendant is using his own name in an unfair manner so as to induce the belief that his business is that of the plaintiff, he will be restrained from such use; and, even if his use is not dishonest in the sense of being intended to induce such belief, if the plaintiff establishes such a reputation in the name that the mere use of it without sufficiently distinguishing elements⁴), is calculated to deceive, and the defendant is so using it, he may be restrained⁵); but no case has occurred in which a person has been absolutely restrained from the use of his own name, at the most he will only be restrained from using it so as to be calculated to deceive or without distinguishing his business from that of the plaintiff⁵). In this connection it may be noticed that the Trade Marks Act, 1905, contains a provision that no registration under that Act shall interfere with any *bona fide* use by a person of his own name or that of any of his predecessors in business⁶).

With regard to the names of registered companies, the Companies (Consolidation) Act, 1908, section 8, enacts that a company may not be registered by a name identical with that by which a company is already registered, or so nearly resembling that name as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signifies its consent in such manner as the Registrar requires. This section affords a protection to a registered company additional to that given by the common law, but it only applies before actual registration of the company with the conflicting name. So that if registration has been effected, or if it is feared that it may notwithstanding the section be effected, a remedy by injunction should be sought⁷).

The general principles to be applied in cases under the section are extremely analogous to those which are applicable in cases of passing off by the use of a trade name⁸), the test given by the section being that applied by the Court in trade name cases where the section does not apply, subject to this, however, that where there is identity of names registration of the second company is prohibited however different the businesses are. Where the names are not identical but there is some similarity, then even under the statute, it is material to consider what business has been carried on or is intended to be carried on by the old company and what is intended to be carried on by the new company⁹). Where a company has been registered, the name of which by reason of its resemblance to that of another registered company or firm is calculated to deceive, an injunction will be granted against allowing the name to

¹) *Tussaud v. Tussaud* (1890), 44 Ch. D. 678; *Fine Cotton & Spinners and Doublers Association v. Harwood Cash and Co. Ltd.*, [1907] 24 R. P. C. 533; *Kingston, Miller & Co. v. Thomas Kingston & Co.*, [1912] 1 Ch. 575.

²) *Burgess v. Burgess* (1853), 3 D. M. & G. 904; *Turton v. Turton* (1889), 42 Ch. D. 128.

³) *Turton v. Turton* (1889), 42 Ch. D. 128.

⁴) In most cases the use of a different Christian name or different initials would be sufficient distinction.

⁵) *Cash v. Cash* [1902] 18 R. P. C. 213, 19 R. P. C. 181; and see *Electromobile Co. Ltd. v. British Electromobile Co. Ltd.* [1908] 25 R. P. C. 149.

⁶) Section 44.

⁷) *North Cheshire & Manchester Brewery Co. v. Manchester Brewery Co.* [1899] A. C. 83.

⁸) *Aerators Ltd. v. Tollit* [1902] 2 Ch. 319, and the *Vacuum Cleaner* case (above noted).

⁹) See *Aerators Ltd. v. Tollit*, *supra*.

remain on the register¹). The section quoted above contains a provision enabling a company which has been registered contrary to its provisions to change its name with the sanction of the Registrar.

XIII. The Criminal Law with reference to Merchandise Marks.

By the Merchandise Marks Act, 1887, and the amending Acts²), various offences are created in reference to the false marking of goods. The object of the Acts is primarily to protect the public from being imposed on by false marks or descriptions, but some of the provisions are intended to operate also as a protection to the proprietors of trade marks and trade names. Broadly the principal offences fall under three heads, namely:

1. Forgery of trade marks.
2. False application of trade marks, and
3. False trade descriptions.

The Act of 1887 also contains important provisions for prohibiting the importation of goods which, if sold, would be liable to forfeiture, and special sections relating to watches and watch cases.

1. Forgery of trade marks. Every person who:

- a) Forges a trade mark, or
- c) Makes any die, block, machine or other instrument for the purpose of forging, or being used for forging, a trade mark, or
- e) Disposes of or has in his possession any die, block, machine, or other instrument for the purpose of forging a trade mark, or
- f) Causes any of these things to be done,

is, subject to the provisions of the Act, and unless he proves that he acted without intent to defraud, guilty of an offence against the Act³).

A person is to be deemed to forge a trade mark who either:

- a) Without the assent of the proprietor makes that trade mark or a trade mark so nearly resembling that trade mark as to be calculated to deceive, or
- b) Falsifies any genuine trade mark, whether by alteration, addition, effacement or otherwise⁴).

For the purposes of the Act trade mark means a trade mark registered under the Trade Marks Act, 1905⁵), and includes any trade mark which, either with or without registration, is protected by law in any British Possession or foreign State to which the provisions relating to International and Colonial arrangements have been applied⁶). It is also an offence for a person to sell, or expose for, or have in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark is applied unless he is able to establish one of the special defences under the Act⁷). It is the policy of the Act to throw upon a person who does one of the acts which if done with intent to defraud would be an offence, the onus of showing that he acted without intent to defraud.

2. False application of a trade mark. Every person who falsely applies to goods any trade mark or any mark so nearly resembling a trade mark as to be calculated to deceive, or causes that to be done is, subject to the provisions of the Act, and unless he proves that he acted without intent to defraud, guilty of an offence against the Act⁸). "Goods" mean anything which is the subject of trade, manufacture, or merchandise⁹).

The definition of the expression "apply" is a very comprehensive one.

¹) *Panhard et Levassoir (société anonyme etc.) v. Panhard Levassoir Motor Co. Ltd.* [1901] 2 Ch. 513.

²) These are the Merchandise Marks Acts, 1891, 1894, 1909, and 1911. Except in one particular mentioned in the text, the three first relate wholly to official prosecutions. The Act of 1911 relates to requiring information from importers of prohibited goods.

³) Section 2 (1).

⁴) Section 4.

⁵) Section 3 and Interpretation Act, 1889, section 38.

⁶) Section 3, and section 91 of the Patents and Designs Act, 1907.

⁷) As to these see below p. 630.

⁸) Section 2 (1) (b) and (f).

⁹) Section 3 (1).

A person is deemed to apply¹⁾ a trade mark or mark or trade description to goods who:

- a) Applies it to the goods themselves;
- b) Applies it to any covering, label, reel or other thing in or with which the goods are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, or
- c) Places, encloses, or annexes any goods which are sold or exposed or had in possession for any purpose of sale, trade, or manufacture, in, with, or to any covering, label, reel, or other thing to which a trade mark or trade description has been applied, or
- d) Uses a trade mark or mark or trade description in any manner calculated to lead to the belief that the goods in connection with which it is used are designated or described by that trade mark or mark or trade description²⁾.

A person is deemed *falsely* to apply to goods a trade mark, or mark, who without the assent of the proprietor of a trade mark applies such trade mark, or a mark so nearly resembling it as to be calculated to deceive; but in any prosecution for falsely applying a trade mark or mark to goods, the burden of proving the assent of the proprietor lies on the defendant³⁾. It is also an offence for a person to sell, or expose for, or have in his possession for, sale, or any purpose of trade or manufacture, any goods or things to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied, unless he establishes one of the special defences under the Act⁴⁾.

3. Application of a false trade description. This is the most important of the offences under the Act, most of the prosecutions being under this heading.

Every person who:

- d) Applies⁵⁾ any false trade description to goods, or
- f) Causes that to be done, is, subject to the provisions of the Act, and unless he proves that he acted without intent to defraud, guilty of an offence against the Act⁶⁾.

"Trade description" is defined as any description, statement, or other indication, direct or indirect,

- a) As to the number, quality, measure, gauge, or weight of any goods, or
- b) As to the place or country in which any goods were made or produced, or
- c) As to the mode of manufacturing or producing any goods, or
- d) As to the material of which any goods are composed, or
- e) As to any goods being the subject of an existing patent, privilege, or copyright,

and the use of any figure, word, or mark which, according to the custom of the trade, is commonly taken to be an indication of any of the above matters, is to be deemed a trade description⁷⁾.

The definition is very wide; it does not however cover verbal descriptions. The subclause (b) is one of much importance, and difficult questions of fact sometimes arise under it, for instance, where goods have been made partly in one country and partly in another. In the case of substances such as margarine, the place where the product is finished ready for sale is to be regarded as the place of manufacture, but this principle has been held not to apply to such an article as a watch; if important parts are made abroad, the watch cannot properly be described as English, although the parts are put together in this country. English words forming part of the goods themselves, e.g. on Christmas cards, are treated by the customs authorities as not being indications of English origin. In the case of imported goods evidence of the port of shipment is *prima facie* evidence of the place or country in which the goods were made or produced⁸⁾. The customs entry relating to imported

¹⁾ Whether it is woven, impressed or otherwise worked into, or annexed or affixed to the goods, or to any covering, label, reel or other thing; section 5 (2).

²⁾ Section 5 (1), "covering" includes any stopper, cask, bottle, vessel, box cover, capsule, frames or wrapper; and "label" includes any band or ticket; sub-section (2).

³⁾ Section 5 (3).

⁴⁾ As to these see below p. 630.

⁵⁾ As to which constitutes "applying", see section 5, above.

⁶⁾ Parts of section 2 (1).

⁷⁾ Section 3.

⁸⁾ Section 10 (2).

goods is a trade description applied to the goods¹). "False trade description" means a trade description which is false in a material respect as regards the goods to which it is applied and includes every alteration of a trade description whether by way of addition, effacement, or otherwise, where that alteration makes the description false in a material respect²); and a trade mark may be a trade description. The provisions respecting the application of a false trade description to goods extend to the application to goods of any such figures, words, or marks, or arrangement or combination thereof, whether including a trade mark or not, as are reasonably calculated to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose manufacture or merchandise they really are³).

The Act contains a saving clause in favour of conventional trade descriptions in use at the time of its passing. Where at that time a trade description was lawfully and generally applied to goods of a particular class, or manufactured by a particular method to indicate the particular class or method of manufacture of such goods, the provisions of the Act with respect to false trade descriptions is not to apply to such trade description when so applied⁴). Where, however, any such trade description includes the name of a place or country, and is calculated to mislead as to the place or country where the goods to which it is applied were actually made or produced, and the goods are not actually made or produced in that place or country, the exemption does not apply unless there is added to the trade description, immediately before or after the name of that place or country, in an equally conspicuous manner, with that name, the name of the place or country in which the goods were actually made or produced with a statement that they were made or produced there⁵).

The provisions of the Act respecting the application of a false trade description to goods or respecting goods to which a false trade description is applied extend to the application to goods of any false name or initials of a person, and to goods with the false name or initials of a person applied, in like manner as if such name or initials were a trade description, and the expression false name or initials means as applied to any goods, any name or initials of a person which —

- a) Are not a trade mark or part of a trade mark, and
- b) Are identical with, or a colourable imitation of, the name or initials of a person carrying on business in connection with goods of the same description, and not having authorised the use of such name or initials, and
- c) Are either those of a fictitious person or of some person not *bona fide* carrying on business in connection with such goods⁶).

Every person who sells, or exposes for, or has in his possession for, sale, or any purpose of trade or manufacture, any goods to which any false trade description is applied, is guilty of an offence against the Act unless he establishes one of the special defences under the Act⁷). These are:

- a) That having taken all reasonable precautions against committing an offence against the Act, he had at the time of the commission of the alleged offence no reason to suspect the genuineness of the trade mark, mark or trade description, and
- b) That on demand made by or on behalf of the prosecutor, he gave all the information in his power with respect to the persons from whom he obtained such goods or things; or
- c) That he otherwise acted innocently.

Watches and Watch cases. Where a watch case has thereon any words or marks which constitute, or are by common repute considered as constituting, a description of the country in which the watch was made, and the watch bears no description of the country where it was made, those words or marks are *prima facie* deemed to be a description of that country within the meaning of the Act, and the provisions

¹) Merchandise Marks Act, 1891, section 1

²) Section 3 (1).

³) Section 3 (2).

⁴) Section 18.

⁵) Proviso to section 18.

⁶) Section 3 (3).

⁷) Section 2 (2).

of the Act with respect to goods to which a false trade description has been applied, and with respect to selling or exposing for, or having in possession for, sale, or any purpose of trade or manufacture, goods with a false trade description, are to apply accordingly, and the expression "watch" means all that portion of a watch which is not the watch case¹).

Punishment and forfeiture. Offences against the Act are punishable by fine, imprisonment, or hard labour²). A person guilty of an offence is moreover liable to forfeit every chattel, article, instrument, or thing by means of or in relation to which the offence has been committed³); and the Court may order any forfeited articles to be destroyed or otherwise disposed of.

Prohibition on importation. The Act however not only provides for the punishment of offences, but by prohibiting the importation of offending goods endeavours to prevent the commission of offences. All goods which, if sold, would be liable to forfeiture under the Act, and all goods of foreign manufacture, bearing any name or trade mark being or purporting to be the name or trade mark of any manufacturer, dealer, or trader in the United Kingdom, unless such name or trade mark is accompanied by a definite indication of the country in which the goods were made or produced, are prohibited to be imported into the United Kingdom⁴); and if imported or brought into the United Kingdom are liable to be forfeited and destroyed⁵). It is to escape the prohibitions against importation by giving the "definite indication" of origin required by the Act, that imported goods bearing or marked with some suggestion of English origin are marked "made in" or "made abroad"⁶). Where there is on any goods a name which is identical with or a colourable imitation of the name of a place in the United Kingdom, that name, unless accompanied by the name of the country in which such place is situate, is to be treated for the purposes of the prohibition against importation as if it were the name of a place in the United Kingdom⁷). The administration of these provisions relating to prohibition on importation is in the hands of the Commissioners of Customs, who have power to make regulations⁸). Great Britain is a party to the International Convention⁹), which contains clauses as to goods illegally bearing trade marks or trade names or bearing false indications of origin, and is also party to a further arrangement as to false indications of origin, made at Madrid¹⁰).

XIV. Implied Warranty on sale of Marked Goods; Miscellaneous Offences.

On the sale or in the contract for sale of any goods to which a trade mark, or mark, or trade description has been applied, the vendor is deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description, unless the contrary is expressed in writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the purchaser¹¹).

It is an offence¹²) to represent a trade mark as registered if it is not so, whether by the word "registered" or any words expressing or implying that registration has

¹) Section 7. Section 8 requires a declaration to be made at the Assay Office, when a watch is brought to be assayed, stamped or marked.

²) Section 2 (3).

³) Section 2 (3) (iii).

⁴) Section 16 (1).

⁵) Section 16 (1) and Section 42 of the Customs Consolidation Act, 1876.

⁶) This phrase is sufficient in some cases; General Orders of Feb. 26th 1900.

⁷) Section 16 (4).

⁸) The principle of these are the General Orders of Feb. 26th 1900. There are also some regulations dealing with watch cases. The Merchandise Marks Act, 1911, confers power on the Commissioners to require information from an importer of goods bearing a fraudulent name or mark.

⁹) Dated March 20th 1883.

¹⁰) Signed on April 14th 1891. Revised at Washington, June 2nd 1911.

¹¹) Section 17.

¹²) There are numerous offences under Acts relating to adulteration, e.g. the Sale of Food and Drugs Acts, 1875, 1879 and 1899 and under Acts relating to special articles, e.g. Margarine.

been obtained¹⁾. It is also an offence falsely to represent that any goods are made by a person holding a Royal warrant, or for the service of His Majesty, or any of the Royal Family, or any Government Department²⁾. The use by any unauthorised person of the Royal Arms or Arms so nearly resembling them as to be calculated to deceive in such manner as to lead to the belief that he is duly authorised is also prohibited³⁾.

¹⁾ Trade Marks Act, 1905, section 67.

³⁾ Merchandise Marks Act, 1887, s. 20.

²⁾ Patents and Designs Act, 1907, section 90. Section 68 of the Trade Marks Act, 1905, which gives a remedy by injunction, extends to representations of employment by His Majesty or any member of the Royal Family.

(For the Index, see Volume 14.)

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